Case Note
William Hare UAE LLC v Aircraft Support Industries Pty Ltd [2014] NSWSC 1403
Public policy exception to enforcing foreign awards in Australia

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Introduction

In *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* ('***William Hare***'), the NSW Supreme Court considered the scope of the public policy exception under the *International Arbitration Act 1974* (Cth) ('**IAA**') when enforcing a foreign arbitral award. In coming to its conclusion to partially sever the award on public policy grounds, the Court confirmed the recent decision of *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [3] stating that, '*[n]o international arbitration award should be set aside for being contrary to Australian public policy unless* ***fundamental norms of justice and fairness*** *are breached and real unfairness and practical injustice has been shown to have been suffered by an international commercial party*'.

Background

The dispute in *William Hare* involved a subcontract between an Australian contractor Aircraft Support Industries Pty Ltd ('**Aircraft**') and a UAE subcontractor William Hare UAE LLC ('**William Hare**') to perform certain construction works at the Abu Dhabi International Airport for a subcontract price of approximately US$15 million ('**Contract**'). Issues arose regarding final payment and payment of retention monies. While the Contract specified retention deductions and for payment to be by mutual agreement, a subsequent letter executed by the parties outlined the exact amounts owing on specific days. Aircraft failed to pay the second final amount owing under the terms of the letter and William Hare applied for arbitration in the UAE pursuant to the Contract.

On 1 May 2014 the arbitral tribunal issued a final award in favour of William Hare for the amount owing in retention monies (US$797,500 plus interest) as well as US$50,000 for a bargaining deduction previously given by William Hare to Aircraft in exchange for a timely payment guarantee ('**Award**').

William Hare applied to enforce the Award against Aircraft in Australia. Aircraft resisted enforcement claiming that the Award was contrary to Australian public policy according to section 8(7)(b) of the IAA.

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3 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, 111.

Enforcement proceedings

Aircraft's six arguments to resist enforcement

Aircraft relied on six grounds to resist enforcement of the Award:

1) The tribunal awarded William Hare US$50,000 despite the fact that William Hare did not claim the amount in its Statement of Claim and Aircraft did not respond to it in its Defence;

2) The tribunal failed to consider Aircraft's contention that the agreement embodied in the subsequent letter must be considered to be a permitted variation to the Contract to be enforceable;

3) The tribunal refused to allow Aircraft to rely on certain supplementary grounds of defence and proceeded with the hearing *de bene esse* before determining whether Aircraft could rely on those supplementary defences;

4) The tribunal failed to give reasons for the rejection of each of the defences relied upon by Aircraft;

5) The tribunal failed to give reasons why the sum claimed by William Hare was due under the Contract; and

6) The tribunal failed to give reasons why the sums due under the Contract were otherwise than as contended by Aircraft.

The public policy exception to enforcement under the IAA

Before considering the grounds relied upon by Aircraft, Justice Drake considered the notion of the public policy defence and the rules of natural justice within the context of the Model Law and sections 8(7A) and 19 of the IAA. Quoting the recent Federal Court decision of *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*,[4] Drake J confirmed that the Australian public policy exception is not to incorporate an 'idiosyncratic national approach', but to ensure that equality of treatment and natural justice are respected in the arbitral process.[5] Breaches to the rules of natural justice were considered to be those fundamental to 'the heart of the constitutional conception of due process', a threat to an internationally recognised *ordre public*.[6]

Drake J further distinguished the private and internationally recognised nature of the IAA's public policy defence from the domestic public policy review powers in administrative law. Drake J referred to the decision of *Traxys Europe SA v Balaji Coke Industry Pvt*, where their Honours clarified that '*the system enshrined in the Model Law was designed to place independence, autonomy and authority into the hands of arbitrators*'.[7] Interference by national courts in the arbitral enforcement process beyond matters specified in the Model Law was said to threaten the arbitral system and the free will of the contracting parties, as well as adversely affect the swift enforcement of awards. Interpretations of natural justice under administrative law thus has limited application in international arbitration.

4 Ibid [73] – [76], as referred to in *William Hare* [41].
5 Ibid [73] – [76].
6 Ibid [73] – [76].
7 *Traxys Europe SA v Balaji Coke Industry Pvt Ltd and Another (No 2)* [2012] FCA 276 [109] as referred to in *William Hare* [43].

Guided by these principles, the Court then considered the 6 grounds of review relied upon by Aircraft, rejecting all but the first ground. Drake J considered that although William Hare's request for US$50,000 was referred to on numerous occasions during the arbitration proceedings, its absence from William Hare's Statement of Claim amounted to a denial of natural justice. In conjunction with William Hare's proclaimed reliance on its Statement of Claim "'*in full*'" and failure to make any supporting submissions, such an omission strongly suggested that William Hare had abandoned its claim.[8] For the tribunal to still consider the claim, '*fairness required*' both parties to make submissions and address the relevant facts.[9] The Defendant was entitled to be heard on the matter.

In relation to Aircraft's contentions that the tribunal failed to consider the status of the relevant agreement and its application to rely on supplementary defences, the Court found that there had been no breach of natural justice and that the '*tribunal gave the defendant (Aircraft) ample opportunity*' to make applications at the hearing and to object to the tribunal's decision to consider the application *de bene esse*.

In regards to the tribunal's alleged failure to give reasons, the Court found that, despite being minimal, the reasons provided were not 'relevantly inadequate' nor did they reveal any failure on the part of the tribunal to consider William Hare's case as required by Article 31(2) of the Model Law.

Court permitted to sever unenforceable aspects of award

The Court finally held that although the award of US$50,000 amounted to a breach of natural justice, it did not preclude enforcement of the award *in toto* and William Hare was entitled to have the majority of the award enforced. The Court did not find severance and partial enforcement '*in any way offensive, or contrary, to the principles of justice*'.[10] Severance would be considered impossible, however, if the unenforceable aspect, or 'bad part', of the award formed a connection with the entire award, 'good part', in such a way that enforcing the severed award would be unjust.[11]

Conclusion

Australian courts' limited interpretation of 'public policy', as well as its willingness to sever aspects of otherwise enforceable awards, highlights Australian courts' support for the arbitral process. The court emphasised at length that Australia's public policy exception reflects internationally recognised 'fundamental principles of justice and morality' and is not an excuse to integrate national policies. Overseas and Australian businesses can feel confident that Australian courts will make every attempt to respect the intentions of the arbitrating parties and enforce arbitral awards when sought.

8 *William Hare* [58] – [59].
9 *William Hare* [62].
10 *William Hare* [124]
11 *ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc and Another* [1997] 2 VR 31 [38], as referred to in *William Hare* [109].