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Legal update

Greater rights for parties seeking to enforce exclusive jurisdiction clauses in cases involving third parties

International dispute resolution practitioners cannot emphasise often enough how important it is for parties to international commercial contracts to carefully consider (when the contract is being negotiated) the types of disputes that may arise, the likely parties to those disputes, the most appropriate dispute resolution process and the most appropriate venue for that process.

Disputes about where and/or how to determine a dispute are commonplace. All too often and for a variety of reasons parties argue that they are not bound by an arbitration or jurisdiction clause in the circumstances of the particular dispute that has arisen. Australian courts have sought to address that phenomenon by:

- recognising that arbitration and exclusive jurisdiction clauses contain valuable promises
- acknowledging the clear commercial interest in minimising the possibility of a dispute or disputes being determined by multiple tribunals, which may reach divergent findings, and
- accordingly, construing arbitration and jurisdiction clauses in international commercial contracts as broadly as possible.

A recent case in New South Wales has highlighted the difficulties that can arise in a multi-party transnational commercial dispute where two, but not all, of the parties had previously agreed that the courts of a particular country would determine the dispute.

In brief

- This case emphasises that exclusive jurisdiction clauses are to be construed broadly, in the same liberal manner as arbitration clauses.
- A party to an exclusive jurisdiction agreement can enlist an Australian court's assistance to stay proceedings brought against both it and non-parties.
- In some circumstances, persons who are not parties to the contract may even, in their own right, seek a stay of court proceedings on the basis of the exclusive jurisdiction clause.
- Australian companies engaging in transnational commerce—particularly multinational enterprises—should consider the most convenient and favourable forum in which any dispute is to be resolved when negotiating the contract. Parties can achieve considerable certainty and commercial advantage, and avoid the inconvenience and cost of multiple, cross-border dispute resolution processes, by careful drafting of an exclusive jurisdiction clause.

Key issues

In *Global Partners Fund Limited v Babcock & Brown Limited (in liq) and Ors* (2010) 79 ACSR 383, Chief Justice Spigelman and Justices Giles and Tobias unanimously upheld Justice Hammerschlag's decision ((2010) 267 ALR 144) to enforce a foreign exclusive jurisdiction clause by staying proceedings brought in New South Wales against not just the contracting party, but also three of its associated entities, including its parent company in liquidation.

In reaching its decision, the Court of Appeal emphasised that an exclusive jurisdiction clause is to be construed broadly, albeit in the particular context of the contract in which it is contained and any interrelated arrangements.

The decision is important, and in some respects groundbreaking in Australia, because it:

- clearly acknowledges that it is inappropriate for disputes that in substance arise from a contractual relationship to be determined by courts other than those to which the parties have agreed to submit disputes
- emphasises that in contracts that are intended to have international operation, there is an even greater imperative to construe an exclusive jurisdiction clause broadly
- recognises that there are some circumstances in which an exclusive jurisdiction clause can extend to claims brought against persons who are not party to the contract containing the clause. This limits the capacity of parties to avoid (in a practical sense) the valuable promise contained in an exclusive jurisdiction clause by simply joining another party to the proceedings
- establishes that in some circumstances a person who is not party to the exclusive jurisdiction agreement can nonetheless rely on it in approaching the court to seek a stay of proceedings brought against it, and
- confirms that considerations relevant to the question of whether an Australian court is a clearly inappropriate forum for determining the dispute (eg location of witnesses, relative costs, etc) are not applicable where there is an exclusive jurisdiction clause.

Key lessons

The key lesson from this decision is that in international commerce it is critical to give careful consideration (when the contract is being negotiated) to the types of disputes that may arise, the likely parties to those disputes, the most appropriate dispute resolution process and the most appropriate venue for that process.

International commercial actors (in particular, multinational corporate groups) who are seeking to avoid the strategic disadvantage, inconvenience and cost of transnational litigation or litigating before a foreign court now have a greater ability to control the resolution of disputes involving themselves and associated companies through careful drafting of an exclusive jurisdiction clause.

An exclusive jurisdiction clause is capable of extending not just to contractual claims between the parties, but also to:

- disputes that, in a practical sense, arise from the commercial relationship
- any proceedings in which rights conferred on non-parties to the contract (eg indemnities) might arise, and
- claims brought against persons who are not party to the contract which sets forth the exclusive jurisdiction clause.

The decision reflects a strong judicial preference for:

- holding parties to their bargain
- minimising, to the extent possible, the possibility of a dispute being determined by multiple tribunals, and so avoiding the attendant costs and inconvenience and the consequent prospect of divergent findings, and
- upholding the 'clear commercial interest' in ensuring that all disputes arising out of the one relationship are determined in a coherent manner by a single jurisdiction, so far as it is possible to do so.

Factual background

The case related to proceedings brought in the Supreme Court of New South Wales by Global Partners Fund Limited (**GPF**), a Cayman Islands company, in relation to a syndicated investment that an English limited partnership had entered into with the Babcock & Brown group. The proceedings were brought against a number of Babcock & Brown entities (**B&B Defendants**), two of which were Australian (Babcock & Brown Ltd (in liq) and Babcock & Brown International Pty Ltd), a Delaware subsidiary and a Cayman Islands subsidiary.

One of the B&B Defendants (the Cayman Islands subsidiary (**BBMGP**)), was the former managing general partner of the English limited partnership. GPF became the managing general partner on BBMGP's removal.

The English limited partnership was established under and governed by a partnership agreement. GPF and BBMGP were parties to that agreement. The other B&B Defendants were not.

The partnership agreement contained an exclusive jurisdiction clause which provided that the courts of England will have exclusive jurisdiction to settle any disputes which may arise out of or in connection with the partnership agreement and/or certain other agreements and transactions, whether or not governed by the laws of England.

The agreement provided that it and the relationship between the parties was governed by English law.

The B&B Defendants sought a stay of the whole of the proceedings in New South Wales, including on the basis that:

- the exclusive jurisdiction clause applied to all of GPF's claims against all of the parties
- related proceedings were on foot in England, and
- New South Wales was an inappropriate forum for determining the controversy between the parties.

Decision

The B&B Defendants were successful at first instance before Justice Hammerschlag, who held that:

- the exclusive jurisdiction clause in the partnership agreement also extended to claims against the B&B Defendants who were not parties to the partnership agreement
- even if the exclusive jurisdiction clause only covered claims as between parties to the partnership agreement, the New South Wales proceedings should be stayed since New South Wales was a clearly inappropriate forum for the determination of the controversy
- alternatively, the New South Wales proceedings should be temporarily stayed to allow related English proceedings to proceed to their conclusion.

On appeal, Chief Justice Spigelman and Justices Giles and Tobias unanimously dismissed GPF's appeal, and held that:

- an exclusive jurisdiction clause should be interpreted in a liberal manner, similar to arbitration clauses. That approach is particularly apt in the context of a contract with an international dimension. This is because a significant purpose of an exclusive jurisdiction clause is to ensure that all disputes are determined in a coherent manner by the courts of a single jurisdiction. Furthermore, there is a clear commercial interest in minimising the possibility of a dispute being determined by multiple tribunals, which may each reach divergent findings
- an exclusive jurisdiction clause could, depending on the contractual context, be interpreted so as to bind a party to the contract with respect to proceedings brought by it against a non-party to the contract
- BBMGP had the contractual right to assert the exclusive jurisdiction clause with respect to both:
  - GPF's claims against it, and
  - GPF's closely related claims against the B&B Defendants who were not parties to the partnership agreement
- the B&B Defendants who were not parties to the partnership agreement were entitled to approach the court, in their own right, to request that the court exercise its discretion to grant a stay of the proceedings as against them. This was on the basis that although they were not parties to the partnership agreement, they:
  - were involved in the affairs of the partnership, as envisaged by that agreement, and
  - enjoyed rights as indemnified persons under the partnership agreement.

Impact on selecting the most appropriate dispute resolution process

The likely involvement of third parties to a dispute is an issue which should be considered when selecting the most appropriate dispute resolution process.

Third parties obviously cannot be joined to arbitration proceedings without their consent. That means that, absent a third party's agreement to participate in arbitration proceedings, a party to those proceedings may only be able to seek relief against that third party by bringing separate court proceedings. Parties may be able to address that issue through careful negotiation and drafting of arbitration clauses in any interrelated agreements.

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Alternatively, there may be circumstances where an exclusive jurisdiction clause is the most effective way to minimise the risk of fractured dispute resolution processes in international commercial arrangements involving persons who are not themselves party to any relevant contract.

While this case demonstrates that in certain circumstances an exclusive jurisdiction clause may be construed to extend not just to claims between the contracting parties, but also to claims brought by contracting parties against non-contracting parties, parties can achieve greater certainty still by express agreement. For example, a clause could provide that any claim arising out of or in connection with the agreement or other specified arrangements, including claims against specified third parties, will only be brought in specified courts.

In the increasingly complex world of international commerce, this case serves as yet a further salient reminder of the importance of negotiating dispute resolution provisions with as much care and diligence as the rest of the agreement.

Freehills acted for three of the four successful Babcock & Brown defendants in these proceedings.

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From 2006 to 2008, Danielle was a Visiting Attorney at Hughes Hubbard & Reed LLP, a New York based law firm, where she gained particular experience in cross-border dispute resolution and international commercial arbitration, including appearing in a two week ICC arbitration hearing in Turkey. She obtained a German for Lawyers Certificate from the University of Passau, Germany in 2003, and she worked in the Frankfurt office of Clifford Chance in the same year.