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young LAWYERS

Civil Litigation Committee
NEWSLETTER

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Testing the enforceability of an international arbitration award in Australia

Case In Focus – *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011) FCA 131*

By Kimberly Statham

Recently, the Federal Court of Australia (**FCA**) handed down it's very first decision in Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011) FCA 131 (**Uganda Telecom**) to uphold an international arbitration award since the 2010 amendments to the *International Arbitration Act 1974* (Cth) (**Arbitration Act**).

Background

Uganda Telecom Limited (**UTL**) is a company incorporated under the laws of the Republic of Uganda. UTL owns telecommunication facilities and provides telecommunication services to Hi Tech Telecom Pty Ltd (**Hi-Tech**), a company incorporated in Australia which also provides telecommunication services to customers based in Australia.
Both UTL and Hi-Tech entered into an agreement which provides that any lawsuits, disagreements or complaints regarding the agreement be submitted to compulsory arbitration. The agreement also provided that the governing law of the arbitration be in accordance with the laws of the Republic of Uganda.

After UTL suspended its services to Hi Tech due to several breaches of contractual obligations, the lawyers acting for UTL sent a letter to Hi-Tech requesting the appointment of an arbitrator to conduct an arbitration in Uganda. Hi –Tech failed to respond to this request and UTL subsequently conducted the arbitration in Uganda without the presence of Hi-Tech.

The arbitrator in Uganda delivered an award in favour of UTL in the amount of USD433,695 for general damages and USD140,944.65 in special damages. A letter was sent to Hi-Tech advising them of the orders. UTL registered the award in the High Court of Uganda and sought to enforce the award as a foreign award.

Australian lawyers acting for UTL's lawyers in Uganda sent a letter of demand to Hi-Tech and subsequently filed an application granting leave to UTL to register the award as a final judgement.

Hi-Tech's argument

Hi-Tech argued that the clause in the agreement which referred any disputes to arbitration was void due to uncertainty. This is because the clause did not address:

- the seat of the arbitration;
- the identity of the arbitrator(s), and if so, how many;
- the service of documents by which the arbitration was initiated;

- how any disputes which may arise concerning the appointment of the arbitrator should be resolved;
- the rules that apply to the arbitration; and
- the governing law.

Hi-Tech also argued that the arbitrator made errors of fact and law, and therefore, the court should decline to enforce the award on that basis.

Objectives of the International Arbitration Act 1974 (Cth)

Recent amendments to the Arbitration Act which came into effect in July 2010 now mention that some of the objectives of the Arbitration Act are:

(a) to "facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes";

(b) to "facilitate the use of arbitration agreements made in relation to international trade and commerce";

(c) to "facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and

(d) to "give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards".[1]

Federal Court decision

Foster J held that the amendments to the Arbitration Act make it clear that there is no general discretion for the court to refuse to enforce a foreign award.[2]

In considering Hi-Tech's arguments, Foster J of the FCA noted that it is in accordance with the Arbitration Act and Australian public policy to "enforce such awards wherever possible in order to uphold contractual arrangements entered into in the court of international trade, in order to support certainty and finality in international dispute resolution…".

Foster J also noted that the Arbitration Act does not permit a party to a foreign award and ability to resist enforcement of that award based on public policy grounds.[3] This principle has been enforced in United States Courts, and refusal to enforce an award on public policy grounds are to be interpreted narrowly.[4]

What does this mean?

The result in Uganda Telecom is the first decision which applies the new amendments to the Arbitration Act.

Parties to international contracts which opt-in for international arbitration can be assured that Australian courts take international awards seriously and will vigorously enforce arbitral awards without readdressing the merits of the dispute.

Increase in Local Court jurisdiction

By Elias Yamine

On 7 December 2010, the jurisdiction of the Local Court of NSW sitting in its General Division was increased to $100,000 (excluding claims for personal injury or death).

[1] Section 2D(a),(b),(c) *International Arbitration Act 1974* (Cth).

[2] Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011) FCA 131 at 132.

[3] Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011) FCA 131 at 126.

[4] Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011) FCA 131 at 132 and 133.

Special features of Dividing Fence Applications

By Phillip Roberts

Earlier this year I represented clients at the hearing of a dispute in a suburban Local Court under the Dividing Fences Act ("DFA"). Rather than describe the full case in this article I thought that it would be interesting to other practitioners if I highlighted some of the relatively unique aspects of the procedures that apply in this type of proceeding.[5]

Dividing Fence Notices

When the owners of a residential property wants to erect a new fence between their property and a neighbour's property the first thing they should do is simply approach the neighbour to obtain consent to this and an agreement as to specifics of the fence including the apportionment of costs between them.

However if the parties can't agree about whether the fence should be built or the specifics of a new fence then under DFA s11 one of the parties can serve a Dividing Fence Notice requiring the adjoining owner to contribute to a new. The Notice must set out where the fence will be put up, the type and description of the fence and the cost of the fencing work. The notice may also include the costs apportionment sought.

Under s12 if the adjoining owners don't agree within a month of the Notice being served then one of the parties can apply to the Local Court or a Local Land Board[6] for an order as to how the dividing fence work, if any, will be carried out.

In my clients' case they had been served with a Notice by the adjoining owners, but the parties were not able come to an agreement within the required time. However, instead of making an application under s12 the adjoining owners next proceeded to put up a new fence. The problem with this is that under s11(5)(b) if an owner goes ahead with dividing fence work before making an application to the Court or a Land Board then the adjoining owner is not liable to contribute to the cost of that work.

Special Jurisdiction

Technically speaking, a dividing fence application in the Local Court comes under neither the civil or criminal jurisdiction of the Court. Instead it's made under the 'special jurisdiction' which is provided for in Part 4 of the Local Court Act ('LCA').

Under LCA s45 an 'application proceedings' can be commenced in this special jurisdiction by use of an application notice which can be obtained from the Court.

Although it is not a civil proceeding, the LCA s71 provides that rules may be legislated that adopt any of the Uniform Civil Procedure Rules. However, instead of adopting any of those rules, the Local Court Rules 2009 ('LCR') Part 4 sets out the rules that apply to application proceedings such as those relating to dividing fence disputes.

On a practical level in my client's matter the 'special jurisdiction' nature of the proceedings meant that, although the matter was listed for mention on the Court's daily criminal list, my enquiries to the registry was always directed to the civil section. Certainly on the day of the hearing the Magistrate treated the matter as civil dispute attracting less priority than criminal matters for scheduling the hearing.

Magistrate's Powers

Under DFA s8 if a dividing fence has been damaged or destroyed by a negligent or deliberate act of one of the adjoining owners that fence is to be restored to a reasonable standard bearing in mind its condition before the damage or destruction. The adjoining owner who damaged or destroyed the fence is liable for up to the total cost of the fencing work required for this restoration.

In my clients' matter the adjoining owners had destroyed the pre-existing fence without the consent of my clients. On this basis I made submissions that the current fence should be taken down and a fence similar the pre-

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[5] For a general description of the process a good place to start is *Problems with Fences*, Local Court of NSW Information Sheet, New South Wales Government, Attorney General's Department, November 2007.

[6] This article will only cover the Local Court procedures. For more information about the Local Land Boards see www.lands.nsw.gov.au/crown_land/dividing_fences

existing fence should be erected at the adjoining owners' expense.

In this context a question arose as to whether the magistrate has the power under the DFA to order an adjoining owner to remove an existing fence and erect a new fence. Local Courts do not have injunctive powers generally. So does a magistrate have the power to make these types of orders? Or is a magistrate limited to deciding whether a contribution should be made by the other adjoining owner to the dividing work already carried out and, if so, how much the contribution is to be?

The published decision in this case is silent on these points. However it is submitted that a Magistrate does have the power to make this type of order on the following grounds:

1. If there has not been an agreement reached between the parties s12 sets out the procedure to be followed. In such case either party can request the Court to make orders determining the manner in which any fencing work is to be carried out.

2. The types of orders that can be made by the Court are set out in s14. In s14 (1) (b) it is provided that these include orders determining "the fencing work to be carried out (including the kind of dividing fence involved)".

3. In s3 the definition of "fencing work" includes the replacement of the whole or part of a dividing fence (including the planting of hedge or similar vegetative barrier).

It also submitted that it would be absurd to interpret the Act in a way that it did not provide the Magistrate with such a power. Otherwise an adjoining neighbour generally could not obtain orders for replacement of a fence erected without consent no matter how hideous or inappropriate a fence has been erected by their neighbour.

Pre-litigation protocols

By Elias Yamine

From 1 April 2011, a new part 2A *Steps to be taken before the commencement of proceedings* will be inserted into *Civil Procedure Act 2005* (see Schedule 6.2 of the *Courts and Crimes Legislation Further Amendment Act* 2010). The general effect of the new part 2A will require parties to take "reasonable steps" prior to the commencement of proceedings to either resolve the dispute or narrow the issues in dispute.

Reasonable steps

In order for parties to comply with pre-litigation requirements to resolve, or at least narrow the issues in dispute before filing proceedings in court, "reasonable steps" have been defined in section 18E.

Reasonable steps will include an exchange of information about the subject matter of the dispute and any relevant documents, responding to any notification of dispute by providing information and documents in return, engaging in negotiation and, where appropriate alternate dispute resolution.

Dispute resolution statement

If proceedings are commenced, parties will need to file a dispute resolution statement detailing their compliance with the pre-litigation requirements at the same time as the first substantive pleading is filed.

The plaintiff will need to outline the steps taken to attempt to resolve or narrow the issues in dispute and if no such steps were taken provide reasons for this. The defendant is required to either agree with of the plaintiff's statement or state the reasons why the defendant disagrees and specify other reasonable steps that the defendant believes could be undertaken to resolve the dispute.

Application of pre-litigation protocols

The pre-litigation requirements apply to civil disputes that result in the commencement of civil proceedings in the following Courts:

- Local Court;
- District Court; and
- Land and Environment Court.

The pre-litigation requirements do not apply to *excluded proceedings* as defined, including but not limited to:

- Appeals;

- Ex-parte proceedings;
- Proceedings in which parties have already been subject to a separate pre-litigation process, such as the scheme currently in operation under the *Motor Vehicle Accidents Compensation Act 1990*;
- Disputes involving a vexatious litigant;
- Civil penalty proceedings (as defined in sections 18B (2) and (3) of the Act).

In addition, any civil proceedings commenced in the Supreme Court are "excluded proceedings" for the purposes of the new Part 2A of the Civil Procedure Act (see *Civil Procedure Amendment (Excluded Proceedings) Regulation 2011*).

In the Committee's proposed submission in relation to the 5 year review of the *Civil Procedure Act 2005* (due to be served by 31 March 2011), the Committee expresses its view that the these exclusions have been practically and appropriately identified in light of the Act's overriding purpose. However, in respect of all other matters dealt with by the Courts, the Committee notes its concern that a blanket approach to pre-litigation requirements may subvert the overriding purpose of the Act. A copy of the Committee's submission will be circulated as soon as it is finalised.

Non-compliance with pre-litigation protocols

If pre-litigation protocols are not complied with, parties are not prevented from commencing, responding to or continuing with proceedings. However, the Court will have power to make costs orders, including costs orders against legal representatives in circumstances where the legal representative fails to advise a client regarding the pre-litigation protocols and alternatives to litigation.

Costs of compliance

Unless the Court orders otherwise, parties are required to bear their own costs of compliance with the pre-litigation protocols (section 18L of Part 2A).

Transitional provisions

The pre-litigation protocols must be complied with for proceedings commenced on or after 1 October 2011, being 6 months after the commencement of the pre-litigation protocols on 1 April 2011.

Law Society Committee Reports

Dispute Resolution Committee
NSWYL Representative, Christina Kafalias

The Dispute Resolution Committee is currently organising a series of panel events for the profession for 2011 on current issues in dispute resolution, following the huge success of last year's event of the same nature.

A subcommittee has been formed to re-vamp the Schools Conflict Resolution and Mediation Competition (SCRAM) to run parallel with the Mock Trail, with a view to re-launching the program to schools in 2012.

The Committee is also monitoring recent legislative changes and advising on proposed future changes to the rules and regulations of the Federal Court, as well as those relating to mediators.

Costs Working Group
NSWYL Representative, Juliet Eckford

The Costs Working Group (CWG) has invited the Manager, Costs Assessment of the Supreme Court to join the Group, in order to facilitate better communication.

Also, the CWG has been monitoring the number and nature of calls to the Law Society on costs, so as to determine how to best assist the profession and the CWG is currently considering the costs information provided in the Law Society diary to establish whether this is necessary, accurate and can be improved for next year.

The CWG is also monitoring costs aspects of the proposed National Reforms.

Committee Events

A reminder that the launch of the Committee's most recent publication the *Survive and Thrive Handbook* will be taking place on 5 May 2011 at 6pm at the offices of TressCox Lawyers. We are pleased to announce that Justice Sackar and Richard Beasley will be our guest speakers at the launch. We will circulate a flyer and invitation in the coming weeks.

Contact us

We are always interested in receiving your feedback, comments or ideas. Feel free to contact us on the details below.

1. Elias Yamine, Chair
   civillit.chair@younglawyers.com.au
2. Renee Bianchi, Co Vice Chair
   civillit.chair@younglawyers.com.au
3. Talitha Fishburn, Co Vice Chair
   civillit.chair@younglawyers.com.au
4. Nicole Compton, Secretary
   ncompton@hunthunt.com.au
5. Brenda Tronson, Chair, Standing Subcommittee on Submissions
   btronson@sixthfloor.com.au

Next meeting

Wednesday, 27 April 2011 at 1:05pm. Venue TBA.