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WA Supreme Court awards indemnity costs for breach of agreement to arbitrate

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The message is clear – a party who commences legal proceedings in breach of a contractual obligation to refer a dispute to arbitration is likely to be ordered to pay indemnity costs.

The Supreme Court of Western Australia recently affirmed the principle determined in the English High Court case of *A v B* [2007] EWHC 54.

The facts

In *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10, Pipeline commenced proceedings against ATCO alleging breaches of an installation agreement for underground gas pipelines.

ATCO filed a conditional appearance, and applied for a stay of the proceedings on the basis that the parties' agreement contained a dispute resolution clause requiring a dispute to be referred to arbitration. The clause prohibited the parties from commencing court proceedings before complying with the agreed process.

Under section 8(1) of the *Commercial Arbitration Act 2012* (WA) (**the Act**), the Court must refer parties to arbitration where the dispute is the subject of an arbitration agreement, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Pipeline argued that the relevant arbitration agreement lacked clarity and was uncertain, and that ATCO had waived its right to insist on compliance with the arbitration agreement by failing to invoke the agreement in response to threatened Court proceedings.

The Court held that the dispute be referred to arbitration and the proceedings be stayed.

ATCO applied for an order that Pipeline pays its costs of the stay application on an indemnity basis.

The decision

The Court found that:

- the Act had at its heart the UNICTRAL Model Law on International Commercial Arbitration, being internationally accepted and recognised;
- the object and purpose of the Act required the Courts to support and enforce arbitration agreements;
- the dispute resolution clause survived termination of the parties' agreement;
- ATCO had promptly applied for a stay of the Court proceedings, and did so before taking any substantive steps; and
- there was nothing to suggest that ATCO had waived its rights under the dispute resolution clause or would acquiesce to the dispute being resolved in any other manner.

The Court ordered Pipeline to pay ATCO's actual costs of the stay application provided that the costs were not unreasonably incurred and were not unreasonable in amount.

The takeaways

The Supreme Court of Western Australia no longer has a discretion under the Act (as it did under its precursor, the *Commercial Arbitration Act 1985* (WA)) on whether to stay proceedings or refer to arbitration. An arbitration agreement must be null and void, inoperative or incapable of performance, before the Court can hear the dispute.

The decision will deter parties from commencing Court proceedings where the parties have entered a binding arbitration agreement to resolve disputes.

Jennifer Keane is a Senior Associate in Rockwell Olivier's Dispute Resolution team, currently on secondment in the Sydney office. Please feel free to contact Jennifer directly at jkeane@ro.com.au for more information on this issue.

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