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The Western Front: New Arbitration Rules for the Supreme Court of Western Australia

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Introduction

Western Australia has many of the hallmarks of an arbitral hub: from a stable liberal democracy, a reliable and predictable judiciary, and very low rates of corruption, to offices of numerous national and international law firms, world-standard business hotels (albeit only a recent arrival), and an efficient international airport (again, only of late, but better late than never). The capital, Perth, is a short flight from south Asia, and situated in the most populous time zone on the planet. Sitting at the base of an enormous corridor of economic activity, Perth ought, in theory, be a favoured venue for international arbitration.

It is no secret, though, that Western Australia, like all Australian jurisdictions, has lagged the rest of the developed world in its uptake and acceptance of international arbitration as a form of dispute resolution. It remains the case that most commercial disputes concerning Western Australian projects are resolved by litigation, not arbitration.

However, recent economic drivers, and an increasingly 'arbitration friendly' Supreme Court, may herald an increase in international arbitrations that are either seated in Western Australia or involve Western Australian companies.

Economic drivers affecting international arbitration

During the global resources boom in the mid-2000's, minerals-rich Western Australia was a hotbed of exploration and project development. Over this period, the State saw a substantial increase in inbound investment, as money rushed into Western Australia to fund the construction of some of the most significant resources and energy projects in the world. While empirical evidence is difficult to come by, it is logical to suspect that many of the contracts struck during this period contain agreements to arbitrate.

The mining construction boom has passed, and many projects have now entered, or are entering, the production phase. But with projects facing cost pressures associated with global economic stagnation over the past decade, the spectre of disputation looms large. And with so many sophisticated international companies active in the jurisdiction, there is likely to be a growing volume of arbitrations with some connection to Western Australia. This, among other things, prompted the foundation of the Perth Centre for Energy and Resources Arbitration to deal with

new opportunities for Perth-seated arbitration.

Fortunately, the Supreme Court of Western Australia recognises, and is supportive of, this development. It has recently implemented new court rules to streamline and clarify the process for parties seeking the support of the Supreme Court in aid of arbitration. Additionally, recent decisions of the Supreme Court have signalled that Western Australia is a safe seat for commercial arbitration.

New Arbitration Rules

The *Supreme Court (Arbitration) Rules 2016* (WA) (Rules) substantively came into force on 3 January 2017. The Rules apply to both international arbitration governed by the *International Arbitration Act 1974* (Cth) (IAA) and domestic arbitration governed by the *Commercial Arbitration Act 2012* (WA). The Rules set out the processes by which parties can apply to the Court to, among other things:

(a) stay court proceedings commenced notwithstanding the existence of a valid arbitration agreement (Rule 6);
(b) grant provisional relief in aid of an arbitration (Rule 12);
(c) facilitate arbitration processes (for example, by issuing subpoenas to third parties in respect of documentary evidence) (Rules 9-11); and
(d) enforce or set aside an arbitral award or another procedural order (Rules 7 and 13-14).

All proceedings subject to the rules are referred to the Commercial and Managed Cases List, and, specifically, a separate Commercial Arbitration List, currently managed by the Chief Justice of the Supreme Court.[1)] The Rules also provide designated court forms for use in proceedings related to Commercial Arbitration.

The Rules are similar to the rules adopted in other Australian jurisdictions, and are a continuation of the measures adopted by both Commonwealth and State governments following a review of Australia's arbitration framework. This review, which commenced in 2008, was designed to improve the effectiveness and efficiency of the arbitral process in Australia. In large part, this was achieved by the adoption of uniform legislation, based on the Model Law, in each state and territory to govern commercial arbitration, and amendments to the IAA. At the time of writing, the Commonwealth government has just proposed further reforms to the IAA that would make the enforcement of foreign awards easier in Australia.

Practical Judicial Support

In addition to the practical architecture of the new Rules, the Western Australian Supreme Court has recently made clear in a number of decisions that Western Australia is an 'arbitration-friendly' jurisdiction. The Court has issued a number of recent decisions staying court proceedings and upholding the validity of arbitration agreements.[2)] Further, the Chief Justice has, in recent years, endorsed the principle, set out in the English authority of *A v B* [2007] EWHC 54, that a party successful in applying for a stay of proceedings due to the existence of a valid arbitration agreement should ordinarily be awarded indemnity costs.[3)] While this principle has not been universally accepted by judges of the Court,[4)] it is another sign of an increasingly pro-arbitration judiciary in Western Australia.

This being said, the Court continues to preserve its own jurisdiction to award interim relief, notwithstanding the existence of an arbitration agreement (or to refuse relief in support of an existing or pending arbitration) unless there is clear and unequivocal contractual language which would require that deference to the arbitral process. In the recent case of *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd* [2017] WASC 112, which considered an application to restrain the defendant from calling on certain bank guarantees, the Court both:

(a) refused the application for a stay of interim injunction proceedings pending arbitration made by the defendant (because of an express carve out in the relevant arbitration agreement for urgent injunctive relief); and

(b) in any event, did not grant the injunctive relief[5)] (to prevent a call on the bank guarantees) sought by the plaintiff as it did not accept, among other things, the plaintiff's argument that the defendant should be restrained from calling on the bank guarantees (which they were contractually permitted to do) until the arbitration process had run its course.

Conclusion

Both the introduction of the Rules and the Court's recently expressed disposition to supporting and endorsing the arbitral process make clear that Western Australia is an arbitration-friendly jurisdiction. In the coming years, as more arbitrations are likely to take place in Western Australia, practitioners should be confident that the Court system will be supportive of the arbitration process.

References

?1 This designated list existed prior to the enactment of the Rules, pursuant to Practice Direction 4.1.2.3 of the *Consolidated Practice Directions of the Supreme Court of Western Australia*.

?2 See *Samsung C&T Corporation v Duro Felbuera Australia Pty Ltd* [2016] WASC 193; *Roy Hill Holdings Pty Ltd v Samsung C&T Corporation* [2015] WASC 458.

?3 *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 [18]; *KNM Process Systems SDN BHD v Mission New Energy Ltd formerly known as Mission Biofuels Ltd* [2014] WASC 437(S).

?4 *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 (S); *Roy Hill Holdings Pty Ltd v Samsung C&T Corporation [2015] WASC 458* (S).

?5 The decision is currently on appeal to the Court of Appeal, and a temporary injunction has been granted pending the outcome of the appeal, see: *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd* [2017] WASCA 85.

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