The recent decision of the New South Wales Court of Appeal in *Aircraft Support Industries Pty Ltd v William Hare UAE LLC [2015] NSWCA 229* (‘*Aircraft Support Industries’*) confirms that Australian courts have power to partially enforce a foreign arbitral award in certain circumstances. The decision of the Court of Appeal also reinforces the pro-enforcement attitude of the Australian judiciary in proceedings to set aside or to resist enforcement of a commercial arbitral award on public policy grounds for a breach of natural justice.

On 11 August 2015, the Court of Appeal dismissed an appeal from the decision of the Supreme Court of New South Wales in *William Hare UAE LLC v Aircraft Support Industries Pty Ltd [2014] NSWSC 1403* (discussed in our previous article - ‘Court’s refusal to enforce an award on public policy grounds: a step backward for international arbitration in Australia?’). The Court unanimously held that the *International Arbitration Act 1974* (Cth) (‘IAA’) does not contain any express or implied restrictions on the power of a court to partially enforce a foreign arbitral award in circumstances where no injustice flows as a result of the severance of part of the award. Australian courts are not bound to treat an award that is void in part as void in totality under section 8 of the IAA.

In addition, the Court found that there was no denial of natural justice in the tribunal’s making of the award to William Hare, and endorsed the narrow construction of the natural justice exception discussed in our recent article on the pro-arbitration attitude of the Australian judiciary.

**BACKGROUND OF THE DISPUTE**

Please refer to our previous article for a detailed background of the dispute.

**IMPLICATIONS OF THE DECISION**

Partial enforcement of a foreign arbitral award

The Court’s decision confirms the ‘centuries old power’ to ‘partially enforce awards where no
injustice flows as a result’. His Honour, Chief Justice Bathurst, agreed with the primary judge in finding that the wording of section 8(7A) of the IAA did not 'expressly, or by necessary implication' impose a restriction on the circumstances in which an award can be severed. His Honour agreed with Jacobs JA's comments in Evans v National Pool Equipment (1972) 2 NSWLR 410 that 'not since before the time of King James I had an award which was void in part been considered to be void altogether.'

The Court’s decision provides useful guidance on when part of a foreign arbitral award may be severed and partial enforcement ordered under section 8 of the IAA:

1. Provided that the void portion of an arbitral award is clearly separate and divisible, the non-void portion of the award will remain enforceable.

2. The court may order partial enforcement of the remainder of the award, provided that no injustice would flow from partial enforcement.

Narrow approach to the public policy exception

This decision confirms the high bar which must be met in order to challenge a commercial arbitral award as contrary to public policy by virtue of a breach of natural justice under section 8(7)(b) of the IAA.

In finding that no breach of natural justice occurred in connection with the making of the award, Bathurst CJ endorsed and applied the approach taken by the Full Court of the Federal Court of Australia in TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83 ('TCL Air Conditioner'). The approach in TCL Air Conditioner has now been uniformly adopted by Australian courts and provides that in order for a court to decline to enforce an award under section 8(7)(b) of the IAA it is necessary to show that a breach of natural justice caused 'real practical unfairness and real practical injustice to the party resisting enforcement'. Dissatisfied parties should therefore carefully consider the merits of an application to resist enforcement or to set aside an arbitration award on these grounds, as an unsuccessful challenge carries the risk of an adverse costs order on an indemnity basis.

These issues are discussed in further detail in our recent article on the pro-arbitration attitude of the Australian judiciary.

Although the more contentious aspect of the primary judge's decision (considered in our previous article) did not form part of the appeal, Aircraft Support Industries has removed any lingering uncertainty as to the uniformity of the pro-arbitration stance taken by Australia’s judiciary by clearly endorsing the approach set out in TCL Air Conditioner.

CONCLUSION

The decision in Aircraft Support Industries confirms that Australian courts have power to partially enforce a foreign arbitral award, consistent with the approach to enforcement taken in other jurisdictions which have endorsed the New York Convention and the Model Law. This provides comfort that a flaw affecting part of an arbitration award will not taint the entire award so as to preclude partial enforcement.

MORE INFORMATION

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