Case Note: Abigroup Contractors Pty Ltd v. Transfield Pty Ltd and Obayashi Corporation

Supreme Court of Victoria,
Gillard J. 16 October 1998 (unreported)

Stay of Court Proceedings,
Proof of Evidence of Arbitration Agreement,
***International Arbitration Act* 1974 (Cth),**
***Commercial Arbitration Act* 1984 (Vic.).**

Background and history of proceeding

Transfield Pty Ltd and Obayashi Corporation as joint ventures, known as the Transfield Obayashi Joint Venture, (TOJV), contracted to design, project manage and construct the Melbourne CityLink project. Part of the project included the construction of the Southbank interchange. TOJV sub-contracted with Abigroup to perform the works. Disputes arose between the parties and Abigroup issued a Supreme Court Writ, against TOJV and other Defendants. Against joint ventures Abigroup claimed damages for breach of alleged sub-contract and breaches of s.52 of the *Trade Practices Act*, alternatively Abigroup claimed quantum meruit based on the allegation that no sub-contract had been entered into between Abigroup and the joint venturers. The disputes that Abigroup raised with the other Defendants were largely intertwined with the disputes it raised against the joint ventures. TOJV issued a Summons seeking a stay of proceeding against them and a referral of the disputes to arbitration. The stay was sought on two grounds: (a) pursuant to s.7 of the *International Commercial Arbitration Act* 1974 (Commonwealth); and (b) pursuant to s.53 of the *Commercial Arbitration Act* 1984 (Vic.).

The *International Arbitration Act* was relied upon by reason of the fact that Obayashi Corporation was domiciled and ordinary resident in Japan and that Japan was a Convention Country, with the Convention applying to Australia. It was not argued that there were ground for the other Defendant to require arbitration or that the proceedings against them could be stayed.

Proof of arbitration agreement issue

At the hearing of the interlocutory application for stay, Abigroup submitted that no concluded sub-contract had come into existence between the parties. Accordingly, there was no written agreement to arbitrate between the parties, so as to attract the operation of either s.7 of the *International Commercial Arbitration Act* or s.53 of the *Commercial Arbitration Act*. The affidavit material raised substantial issues concerning whether a sub-contract had come into existence between the parties. Mr Justice Gillard in the Supreme Court identified the matter in dispute:

> "... the Plaintiff asserts that the alleged arbitration agreement between the parties did not exist. Therefore the issue between the parties is whether there is any binding and concluded contract in law concerning arbitration. This question is part of the central issue whether there is a binding concluded contract in law to perform the works."

The parties conceded that the issues of the existence of the sub-contract could not be resolved by the Court on affidavit material in an interlocutory hearing.

This issue could only be finally resolved after a full scale hearing. How then was a court to decide any issue which was material to the Court's jurisdiction to grant a stay of proceeding? Abigroup submitted that as the Court was unable to finally determine the issue on an interlocutory application TOJV's application could not succeed and ought to be dismissed. TOJV argued that Abigroup in relying on the sub-contract in its pleading had obviated the need for the Court to consider this issue on the application for a stay.

His Honour found in favour of TOJV:

> "In my opinion, it is not open to the Plaintiff to argue on this application that there is not in existence a binding and concluded sub-contract in law containing a dispute resolution clause. It is bound by its pleading."

International Arbitration Act issue

Once the Court was satisfied of the existence of an arbitration agreement in writing between the parties it was conceded that prima facie s.7 of the *International Arbitration Act* 1974 applied. However the Court still had to consider two subsidiary issues:

(i) Did the Act permit the parties to exclude the application of s.7; and
(ii) Did the parties by express or implied agreement so exclude the application of s.7.

His Honour concluded there was nothing in the *International Arbitration Act* which indicated an intention to exclude the usual rights of the parties to agree that the provisions of the Act not apply to a foreign arbitration. It followed that the parties to a foreign agreement were able to exclude the operation of the Act by agreement.

Did the parties in this case exclude the operation of s.7 of the *International Arbitration Act*? The sub-contract provided a procedure for dispute resolution. First it required the parties to negotiate, then mediate and finally it provided for arbitration as follows:

"(a) Any dispute not resolved by mediation or expert determination, other than a dispute under or in respect of any of the matters the subject of any Clauses 12.1 to 12.9 inclusive, must be resolved by arbitration...

(b) The arbitration must be conducted in accordance with the following rules and procedures:
  (i) The place of arbitration must be Melbourne, Victoria;
  (ii) The parties to the arbitration are entitled to legal representation;
  (iii) The arbitrator must hand down his award within one month after the conclusion of the hearing unless the parties agree to extend the time for one further period of a maximum of one month;
  (iv) The cost of the reference to arbitration and award are at the discretion of the arbitrator, that the arbitrator does not have the power to tax any award of costs made under s.34 of the Commercial Arbitration Act of Victoria;
  (v) The rules of evidence apply to the proceedings; and
  (vi) The Commercial Arbitration Act of Victoria applies to the arbitration except to the extent it is inconsistent with the proceeding four provisions of this clause –

    (a) The proper law of the sub-contract and of the dispute resolution procedures is the law of Victoria."

It was submitted on behalf of Abigroup that these provisions made it clear that the parties intend to exclude s.7 of the *International Arbitration Act* 1974 and to make the *Commercial Arbitration Act* 1984 the applicable Act. His Honour disagreed. His Honour concluded that s.7 of the *International Arbitration Act* was not excluded and continued to apply. His Honour stated:

"The law of Victoria concerning dispute resolution procedures applies but this does not exclude the right of a party to apply for a stay."

Once the Court found that the parties had not excluded the application of s.7 of *International Commercial Arbitration Act* under s.7 (5) the Court was required to stay the proceeding and refer the matter to arbitration. The Court had no discretion to refuse a stay.

Commercial Arbitration Act issue

Although strictly speaking the Court was not required to consider the alternative claim under s.53 of the *Commercial Arbitration Act* 1984 (Vic.) it did so. Unlike the *International Arbitration Act* the *Commercial Arbitration Act* gives the Court a discretion whether or not to stay a proceeding. The Court proceeded to exercise its discretion under s.53 in favour of Abigroup. The disputes between Abigroup and TOJV were so intertwined with the causes of action involving

Abigroup and the other Defendants that there was a real prospect of multiplicity of proceedings, with an increase in legal costs and risks of inconsistent findings and results.

Unsatisfactory result

Consideration of what was best for the administration of justice and the parties including the Defendants caused the Court to form the clear view that the dispute ought to be resolved by way of Court proceeding rather than arbitration. However the Court found that as the parties did not intend to exclude the provision of s.7 of the *International Arbitration Act* 1974, it had no option but to stay the proceeding and refer the matter to arbitration. The Court thought this result to be "impractical". The Court urged the parties to consent to the dispute being heard by the Court rather than be remitted to arbitration.

P. C. Golombek, *Barrister*