DLA PIPER

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ARBITRATION UPDATE

CLAUSE FOR CONCERN: NSW SUPREME COURT DECISIONS A REMINDER AGAINST BOILERPLATE DISPUTE RESOLUTION CLAUSES

Two recent decisions in Australia highlight the importance of adopting caution when using boilerplate dispute resolution clauses. The Supreme Court of New South Wales' decisions in *Re Ikon Group Limited (No 2)* [2015] NSWSC 981, (*Ikon Group (No 2)*), available here) and *InfraShore Pty Ltd v Health Administration Corporation* [2015] NSWSC 736 (*Infrashore*, available here) illustrate the importance of ensuring parties tailor their dispute resolution clauses to suit the dynamics of the parties' underlying agreement. To avoid difficulties in the dispute resolution process, it is crucial that parties contemplate the types of disputes that might arise under an agreement, who the parties will be to those disputes, the relief that may be sought in those circumstances, and whether the wording of the clause provides clarity as to the parties' intention to arbitrate.

BACKGROUND OF *IKON GROUP (2)*

Ikon Group (2) concerned a Joint Venture Agreement which was the subject of an arbitration agreement. The plaintiff, Ikon Group Ltd, was party to that Agreement, along with Ikon Australia Pty Ltd (the first defendant), Ikon Financial Group Ltd (of which the second defendant was a director), and Multitrade Financial Group Limited (the third defendant). The fourth and fifth defendants were directors appointed to the first defendant. The second defendant sought to withdraw from the Agreement and recover funds deposited with the joint venture companies.

The plaintiff subsequently filed proceedings in the Supreme Court of New South Wales and sought a range of declarations, including that; the removal of one of the directors of the first defendant was invalid; the directions and appointments of the fourth and fifth defendant were invalid; that a USD $178,000 payment made by the first defendant to the second defendant was unauthorised and held on trust for the first defendant; and that by authorising

the payment, the fourth and fifth defendant were in breach of their director duties.

On 13 May 2015, Brereton J stayed the plaintiff's proceedings under section 7 of the *International Arbitration Act 1974* (Cth) (IA Act) (read with section 16 of the IA Act and Article 8 of the *UNCITRAL Model Law on International Commercial Arbitration 1985*) and referred the plaintiff, the first defendant and the second defendant to arbitration, on the basis that an arbitration agreement was on foot between those parties. However, his Honour did not refer all aspects of the proceedings to arbitration, with claims against the fourth and fifth defendant held not to be '*amenable to referral to arbitration*' on the basis that they were not parties to the arbitration agreement.

THE CLAUSES IN *IKON GROUP (NO 2)*

Clause 22.2 of the Third Addendum to the Joint Venture Agreement between the parties in *Ikon Group (No 2)* provided that '*Should any dispute or difference aris*[ing] *out of, in relation to or in connection with the JV Documents or any of them or the Third Addendum or the performance, validity or enforceability of any of the JV Documents or the Third Addendum (Dispute) then the Parties shall follow the procedures set out in this Clause 22.*'

Clause 23.1 of the Third Addendum to the Joint Venture Agreement stipulated the terms of the arbitration agreement between the parties, which required any disputes requiring resolution as per clause 22 of the Joint Venture Agreement to be referred to and finally resolved by arbitration.

Brereton J considered the expression '*arising out of*' in clause 22.2 to be (in the context of the Joint Venture Agreement) generally broader than '*under*', and that the claims as made by the plaintiff would fall within the ambit of the dispute resolution clause. His Honour further noted that:

- it is irrelevant that the rights sought to be invoked were statutory rights under the *Corporations Act 2001* (Cth), as rights under statute can be the subject of arbitration.
- although an arbitrator may not have the ability to grant relief in respect of all claims made (particularly those statutory rights the plaintiff sought to be invoked under the *Corporations Act 2001* (Cth)), the arbitrator can determine underlying questions of fact and law, and that on completion of the arbitration, the Court can address the granting of relief.

However, his Honour highlighted that only those parties who were party to the arbitration agreement may be referred to arbitration. As the fourth and fifth defendants while being directors were not named parties to the Joint Venture Agreement, they were therefore not bound by the agreement to arbitrate.

IMPLICATIONS OF *IKON GROUP (NO 2)*

Parties must ensure they contemplate all entities and persons that may be the subject of a claim such that their mechanism for seeking redress is not hindered by privity issues. The inability to join parties to a dispute resolution process can add to the complexity, time and cost of obtaining the desired relief in disputes.

Similarly, parties must turn their minds to the type of claims that may arise under their agreement and the type of relief that they may wish to seek. Parties may even wish to carve certain claims and disputes out of a particular dispute resolution mechanism and/or direct certain disputes toward particular dispute resolution methods (i.e. technical accounting issues to an expert determination) to ensure the appropriate resolution process is adopted for their disputes.

BACKGROUND OF *INFRASHORE*

The plaintiff in *Infrashore* was contracted by the defendant to undertake works, including the demolition of buildings containing hazardous materials. After the works commenced, the plaintiff issued a claim asserting that additional works were required in respect of the hazardous materials and that it was entitled to additional payments. The defendant rejected the claim and the matter was brought unsuccessfully to expert determination under the Contract.

The plaintiff commenced proceedings in the Supreme Court of New South Wales, suing for damages and seeking a declaration that the determination was non-binding on the parties. The defendant sought orders under section 8(1) of the *Commercial Arbitration Act 2010* (NSW) (CAA) that the proceedings be referred to arbitration and stayed.

Hammerschlag J declined to refer the dispute to arbitration on the basis that the dispute was '*not one which either party can require to be arbitrated*'. His Honour held this was a matter of contractual construction and that on the ordinary meaning of the clauses 40.2(e) of the Contract and 12.4 of the Expert Determination Agreement, there was no conferral of any right to require arbitration, nor was any right provided by implication.

THE CLAUSES IN *INFRASHORE*

Clause 12.4 of the Expert Determination Agreement between the parties provided '*The parties acknowledge and agree that the matters in dispute have been referred to expert determination before the Expert in accordance with and for the purposes of clause 40.1 and 40.2 of the Contract, and in accordance with clause 40.2(e) of the Contract, any determination made by the Expert will be final and binding where the dispute is not referred to arbitration under clause 40.3 of the Contract or legal proceedings within 10 days of the expert ruling.*'

Clause 40.2(e) of the Contract read that '*Any determination made by the expert will be binding on all parties unless referred to arbitration or legal proceedings within 10 Business Days after the relevant decision.*'

The defendant argued that these clauses, when read together, amounted to an arbitration agreement between the parties. His Honour held the construction to be unsustainable. Critically, clause 40.2(e) allowed for two different methods of resolving a dispute, namely arbitration or legal proceedings. His Honour considered that any reading of clause 40.2(e) in a way that gave rise to a right to force arbitration would be unsatisfactory, particularly considering the clause made no provision for who prevails if a party were to choose litigation and the other opted for arbitration. His Honour dismissed the motion, concluding that the arbitration agreement was inoperative (within the meaning of section 8(1) of the CAA).

IMPLICATIONS OF *INFRASHORE*

It is imperative that parties adopting tiered dispute resolution clauses test the progression and outcomes of each stage of the process to ensure the desired intention of the parties for arbitration is reflected clearly in the wording of the clause.

CONCLUSION

Ikon Group (No 2) and *Infrashore* are useful reminders for parties to give careful consideration to their dispute resolution clauses and in particular to the use of boilerplate clauses. To avoid impediments in the dispute resolution process, parties should ensure they consider whether the wording of the arbitration agreement on foot encompasses or provides for all possible litigants, disputes and potential relief sought.

Parties should also exercise caution in wording their multi-tiered dispute resolution clauses. Where parties ultimately intend to arbitrate if preliminary multi-tiered steps fail, care should be taken to ensure that clear wording is used to record the parties' agreement to arbitrate.

MORE INFORMATION

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