ARBITRATION:
REASONABLE OPPORTUNITY TO PRESENT CASE

- ALBERT MONICHINO QC

Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd [2016] VSC 326

This recent decision of the Arbitration List judge of the Supreme Court of Victoria suggests that the requirement that parties will be given a "reasonable opportunity" to present their case will be viewed robustly by a supervising court and not through the prism of domestic court litigation.

Article 18 of the UNCITRAL Model Law on International Commercial Arbitration sets out a pivotal requirement that the parties shall be treated with equality and be given a full opportunity of presenting their respective cases. Article 18 is reflected in section 18 of the new *Commercial Arbitration Acts* which regulate domestic arbitration in Australia, except that 'full opportunity' has been replaced with 'reasonable opportunity'.
A recent decision of the Arbitration List judge of the Supreme Court of Victoria suggests that the requirement that the parties be given a "reasonable opportunity" to present their case will be viewed robustly by a supervising court, and not through the prism of domestic court litigation.

Facts

Amasya ('**the Principal**') entered into a building contract with Asta ('**the Builder**') for the construction of a meat works factory. The contract contained an arbitration clause. The project stalled and each party filed a notice of dispute contending that the contract had been validly terminated by it. The respective disputes were referred to a single arbitrator (a senior barrister).

The Arbitrator conducted a preliminary conference where he confirmed that the governing law of the contract, and of the arbitration, was the law of Victoria, and that the principal issue in the arbitration was which party had validly terminated the contract. Both parties filed notices of defence. The notices of dispute and defence resembled court pleadings. There followed a seven day evidentiary hearing where both parties were represented by junior and senior counsel. Following the evidentiary hearing both parties exchanged comprehensive closing submissions in writing and submissions in reply. Three days later the Arbitrator conducted a final one day oral hearing.

In its notice of dispute the Builder claimed in the alternative that it was entitled to be compensated on a quantum merit basis. In its reply submission, in one short paragraph, the Builder contended for the first time (in the alternative) the contract had been mutually abandoned, and if the Arbitrator so found the Builder was entitled to a quantum merit. No mention of this new claim was made during the final one day oral hearing, either by the parties or the Arbitrator.

Ultimately, the Arbitrator found in his award, that the contract was mutually abandoned and that the Builder was entitled to be compensated on a quantum merit basis, to the tune of about $1 million.

Submissions

The Builder applied to enforce the award under section 35 of the *Commercial Arbitration Act 2011* (Vic). Conversely, the Principal sought to set aside the award under section 34, alternatively sought to resist enforcement under section 36. In particular, the Principal argued that it was not given a reasonable opportunity to present its case (sections 34(2)(a)(ii) and 36(1)(a)(ii)), alternatively that the lack of procedural fairness in connection with the making of the award meant that the award was in conflict with the public policy of Victoria (sections 34(2)(b)(ii) and 36(1)(b)(ii)). The nub of the Principal's complaint was that the award was made on a basis that was not articulated in the Builder's notice of dispute, nor argued during the hearing.

Decision

Croft J granted the Builder's application and enforced the award. In essence, his Honour found that the Principal had the opportunity to deal with the Builder's new argument during the final one day oral hearing but chose (for its own reasons) to ignore it. Quoting Menon CJ in the Singaporean case of AKN v AKL[2015] SGCA 18, Croft J noted that in setting aside proceedings the courts 'do not... and must not bail out parties who have made choices that they may come to regret'.

According to his Honour, if the Builder required more time to deal with the new point, it could have sought an adjournment. But it could not afford to simply ignore the point, which it did to its peril. Moreover, section 18 did not require the Arbitrator to warn the parties in relation to his proposed findings. It was sufficient for the point to have been raised in the Builder's reply submissions.

Croft J noted that while the "unable to present case" and "public policy" grounds in section 34 and 36 are conceptually different, they were practically indistinguishable as applied to the facts of the case.

His Honour also noted that while the new *Commercial Arbitration Acts* do not (unlike the *International Arbitration Act* – see sections 8 (7a) and 19) expressly provide that a breach of natural justice in connection with the making of an award will constitute a breach of "public policy", this may be inferred and that the Commonwealth provisions were inserted to "avoid doubt".

Comment

Whether a party has been afforded a reasonable opportunity to present its case is a question of fact and degree. The case in question is a borderline one. The arbitration had been conducted on the basis that one or other party had validly terminated the contract. Whether the contract had been mutually abandoned and the legal consequences of mutual abandonment (in terms of relief) had not been fully explored.

It is unfortunate that the Arbitrator did not squarely raise the new point at the final oral hearing (or indeed, thereafter) before deciding the case. It is not good arbitral practice for an arbitrator to decide a case on a particular basis without squarely giving the losing party an opportunity to address it. Be that as it may, it is a separate question whether an award should be set aside, or its enforcement resisted, on the basis that the losing party has not been afforded a reasonable opportunity to present its case. This decision demonstrates that the objecting party must be able demonstrate real practical unfairness before it can succeed on this ground.

AUTHOR PROFILE

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