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The Baker McKenzie **International Arbitration Yearbook**

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Australia

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A. Legislation and rules

A.1 Legislation

International arbitration continues to be governed by the International Arbitration Act 1974 (Cth) (the "IAA"). Amendments have been proposed to: (a) clarify the procedural requirements to enforce an arbitral award; (b) expressly specify the definition of a "competent court" for the application of the UNCITRAL Model Law; (c) update and modernize the arbitrator's powers to award costs in an international arbitration; and (d) clarify the confidentiality provisions to investment arbitrations seated in Australia.[4] These amendments have not yet been enacted.

On 18 July 2017, Australia signed the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention") which entered into force on 18 October 2017. The Mauritius Convention extends the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules"), which only apply to arbitrations conducted under treaties entered into *after* 1 April 2014, to investment arbitrations conducted under treaties concluded *before* 1 April 2014. The Transparency Rules allow for, among other things,

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[4] Civil Law and Justice Legislation Amendment Bill 2017 (Cth) introduced on 22 March 2017.

publication of submissions, open hearings and *amicus curiae* briefs of interested third parties in certain circumstances.

On 21 May 2017, Australia re-affirmed the Trans-Pacific Partnership Agreement signed on 4 February 2016 (the "TPP"). The Investment Chapter of the TPP provides certain rights and protections to investors of each state party to the TPP, including the right to resolve investment disputes in international arbitration. Other free trade agreements being negotiated include the Regional Comprehensive Economic Partnership, the Pacific Alliance Free Trade Agreement and the Indonesia-Australia Comprehensive Economic Partnership Agreement.

A.2 Institutions, rules and infrastructure

The Arbitration Rules of the ACICA, effective as of 1 January 2016, are being reviewed.

B. Cases

B.1 Arbitration agreements

In recent years, the Australian courts have given detailed consideration to the interpretation of arbitration agreements for the purpose of staying court proceedings under Section 7 of the IAA and Article 8 of the UNCITRAL Model Law. The approach of the Australian courts was, to some extent, clarified by the Full Court of the Federal Court of Australia in its decision in *Rinehart v. Rinehart (No. 3)*[5] in late October 2017. Even though the case related to a domestic arbitration, the issues were addressed in the same manner as in an international arbitration as the relevant legislation is based on the UNCITRAL Model Law.[6]

[5] *Rinehart v. Rinehart (No. 3)* [2017] FCAFC 170.

[6] Domestic arbitration is governed by uniform state legislation, the Commercial Arbitration Act (the "CAA"), based on the UNCITRAL Model Law. Section 8 of the CAA reflects Article 8 of the UNCITRAL Model Law.

The Court endorsed the liberal approach to the interpretation of arbitration agreements that had been taken in previous cases, such as *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd*.[7] The Court recognized that this approach is consistent with the presumptive approach taken by the House of Lords in *Fiona Trust & Holding Company v. Privalov*.[8]

The Court considered whether to review the arbitration agreement on a *prima facie* basis, similar to the approach taken by the courts in Singapore, Hong Kong, Canada and other jurisdictions, or to carry out a full review on the basis of a balance of probabilities as taken in recent Australian cases.[9] Whilst the Court acknowledged that the *prima facie* approach had much to commend it as an approach that gives support to the jurisdiction of the arbitrator, the Court stated that it was "*difficult to see how the Court can exercise its power under section 8 without forming a view as to the meaning of the arbitration agreement*".[10] The Court emphasized that an arbitration agreement must be construed, like any other contractual provision, in accordance with the accepted principles of contract interpretation, that is, "*at least to the point of being satisfied that the disputes forming the matter are the subject of the agreement*".[11] That interpretation is not to be a narrow semantic interpretation but a liberal interpretation that takes into account common sense and commercial realities.

Interestingly, even though this case involved a dispute between family members, the Court held that it was a commercial dispute that could be referred to commercial arbitration.[12]

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[7] [2006] FCAFC 192.
[8] *Fiona Trust & Holding Company v. Privalov* [2007] UKHL 40.
[9] See, for example, *Rinehart v. Rinehart (No. 3)* [2016] FCA 539 and *Samsung C&T Corporation v. Duro Felbuera Australia Pty Ltd* [2016] WASC 193. Both cases were reported in last year's *Yearbook*.
[10] *Rinehart v. Rinehart (No. 3)* [2017] FCAFC 170 at [145].
[11] *Rinehart v. Rinehart (No. 3)* [2017] FCAFC 170 at [146].
[12] *Rinehart v. Rinehart (No. 3)* [2017] FCAFC 170 at [133]-[139].

The Australian courts have consistently emphasized that an arbitration agreement is to be construed in accordance with the accepted principles of contract interpretation. In *Kennedy Miller Mitchell Films Pty Limited v. Warner Bros. Feature Productions Pty Limited*,[13] the issue was whether the contract contained an arbitration clause. The parties entered into a letter agreement relating to the direction and production of a film, which stated that the "*balance of terms*" would be the "*WB standard for 'A' list directors and producers, subject to good faith negotiations*". When court proceedings were commenced, the defendant applied for a stay arguing that an arbitration clause was incorporated into the letter agreement through the standard terms and/or certificates of employment ("COEs").

Applying the accepted principles of contract interpretation, the judge determined that an arbitration clause was not incorporated into the letter agreement through the standard terms or the COEs. Although the COEs were related to the letter agreement, these alone were not enough to make a dispute arising out of, or in relation to, the letter agreement also a dispute arising out of, or related to, the certificates. Also, the dispute did not concern any issue arising out of, or related to, the certificates. Hence, a reasonable person in the position of the parties to the letter agreement would not have understood that the COEs, by virtue of their arbitration clause, mandated compulsory arbitration for a dispute about an alleged breach of the separate letter agreement. For these reasons, the application for a stay was refused.

There have been a number of other cases involving stay applications. For example, in *Eriez Magnetics Pty Ltd v. Duro Felguera Australia Pty Ltd*,[14] a subcontractor and sub-subcontractor sought a stay referring a "pass through claim" to arbitration after a related dispute had been resolved in arbitration between the head contractor and the subcontractor. The Court acknowledged that if it was a pass through claim then there was little point or purpose in an arbitration being held

[13] [2017] NSWSC 1526.
[14] [2017] WASC 304.

because the sub-subcontractor's rights "*turn critically upon the outcome*" of the dispute with the head contractor. A stay was granted.

In another case,[15] the court adopted a broad interpretation to the arbitration agreement and granted a stay in a related dispute even though the applicant was not a party to the arbitration agreement and the claims against the applicant were under the Corporations Act 2001 (Cth).

Trina Solar (US) Inc v. Jasmin Solar Pty Ltd[16] also concerned stay applications under Section 7(2) of the IAA. The dispute arose under a supply contract between Trina and the subsidiary of Jasmin. Jasmin had provided a parent company guarantee. Arbitration had been commenced in New York under the supply contract. Jasmin claimed it should not be a party to the arbitration as it was not party to the arbitration agreement in the supply contract. The arbitral tribunal determined that Jasmin was a party to the arbitration. Jasmin commenced court proceedings in Australia against Trina under the Australian Consumer Law and sought leave to serve outside the jurisdiction. Trina argued that leave should be refused. Trina had not applied for a stay but argued that a stay would inevitably be granted under Section 7(2) of the IAA.

Applying the law of the forum, not the law of the contract, the primary judge had found that Jasmin was not a party to the arbitration agreement. The judge granted leave to serve outside the jurisdiction but was not required to determine whether a stay should be granted. On appeal, the question before the court was whether the exercise of the discretion to grant leave to serve outside the jurisdiction had miscarried and whether such leave should be refused. The court considered the relevant choice of law rules, noting that the law of the forum is to be applied to determine whether there is *consensus ad idem* and the law of the contract is to be applied to questions of the validity and interpretation of the contract. The court determined that

[15] *In the matter of Infinite Plus Pty Ltd* [2017] NSWSC 470.
[16] [2017] FCAFC 6.

leave to serve outside the jurisdiction should not be refused. The court noted that Trina could still apply for a stay of the proceedings under Section 7(2) of the IAA.

B.2 Challenges to set aside or enforce an award

The Australian courts have maintained an arbitration-friendly approach in applications to set aside and enforce awards. In *Lahoud v. The Democratic Republic of Congo*,[17] the Federal Court (the "FCA") recognized an ICSID award as well as an annulment decision under Section 35 of the IAA. The FCA acknowledged that both the initial award and the annulment decision were "awards" and that it was appropriate to enforce the awards given the overall objects of the IAA, ie, the fact that arbitration is "*an efficient, impartial, enforceable and timely method by which to resolve commercial disputes*" and that awards are intended to provide "*certainty and finality*".[18] This was the first ICSID award recognized in Australia.

The courts have maintained a high threshold in set-aside applications and challenges to the enforcement of an award. In *Mango Boulevard Pty Ltd v. Mio Art Pty Ltd*,[19] the applicant sought to set aside an award in a domestic arbitration under Section 34 of the relevant Commercial Arbitration Act (the "CAA"), which is based on Article 34 of the UNCITRAL Model Law. The applicant argued that the award dealt with a dispute not contemplated by the arbitration agreement or that the arbitrator failed to accord procedural fairness or acted in breach of the rules of natural justice. The Queensland Supreme Court emphasized the need to consider international decisions based on the UNCITRAL Model Law as they were persuasive to ensure a uniform approach to arbitration. Accordingly, the court had regard to a Singapore court decision and Australian decisions on international arbitrations. The court acknowledged the excess of jurisdiction did not extend to an error of law in the proper construction of the contract and

[17] [2017] FCA 982.
[18] [2017] FCA 982 at [25]-[26].
[19] [2017] QSC 87.

any errors that did not amount to or cause "*real practical injustice*" did not warrant an award being set aside.[20]

In *Hui v. Esposito Holdings Pty Ltd & Ors*,[21] the FCA held that it had the power under Article 34 of the UNCITRAL Model Law to set aside part of an award in a way that did not impermissibly rewrite the award to give it a "*merits complexion*" beyond what the arbitrator determined. The court set aside the first and second partial award and ordered that the balance of parties' claims be decided by a new arbitral tribunal.

ASC AWD Shipbuilder Pty Ltd v. Ottoway Engineering Pty Ltd[22] clarified opt-in and opt-out rights after the introduction of the uniform CAA. Under the previous CAA, parties had an opt-out right to appeal any questions of law arising from the arbitral decision. Under the new CAA, that right to appeal became an opt-in right. In this case, the parties did not opt-out of the right to appeal when they entered into the contract in 2009. Ottoway sought leave to appeal an award and argued there was an implied term in the contract to appeal. Overall, the court was not persuaded that the parties had agreed to allow for the right to appeal an arbitral award. The court found that there was no term that implied the statutory right to seek leave to appeal the arbitral award, nor was such an implied term necessary to give business efficacy to either the contract or the arbitration agreement.

The FCA in *Liaoning Zhongwang Group Co Ltd v. Alfield Group Pty Ltd*[23] enforced an arbitral award made by CIETAC, pursuant to Section 8(3) of the IAA. Enforcement of the award was disputed on the grounds of public policy on the basis that there was no valid arbitration agreement and the respondent was unable to present its case in the arbitration due to the threat of detention in China and alleged threats by the applicant. The FCA held that the respondent

[20] *Mango Boulevard Pty Ltd v. Mio Art Pty Ltd* [2017] QSC 87 at [117] per Jackson J. See also *Mi v. Li* [2017] and *Li v. Mi (No. 2)* ACTSC 318.
[21] [2017] FCA 648.
[22] [2017] SASCFC 150.
[23] [2017] FCA 1223.

failed to sufficiently communicate with CIETAC and it did not make any attempts to proceed on written evidence or make any application to attend via telephone or video link.

B.3 Taking of evidence and issue of subpoenas

The Australian courts are often asked to assist with the taking of evidence, particularly in domestic arbitrations. Applications for subpoenas are often made under Section 23 of the IAA and/or Article 27 of the UNCITRAL Model Law in international arbitrations, and Section 27 of the CAA in domestic arbitrations. These are usually made to third parties who are not party to the arbitration who hold documents that are relevant to the arbitration.

In *Samsung C&T Corporation*[24] the FCA was requested to grant leave to issue subpoenas under Section 23 of the IAA in a foreign-seated arbitration between Samsung C&T Corporation and Duro Felguera Australia Pty Ltd. The arbitration was seated in Singapore. The subpoenas were for documents held by third parties based in Australia. The judge had already granted subpoenas in similar circumstances in an earlier application. In this application, the judge refused to grant the subpoenas on the basis that they could only be granted if the arbitration was seated in Australia. The judge acknowledged that his previous decision was "*not only wrong but was clearly wrong*". In fact, the judge's first decision was correct and this second decision is clearly wrong. Unfortunately, it will be difficult for parties involved in foreign-seated arbitrations to obtain assistance from the Australian courts in the taking of evidence under Section 23 of the IAA and/or Article 27 of the UNCITRAL Model Law until this decision is corrected by a higher court.

[24] [2017] FCA 1169.

C. Funding in international arbitration

C.1 Regulation of third-party funding

Australia was one of the first countries to use third-party funding. The Australian High Court has sanctioned the use of litigation funding, confirming that there is no public policy basis for arguing that litigation funding is impermissible or an abuse of process.[25]

There is no regulation of litigation funding, but it is supervised by the courts in each jurisdiction (through the Federal Court of Australia Act 1976 (Cth), the Federal Court Rules 2011 (Cth), the Australian Consumer Law and other state/territory consumer protection legislation, and the Supreme Court legislation for each state/territory and at common law) to safeguard the administration of justice and to make appropriate orders to avoid an abuse of process by litigation funders. For example, Federal Court Practice Note CM17 relating to class actions provides that each party is expected to disclose any agreements by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. It also provides for the production of funding agreements, usually on a redacted basis. At common law, there are no restrictions on litigation funding arrangements other than the court's consideration of whether the proceedings constitute an abuse of process.

There is limited regulation of third-party funders under the federal legislation governing the financial services industry. For example, third-party funders must have adequate procedures and practices in place for managing conflicts of interest. However, unlike legal practitioners, third-party funders are not bound by the various rules and regulations covering lawyer professional conduct, nor are they presently bound by fiduciary duties that apply to legal practitioners.

[25] See *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited* (2006) 229 CLR 386 and *Jeffrey & Katauskas Pty Limited v. SST Consulting Pty Limited* (2009) 239 CLR 75.

Despite the lack of regulation, there are ongoing calls for reform, such as the recommendations published in the Australian government's Productivity Commission Report, *Access to Justice Arrangements*, where one of the recommendations was for third-party litigation funders to hold licenses to verify their capital adequacy and properly inform clients.

C.2 Third-party funding considerations in arbitration proceedings

None of the main arbitration institutions in Australia (such as ACICA and the Resolution Institute) provide for any express rules with respect to funding arrangements. Article 11.4 of the ACICA Rules provides that the tribunal may have regard to the IBA Guidelines. General Standard 6(b) of the IBA Guidelines provides that if a party to the arbitration is a legal entity, and another legal entity or person has a controlling influence on that legal entity, or a direct economic interest or duty of indemnity in the award to be rendered in the arbitration, it may be considered to bear the identity of such party for the purpose of considering the independence and impartiality of an arbitrator and potential conflicts of interest.

There is no difference with respect to the use of third-party funding in domestic and international arbitrations.

C.3 Local market for third-party funding

Australian-based and offshore funders are very active in Australia. While third-party litigation funding has mostly been seen in either class actions or insolvency proceedings, third-party funders are actively looking to expand their caseload to arbitration proceedings.

C.4 Contingency fees and conditional fee arrangements

Contingency fees are prohibited in Australia. Lawyers may enter into conditional fee arrangements in some states, such as New South Wales, Victoria, South Australia and Queensland. For example, in NSW, lawyers may enter into conditional fee arrangements that

provide an uplift fee of not more than 25% of the legal costs (excluding disbursements), rather than a share of the damages.[26]

[26] *Legal Profession Uniform Law* (NSW), sections 181 and 182.