Kluwer Arbitration Blog

Australian Arbitration Week Recap: Resolving Disputes on Major Projects – Lessons Learned from Recent Arbitration Proceedings

Jordan Dittloff (Errard Legal) · Friday, October 13th, 2023 · ACICA

A beautiful Perth morning on Thursday, 12 October 2023 saw the convening of the panel – "Resolving Disputes on Major Projects – Lessons Learned from Recent Arbitration Proceedings". The panel was moderated by Brian Millar of Francis Burt Chambers, and was generously hosted by Herbert Smith Freehills. The panel was conducted under the Chatham House Rule.

The panellists included:

- Charis Tan, Partner, Peter & Kim
- Gavin Denton, Arbitrator & Head of Chambers, Arbitration Chambers
- Ben Luscombe, Barrister, Francis Burt Chambers
- Nicolas Crouy, APAC Area Contact Manager, Saipem
- Helen McGahan, Senior Legal Counsel, INPEX
- Dawna Wright, Senior Managing Director, FTI Consulting
- The Honourable Kenneth Martin KC, Francis Burt Chambers

Mr Millar welcomed all attendees and acknowledged the tremendous work that the ACICA network had done to ensure the success of the 2023 Australian Arbitration Week.

Mr Millar noted that the past few years have seen a huge amount of disputes relating to major projects of all kinds, and the experience that the Perth arbitration market brings to this area is a massive source of potential competitive advantage for the Australian arbitration market generally.

The panel covered the three phases of a major project:

- project planning and initial dispute/contract planning;
- dealing with disputes as they arise during the execution of the project; and
- disputes relating to unsatisfactory outcomes towards the end of the life of a project or in the aftermath of its completion.

Project Inception

Project inception often involves setting up the project vehicle to take advantage of the protections

available under bilateral and multilateral investment treaties. From the investor's perspective, structuring in this manner means taking advantage of those trade agreements and setting up the investment at the outset to ensure that if anything goes wrong, the treaties allow a claim to be brought against the government.

From the State's perspective, investment protection provisions have evolved to include reciprocal/safeguarding elements. These include denial of benefits clauses, and other clauses which require substantial business activity and economic activity.

The panel noted that serious thought and understanding should be given to what is required to benefit from treaty protection for investment in the following areas:

1. Prefinance Structuring: One can obtain cheaper credit or points off on borrowing costs by showing investment structuring (to the banks and/or internal investors via prospectus).
2. Support to Protect One's Investment: If something goes wrong, it will be crucial to ensure that protections are already in place, rather than attempting to hammer out additional legal protections once a dispute has already arisen. Drafting clauses to best effect is an important part of the dispute process.
3. Due Diligence: This includes checking for fraud and irregularities with local advisors at the provincial and district levels. Fraud is often invoked as a basis for attempting to set aside investments or bypass treaty obligations.
4. Systems: Set up people and processes to protect people and documents involved with the Project.
5. Promotion: Explain the benefits of treaty investments with politicians, journalists, and others.

The panel endorsed the use of model clauses, and noted that serious consideration should be given to including an express choice for the law of the arbitration agreement.

Speakers also noted the utility of putting in award delivery time frames, post-closing submissions. This prevents arbitrators from taking on too many matters, limits the time-cost of the dispute, and improves efficiency.

On the efficiency theme, the panel advocated getting clients to provide input on the arbitral procedure, at an early stage. While it is not necessary to specify the identity of arbitrators, it is helpful to identify what skills, experiences and attributes are likely to be most beneficial. Parties should also not overlook the ability for counsel to make submissions to institutions or arbitrators about who they believe should be the chair, or to suggest a list procedure. One panellist suggested that "*party autonomy nowadays should be read as lawyer autonomy*".

Disputes Arising Throughout the Project

It is tempting to ignore or defer disputes until after the end of a project or near the conclusion of a project, however, so often issues might be easier to resolve as they arise, with one panellist noting that "*if you want peace you have to prepare for war*". However, the panel did note that often, intervention during a project is perceived as an unwarranted interference.

In 'preparing for war', the panel suggested:

- obtaining an external analysis of the proposed contract, focusing on the limitation of liability;

- obtaining frank and clear external legal advice to assist the company managers as the project progresses (and challenging that advice where necessary);
- dealing with the basics; retaining documents, organisational charts, and contracts. Refer to the contract, particularly in relation to limitations (such as requirements to nominate or raise an issue within 28 days);
- where claims do arise, follow up on them and build the case properly. Include contractual points, and do not be afraid to leave it all on the table;
- focusing on the issues that are truly significant to the company. For example, while loss of man hours and specialisation are survivable, bottlenecks or contractual points of failure may not be, so build redundancy and contingency into the agreement;
- if things have gone badly on the project, and there is always a risk that things can go very badly, talk to the project owner. Owners will often be extremely flexible and prepared to help creatively solve problems before they become intractable.
- once in an arbitration, work to narrow down the areas in dispute at the earliest possible opportunity. Where possible, these mechanisms can be included in the agreement. The end result is hopefully therefore that every time that there is a hearing or a meeting, the parties are compelled to progress or narrow down the issues in dispute; and finally,
- in relation to time and cost – the panel accepted that some of these come down to the nature of the beast – very few clients will complain when they come out on top. In victory, everything is forgotten!

On the final issue, the panellists accepted that it can be difficult for in-house counsel to sell the time and cost of arbitrations. Hence, it can be beneficial to have external counsel who understand the tensions and the communication between in-house counsel, acting as a bridge between, and enabler of instructions from, the client. The panel did note that often, external counsel received vague instead of detailed instructions from the client, and accordingly, encouraged in-house counsel to push back and further investigate what would actually be needed.

Project Completion and Post-Completion Arbitration

The panel commented at the outset that in instances where disputes arise during or following the completion of a project, in-house counsel should remember that they have been working on this matter for an extended period of time – they know it better than the arbitrators do.

Accordingly, procedural and case management conferences should not be used in a formulaic way, and instead, should be driven by counsel to narrow issues and make sensible decisions about what information is actually needed, and when it should be provided. This is so particularly given that the time commitment and cost of discovery are enormous.

One suggestion was to engage an independent barrister to help drive the process forward from the client's side, while also providing distance, advocacy, and detached advice.

Panellists noted that in their experiences, case management was often formulaic, with arbitrators unable to make difficult decisions to move the arbitration forward and ensure efficiency and procedural fairness. This was typically due to many arbitrators not having enough time to manage cases effectively. Decisions at this stage, especially with regards to discovery and disclosure, affect the quality of the entire process of the arbitration, and the award.

By contrast, in litigation, most large commercial cases could involve as many as 10 pre-hearing conferences or case management meetings. Additional case management and guidance and an emphasis on conferral to ensure the parties are communicating are very productive. On that, the panel reminded attendees, that as the arbitration community, it is always crucial to embrace the idea of assisting parties to resolve the dispute in the most efficient way for them.

The panel concluded with a reminder to always consider the questions that counsels are being asked to resolve, and subsequently to clarify those questions that the tribunal need to answer in order to enable it to make an appropriate and worthwhile intervention.

The panel received a standing ovation and Chad Catterwell of Herbert Smith Freehills Melbourne arbitration hub thanked all speakers and the moderator for an excellent and insightful session.

This concludes our coverage of Australian Arbitration Week 2023. More coverage of Australian Arbitration Week is available here.

This entry was posted on Friday, October 13th, 2023 at 8:22 am and is filed under ACICA, Australian Arbitration Week, Investment agreements, Investment protection, Investor-State arbitration
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