When there’s a will there is a way: Supreme Court of NSW endorses arbitration despite deficiencies in the parties’ agreed arbitral procedure

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Broken Hill City Council v Unique Urban Built Pty Ltd [2018] NSWSC 825

Introduction / summary

Parties who incorporate arbitration agreements into their contracts would expect that agreement to be complied with in the event of a dispute, particularly when they are using a Standards Australia contract. Yet in reality, enforcing arbitration agreements can lead to satellite disputes requiring resolution by the courts, especially where those agreements contain defective arbitral procedures. Not only does this defeat the parties’ objective of opting for a more efficient and cheaper alternative to litigation, but it adds unnecessary layer of complexity and uncertainty to the overall dispute resolution process.

This raises two issues: how do the Australian courts deal with arbitration agreements containing defective arbitral procedures, and what should parties do to avoid unwanted satellite disputes arising from this?

A recent Supreme Court of NSW decision, Broken Hill City Council v Unique Urban Built Pty Ltd, has confirmed that an Australian Court will strive to give effect to the parties’ arbitration agreement and refer them to arbitration pursuant to section 8(1) of the Commercial Arbitration Act 2010 (NSW) (the Act) even if that arbitration agreement contains certain arbitral procedures that are defective or non-existent.

The Court afforded a narrow interpretation of the exception contained in section 8 of the Act and, in doing so, continues to reaffirm the Australian Courts’ pro-arbitration stance.

This decision has implications for both domestic and international arbitrations in Australia. Where the seat or place of arbitration is Australia, an arbitration triggered by an arbitration agreement can be regulated by either the uniform Commercial Arbitration Acts (CAA) which regulate domestic arbitration in each State and Territory of Australia, or Australia’s international arbitration regime contained in the International Arbitration Act 1974 (Cth) (IAA).

Section 8(1) of the Act is mirrored in equivalent sections of the CAA in the other States and Territories as well as in Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration (Model Law), which has been given force of law pursuant to section 16 of the IAA. Therefore, the Court’s interpretation of section 8(1) of the Act in the Broken Hill City Council decision sheds light on the proper interpretation of equivalent sections in the CAA and the IAA.

Notwithstanding the Court’s pro-arbitration stance in the Broken Hill City Council decision, this decision highlights the importance of carefully drafting dispute resolution provisions to ensure that any arbitral procedures contained within those provisions could be complied with in the event of a dispute. In addition, parties should routinely check their standard form contracts and precedents, as well as older contracts due for renewal, to ensure that dispute resolution provisions contained within those contracts are effective and enforceable.

Doing so will avoid disruptive satellite proceedings and allow parties to focus their attention on resolving the substantive issues in dispute in accordance with their agreed dispute resolution procedure.

Background

A dispute arose between the Broken Hill City Council (the Council) and Unique Urban Built Pty Ltd (Urban) in relation to a contract to upgrade the Broken Hill Civic Centre (the Contract). The Contract was based on a standard form contract published by Standards Australia.

The Council alleged that Urban had varioulsy breached the Contract, including failing to complete the works with due diligence and within the stipulated time frame, failing to carry out the works to the required standard and failing to rectify defects and deficiencies in the works.

The Contract contained a dispute resolution clause which provided for any disputes between the parties in connection with the subject matter of the Contract to be finally resolved through arbitration (the Arbitration Agreement). The Contract also provided that, failing agreement by the parties, the arbitrator shall be appointed by the President of the “Australasian Dispute Centre” (which is a non-existent organisation) and for the arbitration to be conducted under the Rules of the Institute of Arbitrators, Australia (now known as the “Institute of Arbitrators & Mediators Australia”).

The Council commenced Court proceedings against Urban in relation to its dispute. Urban sought an order under section 8(1) of the Act (which is modelled on Article 8(1) of the Model Law) for the Court to refer the parties to arbitration in accordance with the Arbitration Agreement.
In response, the Council argued that the Court should not make such an order on the basis that the Arbitration Agreement was inoperative, as it was dependent upon the mechanism for the appointment of an arbitrator and that there could be no agreement to arbitrate if the mechanism “misfires”.

Urban argued that the Arbitration Agreement could stand in its own right and that if the mechanism for the appointment of an arbitrator fails, then the Court is empowered to appoint an arbitrator under section 11(3)(b) of the Act (which is modelled on Article 11 of the Model Law).

The issue before the Court was whether the Arbitration Agreement was inoperative such that the Court should not make an order under section 8 of the Act and refer the parties to arbitration.

Decision

Justice Hammerschlag held that the Arbitration Agreement was not “inoperative”, notwithstanding that there was a defective mechanism for the appointment of an arbitrator.

His Honour emphasised that the Act distinguishes between an arbitration agreement within the meaning of the Act and an agreement on arbitral procedures.

If an arbitration agreement is inoperative, null and void or incapable of being performed, then the Court cannot refer the parties to arbitration pursuant to section 8(1) of the Act. However, the same cannot be said for a defective agreement on arbitral procedures, such as, in this case, a defective mechanism for the appointment of an arbitrator.

Here, the clause at issue was an agreement on an arbitral procedure rather than the arbitration agreement itself.

His Honour determined that section 11 of the Act clearly empowered the Court to appoint an arbitrator in the absence of agreement by the parties or where the procedure for the appointment of an arbitrator fails. However, while the Act steps in to provide a procedure for appointing an arbitrator or remedying a defective procedure, it will not step in to remedy a defective arbitration agreement.

His Honour also noted that the parties did not place importance upon any particular characteristics of an arbitrator appointed by the President of the Australasian Dispute Centre. This could be contrasted with Sembawang Engineers and Constructors Pte Ltd v Covic (Singapore) Pte Ltd [2008] SGHC 229, where the Court, in that decision, ascribed some importance to the fact the arbitrator was to be, or appointed by, a specific person or specialist.

Finally, His Honour indicated that he failed to see how reasonable persons in the respective positions of the Council and Urban intended that their agreement would fail because of the non-existence of the appointing authority.

Ultimately, the Court referred the parties to arbitration pursuant to section 8(1) of the Act.