CLIFFORD
CHANCE

Briefing note October 2016

Nothing to get wound up about: Federal Court refers Masters case to arbitration

In *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164, the Federal Court decided to stay the proceedings brought before it and refer the dispute to arbitration, save for the ultimate question of whether a winding-up order against the first defendant should be made. The decision illustrates the policy of minimal curial intervention that Australian courts follow where arbitration is concerned. The decision also confirms the arbitrability of certain claims under the *Corporations Act (2001)* (Cth).

Background

The case concerned a joint venture agreement (**JVA**) entered into in 2009 between Woolworths Ltd (**Woolworths**) and Lowe's Companies, Inc (**Lowes**) through its subsidiary WDR Delaware Corporation (**WDR**).

Hydrox Holdings Pty Ltd (**Hydrox**) was registered as an Australian company on 20 August 2009 as the corporate vehicle through which the Masters Home Improvement chain of hardware stores would be established and operated in Australia and New Zealand. As at the date of its incorporation, WDR held one-third of Hydrox's shares and Woolworths held the remaining two thirds.

The Masters business operated at a loss since its incorporation, and, as a result, several disputes arose between the parties.

On 29 August, Lowes and WDR brought proceedings to the Federal Court of Australia, seeking a declaration that the conduct of Woolworths and its nominee directors on the Hydrox Board in the period from 9 August 2016 to 29 August 2016 amounted to conduct that was "*oppressive to, unfairly prejudicial to or unfairly discriminatory*" against them. Lowes and WDR sought an order pursuant to the *Corporations Act 2001* (Cth) (**Corporations Act**) that Hydrox be wound-up.

On the 31 August 2016, Woolworths sought a stay of the proceedings brought by Lowes and WDR pending determination of the dispute by arbitration.

Applicable law

Woolworths contended that the Court was bound to stay the whole of the proceedings because all of the disputes raised by WDR and Lowes were "*capable of settlement by arbitration*" within the meaning of s 7(2)(b) of the *International Arbitration Act 1974* (Cth) (**IAA**) and also within Art 8(1) of the *UNCITRAL Model Law on International Commercial Arbitration* (which is Schedule 2 to the IAA). The IAA was applicable as both WDR and Lowes were

Key points:

- Australian courts follow a policy of minimal curial intervention where arbitration is concerned. This decision is a continuation of this trend.
- The decision illustrates some of the more technical aspects of the stay analysis. In particular, it shows how an Australian court determines two key issues: whether the identified matter the subject of the proceeding falls within the scope of the arbitration agreement and the arbitrability of the dispute that has arisen between the parties.
- The scope of the arbitration agreement is determined through a process of contractual interpretation; the issue of arbitrability is determined by reference to the law of the forum – in this case, Australian law.
- The mere fact that a dispute includes an application for a wind-up order does not make the entire dispute non-arbitrable. If the basis of the wind-up order is a contractual dispute, that contractual dispute will be referred to arbitration (provided it is within the scope of the arbitration agreement that exists between the disputing parties).

parties to the JVA (and thus parties to the arbitration agreement contained in the JVA) and were, at the time the JVA was entered into, domiciled or ordinarily resident in the USA (a Convention country for the purposes of the IAA).

Identifying the Matters the Subject of the Proceeding

The Court was initially faced with contention as to the matter(s) the subject of the proceeding.

Lowes and WDR argued that there was a sole 'matter' in dispute; the question as to the winding-up of Hydrox. Lowes and WDR argued that, as a matter of Australian public policy, winding-up disputes are not capable of being resolved by arbitration.

Foster J disagreed with the characterisation of the dispute advanced by Lowes and WDR. His Honour preferred Woolworths' contention that there were several separate 'matters' the subject of the proceeding that fell within the ambit of s7 IAA. In addition to a claim for winding up, Foster J identified claims for breaches of contract (being breaches of the JVA and the constitution of Hydrox), wrongful conduct in a corporate governance sense and wrongful conduct in purporting to terminate the JVA in bad faith on grounds which did not justify the termination.

Scope of the Arbitration Agreement

In a decision of this type, there are two separate questions that must be considered. First, whether the matters fall within the scope of the arbitration agreement (as a matter of construction of that agreement); and second, if those matters do fall within the scope of the agreement, whether or not those matters are arbitrable.

In the present case, the scope of the arbitration clause was not in issue.

Arbitrability

In contrast to the determination of the scope of an arbitration agreement, the concept of arbitrability is not a contractual question. It is instead a question determined by the application of the nation's domestic law alone – in this case, Australia.

WDR and Lowes submitted that there was a "*sufficient element of legitimate public interest in the subject matters*" of this proceeding that made their "*private resolution ... outside the national court system inappropriate*".

WDR and Lowes contended that Australian public policy prohibited the matters being arbitrated as they were matters concerning the Corporations Act, and therefore uniquely the subject of government authority because they affected a person's legal status, they affected interests of third parties and there was a public interest in seeing the matters determined in public. Ultimately, it was argued that the Corporations Act was structured on the basis that the winding-up of a company should be a public process.

Woolworths did not dispute that it was for the Court to form an opinion as to whether there existed an entitlement to a winding-up order. However, Woolworths contended that the other matters in the proceedings were "*jurisdictional or forensic preconditions to the proper consideration by the Court of the appropriateness of making a winding up order*".

While Foster J found it "uncontroversial" that some disputes could not be the subject of private arbitration, she determined that the arbitrability of certain matters raised in any given proceeding under the Corporations Act would usually depend upon the nature of those matters.

Foster J took into account that there was no suggestion that Hydrox was insolvent (indeed, Woolworths had provided letters of comfort to the directors of Hydrox as to its solvency), and that several regulatory requirements were not fulfilled (such as the fact that no creditor had attended any Court hearings). In addition, Foster J noted that the oppression claims brought under the Corporations Act were being litigated on an *inter partes* basis and was therefore arbitrable. As such, Foster J found that there was no substantial public interest element in the determination of the dispute

Furthermore, Foster J criticised "*blanket propositions*" that all claims in a Corporations Act proceeding could not be arbitrable, finding that the "mere fact" a winding-up order was sought did not alter the nature of the proceeding as, ultimately, an *inter partes* dispute (between the sole shareholders of Hydrox) concerning the way in which those shareholders performed their contractual and other obligations.

Staying of proceedings

Foster J identified a number of sources of power to grant the stay sought by Woolworths, and paid particular attention to the well-founded "*policy of minimal curial intervention*" in matters governed by arbitration agreements.

Pursuant to this policy, His Honour noted that the Court was no more entitled to delve into the merits of the

case in the context of a stay application than in the context of enforcement or setting-aside proceedings. The questions of fact and law which substantiated the dispute between the parties were all capable of resolution by arbitration, and as arbitration was the forum by which the parties "*by their own bargain* [had] *chosen*",[1] the parties were to be held to that bargain.

[1] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 94-95 [192].

Contacts

Ben Luscombe
Partner
T: +61 8 9262 5511
E: ben.luscombe@cliffordchance.com

Cameron Hassall
Partner
T: +852 2825 8902
E: cameron.hassall@cliffordchance.com

Jenni Hill
Partner
T: +61 8 9262 5582
E: jenni.hill@cliffordchance.com

Tim Grave
Partner
T: +61 2 8922 8028
E: tim.grave@cliffordchance.com

Dr Sam Luttrell
Counsel
T: +61 8 9262 5564
E: sam.luttrell@cliffordchance.com

Dr Romesh Weeramantry
Counsel
T: +852 2825 8938
E: romesh.weeramantry@cliffordchance.com

Peter Harris
Senior Associate
T: +61 8 9262 5581
E: peter.harris@cliffordchance.com

Nick Helm
Senior Associate
T: +61 8 9262 5554
E: nick.helm@cliffordchance.com

Isuru Devendra
Associate
T: +61 8 9262 5528
E: isuru.devendra@cliffordchance.com

Nicola Birman
Graduate
T: +61 8 9262 5571
E: nicola.birman@cliffordchance.com

Clifford Chance, Level 7, 190 St Georges Terrace, Perth, WA 6000, Australia

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.