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The Baker McKenzie **International Arbitration Yearbook**

Australia

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A. Legislation and rules

A.1 Legislation

International arbitration continues to be governed by the International Arbitration Act 1974 (Cth) ("IAA"). On 25 October 2018, the Commonwealth government passed the Civil Law and Justice Legislation Amendment Bill 2017 (Cth), thereby enacting amendments to the IAA. These amendments: (a) clarify the procedural requirements to enforce an arbitral award; (b) expressly specify the definition of a "competent court" for the application of the UNCITRAL Model Law; (c) update and modernize the arbitrator's powers to award costs in an international arbitration; and (d) clarify the confidentiality provisions to investment arbitrations seated in Australia.[2]

On 31 October 2018, Australia ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP," also referred to as TPP-11). Australia was the sixth country to ratify, which triggered the entry into force of the CPTPP. As a result, the CPTPP entered into force on 30 December 2018 (60 days after Australia's ratification). Now that it is in force, the CPTPP will impact key areas of trade and commerce across the Australian economy.

The CPTPP provides certain investment protections for investors of state parties, such as no expropriation, no discrimination and minimum standards of treatment. Investors are given access to investor-state dispute settlement ("ISDS") such that claims may be

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[2] Civil Law and Justice Legislation Amendment Bill 2017 (Cth) introduced on 22 March 2017.

brought in international arbitration for any alleged breaches of these protections. However, one of the TPP provisions suspended is the extension of ISDS to investment contracts or investment authorizations. In addition, New Zealand has signed side letters to exclude or limit ISDS with five signatories to the CPTPP.

A.2 Institutions, rules and infrastructure

There have been no changes to the Arbitration Rules of the ACICA this year.

B. Cases

B.1 Arbitration agreements

In the 2018 edition of, "The Baker McKenzie International Arbitration Yearbook," it was reported that the Full Court of the Federal Court of Australia ("FCAFC") had to some extent clarified the approach of the Australian Courts to the interpretation of arbitration agreements for the purpose of staying court proceedings under section 7 of the IAA and article 8 of the UNCITRAL Model Law. In *Rinehart v. Rinehart (No. 3)*[3] the FCAFC endorsed the liberal approach to the interpretation of arbitration agreements that had been taken in previous cases, such as *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd.*[4] The FCAFC commended the *prima facie* approach as that approach gives support to the jurisdiction of the arbitrator but stated that it was "difficult to see how the court can exercise its power under section 8 without forming a view as to the meaning of the arbitration agreement."[5] The FCAFC emphasized that the arbitration agreement must be construed in accordance with accepted principles of contract interpretation, like any other contractual provision. That interpretation

[3] [2017] FCAFC 170.
[4] [2006] FCAFC 192.
[5] [2017] FCAFC 170 at [145].

is to be a liberal interpretation that takes into account common sense and commercial realities.[6]

The FCAFC's decision has been appealed to the High Court. The specific issue before the High Court is whether the FCAFC erred in concluding that where an arbitration clause states that disputes "under" the agreement are to be referred to arbitration such clause includes disputes as to the validity of the agreement. The appeal was heard before the High Court in November 2018. A decision is anticipated during the first half of 2019.

In the meantime, the Australian Courts have continued to issue orders to stay court proceedings whilst the matter is referred to arbitration. For example, in *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd*,[7] another case reported last year, a stay was granted on appeal. In that case, the parties' letter agreement referred to standard terms (the "WB standard for 'A' list directors and producers, subject to good faith negotiations"). The standard terms included an arbitration clause. On appeal, the court found that the arbitration agreement was incorporated into the letter agreement through the standard terms.

In *Broken Hill City Council v Unique Urban Built Pty Ltd*,[8] it was argued that the arbitration agreement was inoperative because it stated that the arbitrator was to be nominated by the "President of the Australasian Disputes Centre" which did not exist. Taking a pragmatic approach, the court found that the arbitration agreement was effective and granted a stay.

In *GR Engineering Services Ltd v Eastern Goldfields Ltd*,[9] the dispute resolution clause provided that a party may institute proceedings "to enforce payment due under the Contract." Emphasizing that this clause must be read harmoniously with the arbitration clause, a stay

[6] [2017] FCAFC 170 at [146].
[7] [2018] NSWCA 81.
[8] [2018] NSWSC 825.
[9] [2018] WASC 19.

was granted on the basis that payment claims should be determined in arbitration pursuant to the arbitration clause, not court proceedings. Subsequently, a claim was commenced in court in relation to a related settlement agreement.[10] It was argued that the arbitration clause did not include disputes under the settlement agreement, only the contract. The court ordered that this claim came within the stay that was already granted, as all disputes, including disputes under the alleged settlement agreement, were to be referred to arbitration.

However, in *Hurdsman & Ors v Ekactrm Solutions Pty Ltd*,[11] the Supreme Court of South Australia did not order a stay because the court found that there was no arbitration agreement. The clause provided that disputes were to be submitted to a "mediator for determination in accordance with the rules of the Singapore International Arbitration Centre." In considering whether there was an arbitration agreement, the court referred to pre-contractual negotiations which indicated that, in contrast to this clause, an earlier draft of the dispute resolution clause had referred to arbitration. The court also considered the dispute resolution clause as a whole. As the clause referred to court proceedings as well, this part of the clause would have had little, if any, work to do if there was an arbitration agreement. Accordingly, the court did not grant a stay.

B.2 Anti-arbitration injunction

In *Kraft Foods Group Brands LLC v Bega Cheese Limited*,[12] the Federal Court of Australia ("FCA") issued an anti-arbitration injunction to restrain Kraft Foods Group Brands LLC ("Kraft") from pursuing New York arbitration proceedings against Bega Cheese Limited ("Bega"). The dispute related to intellectual property rights for peanut butter sold in the Australian market. Bega had purchased the Australia and New Zealand grocery and cheese business, which included the peanut butter business, from Mondelez International Inc

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[10] *Eastern Goldfields Ltd v GR Engineering Services Ltd* [2018] WASC 224.
[11] [2018] SASC 112.
[12] [2018] FCA 549.

("Mondelez"), a member of the Kraft group. Following the purchase, Bega started marketing peanut butter using the Bega label. Kraft claimed that Bega's advertisements were false, misleading or deceptive.

Kraft commenced various proceedings against Bega. On 20 October 2017, Kraft commenced proceedings in the New York District Court seeking an order that Bega submit to mediation and if necessary, arbitration. On 9 November 2017, Kraft commenced proceedings in the FCA alleging misleading or deceptive conduct in breach of section 18 of the Australian Consumer Law ("ACL"). On 12 January 2018, a mediation was conducted in New York. It was not successful. On 13 February 2018, Kraft commenced arbitration proceedings against Bega in New York arguing that Bega had violated Kraft's intellectual property rights (including the "trade dress"). On the same day, Bega applied to the FCA on an *ex parte* basis for an anti-arbitration injunction to restrain the New York arbitration. On 16 February 2018, an interim order was granted restraining Kraft from taking any step in the arbitration. Kraft's challenge of the order was unsuccessful.

The court decided that it had the power to issue an anti-suit and anti-arbitration injunction under its implied and equitable powers if: the duplicate proceedings would interfere with the court's proceedings; it was required to protect and prevent an abuse of its own processes; and/or the foreign court proceedings were vexatious or oppressive. The court acknowledged that there was a substantial degree of overlap in the subject matter of the two proceedings and a risk that inconsistent decisions could be issued. The court noted that Kraft could have brought the ACL claims in the arbitration as they were covered by the arbitration clause. However, Kraft chose to initiate the court proceedings and participated in those proceedings before commencing arbitration. The court held that the injunction was necessary for the administration of justice to protect its own proceedings and processes.

B.3 Taking of evidence and issue of subpoenas

Last year we reported on a case, *Re Samsung C&T Corporation*,[13] where the FCA refused to grant leave to issue subpoenas under section 23 of the IAA in an arbitration seated in Singapore. In that case, the judge refused to grant the subpoenas on the basis that they could only be granted if the arbitration was seated in Australia.

In *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd*,[14] an application was made under section 23 of the IAA for the issue of two subpoenas to two people requiring them to attend for cross-examination during the arbitration. The arbitration was seated in Australia. Permission for the application was obtained from the tribunal. The judge acknowledged that

> while the court must be cautious against allowing the imposition of an unwarranted burden on strangers to the arbitration, this does not detract from the supportive role of the court apropos the arbitral process.[15]

The judge found it reasonable to issue the subpoenas in the circumstances. The witnesses had been examined in the Supreme Court in related proceedings but had not been cross-examined. It was appropriate that they were cross-examined in the arbitration.

B.4 Challenges to set aside an award or enforce an award

The Australian courts continue to take an arbitration-friendly approach to applications to set aside and enforce awards. In *Hyundai Engineering & Steel Industries Co Ltd v Alfasi Steel Constructions (NSW) Pty Ltd*,[16] the FCA refused to adjourn enforcement proceedings without the provision of security even though set aside proceedings were pending in the court of the seat. An award had been issued in

[13] [2017] FCA 1169.
[14] [2018] VSC 316.
[15] [2018] VSC 316 [12].
[16] [2018] FCA 1054.

favor of Hyundai Engineering & Steel Industries Co Ltd ("Hyundai"). Hyundai applied to the FAC for enforcement of the award. Two days later, Alfasi Steel Constructions (NSW) Pty Ltd ("Alfasi") applied to the Singapore High Court for annulment of the award. Alfasi then applied for an adjournment of the enforcement proceedings. Hyundai requested an order for security if an adjournment was granted. The court acknowledged that it had the discretion to issue an adjournment. Two factors were to be considered: first, the strength of the annulment arguments on a sliding scale and second, the ease or difficulty of enforcement of the award because, for example, assets have been moved. The court accepted that an adjournment would only be granted if Alfasi provided security. If there was no security, then there would be no adjournment.

In *Mango Boulevard Pty Ltd v Mio Art Pty Ltd & Anor*,[17] another case reported on last year, an award was issued determining the price for the sale of shares pursuant to a formula in the share sale agreement. An application to set aside the award had been rejected at first instance last year. The appeal heard this year was also dismissed. The applicant argued that the arbitrator failed to accord procedural fairness or acted in breach of the rules of natural justice. In particular, the arbitrator had made a finding that had not been argued by the parties and he did not afford the applicant a reasonable opportunity to be heard. The Court of Appeal relied on the approach of the FCA in *TCL Air Conditioner (Chongshan) Company Ltd v Castel Electronics Pty Ltd*,[18] that there was no real unfairness or real practical injustice in how the arbitration was conducted, nor was there any breach of public policy.

C. Diversity in arbitration

In Australia, there are a number of initiatives within the international arbitration community as well as the legal community as a whole to improve diversity and inclusion. For example, ArbitralWomen plays

[17] [2018] QCA 39.
[18] (2014) 232 FCR 361.

an active role in Australia, regularly holding events to discuss a range of issues in arbitration, some issues which are specific to women working in arbitration as well as general arbitration issues. In recent years, ArbitralWomen has held a breakfast seminar during Australia Arbitration Week which has been held in Melbourne (2018), Perth (2017), Sydney (2016) and next year, Brisbane. Breakfast seminars have also been held around other major conferences, such as the International Council for Commercial Arbitration held in Sydney in April 2018 and the International Bar Association Conference held in Sydney in October 2017. These events are well attended by women and men working in arbitration.

In addition, at the International Arbitration Conference held during Australian Arbitration Week there has been a conscious effort to ensure that female speakers are included in the program, with at least one female speaker usually included on each panel. A similar approach was taken at the International Law Association Conference held in Sydney in August 2018.

In the broader legal community, there are many active women's organizations for different areas of law, such as Women's Lawyers Association, The Women's Insolvency Network Australia and the National Association of Women in Construction. These organizations provide an opportunity for female lawyers to network within the legal community as well as within the industries in which they work. They also provide opportunities for women to discuss many of the challenges faced and suggestions for improvement. The Lawyers' Weekly Women in the Law Awards are held each year to celebrate the success of many of the women working in different areas of law.

The Law Council of Australia adopted the Equitable Briefing Policy in June 2016 to encourage the briefing of female barristers. Those law firms and organizations that adopt the policy are to "make all reasonable endeavors to brief or select women barristers with relevant seniority and expertise, experience or interest in the relevant practice area." One of the targets of the policy was that by 1 July 2018:

(a) to brief or select senior women barristers accounting for at least 20% of all briefs and/or 20% of the value of all brief fees would be paid senior barristers;

(b) to brief or select junior women barristers accounting for at least 30% of all briefs and/or 30% of the value of all brief fees paid to junior barristers.

An additional target of the policy is that,

> by 2020 women are briefed in at least 30% of all briefs and receive at least 30% of the value of all brief fees, in accordance with international benchmarks concerning the retention and promotion of women.[19]

Each year, the law firms and other organizations that have signed up to the policy are to provide a report to the Law Council with respect to the measures taken to implement these targets. The report released by the Law Council in July 2018 indicated that overall women received 20% of the total briefs and 15% of the total fees charged by barristers. Female junior barristers received 28% of briefs and senior female barristers received 12% of briefs. However, the report noted that the proportion of male and female barristers varied widely amongst each jurisdiction in Australia.[20]

Baker McKenzie has adopted the Equitable Briefing Policy. The firm is tracking the barristers that are briefed so that it is able to provide a report on the extent to which the Firm is implementing these targets. Within the Firm, it has encouraged lawyers who are briefing barristers to be more proactive about considering female barristers for their matters.

[19] https://www.lawcouncil.asn.au/files/pdf/policy-guideline/National_Model_Gender_Equitable_Briefing_Policy_updatedversion.pdf
[20] https://www.lawcouncil.asn.au/files/web-pdf/EBP%20Annual%20Report%20%28FY%202016-17%29.pdf

More generally, the Australian offices of Baker McKenzie have a very strong Diversity & Inclusion Program which includes BakerWomen, BakerDNA, BakerLBGTI and BakerBalance. Each of these committees is active in raising awareness, addressing issues and challenges and providing a forum for open and constructive discussion about diversity and inclusion issues.

For example, BakerWomen regularly holds networking events where inspirational speakers such as Justice Margaret Beazley, President of the NSW Court of Appeal, discuss the challenges that female lawyers, barrister and judges have faced throughout the decades and how improvements are made. BakerWomen sponsors the Baker McKenzie National Women’s Moot which is held across Australia each year. This year, Justice Ruth McColl was the president of the panel for the finals. The Male Agents for Change program is another important part of BakerWomen.

BakerDNA has also been very active in improving the cultural diversity within the Firm. In March 2017, the Managing Partners’ Diversity Forum signed a commitment with a focus on cultural diversity, responding to the publication of “Leading for Change” issued in July 2016 by the Australian Human Rights Commission. This included the development of a survey to measure cultural diversity across each firm, as there was no substantive data on cultural diversity within the legal profession in Australia. Eight law firms, including Baker McKenzie, are participating in the survey. The survey will measure the existing cultural makeup of the people at Baker McKenzie as well as within the legal profession more broadly. The plan is that the survey will be conducted annually to track progress and identify changes that are needed to reflect the diversity within our community and clients.