NSW Supreme Court Enforces Arbitration Despite Waived Preconditions in Icon SI v. ANSTO

April 3, 2024

Brief

In the pivotal case of *Icon Si (Aust) Pty Ltd v Australian Nuclear Science and Technology Organisation [2024] NSWSC 324*, the Supreme Court of New South Wales rendered a decision that emphatically underscores the judiciary's commitment to enforcing arbitration clauses within commercial contracts. The case arose from a dispute concerning a construction contract for the SyMo Facility at Lucas Heights, leading to issues between contract amendment and dispute resolution clauses.

Facts

Icon Si (Aust) Pty Ltd (Icon) engaged in a contract with the Australian Nuclear Science and Technology Organisation (ANSTO) to construct the SyMo Facility for a substantial sum. The contract incorporated a clause specifying dispute resolution procedures, including expert determination followed by arbitration if necessary. Following disputes, the parties amended the contract, waiving the expert determination but not expressly affecting the arbitration clause. ANSTO sought to enforce the arbitration agreement following further disputes, while Icon resisted, leading to court proceedings.

Arguments

Icon argued against the arbitration, contending that the amendment deed, which waived expert determination, effectively

made the arbitration clause inoperative since one of the prerequisites for arbitration (the completion or waiver of expert determination) could no longer be met. They interpreted the contract and amendment as leaving no path open to arbitration.

Defenses

In contrast, ANSTO maintained that the waiver of expert determination was not intended to negate the overarching agreement to resolve disputes through arbitration. They argued that the contract, read as a whole and in light of the amendment deed, still mandated arbitration for unresolved disputes, emphasizing the contract's and the amendment deed's language and commercial objectives.

Court Interpretation

The Court sided with ANSTO, holding that the arbitration clause remained operative and binding. It determined that the parties' intention, viewed through the lens of the contract's language and the commercial context, supported the continuation of the arbitration pathway for dispute resolution. The Court highlighted that the waiver of expert determination did not equate to a waiver of arbitration but simply removed one tier of the multi-tiered dispute resolution process. Thus, disputes were still subject to arbitration as per the contract's terms.

The Honourable Justice Ball highlighted this as follows:

"As I have explained, before the Amendment Deed was executed, the parties had agreed ultimately to submit all their disputes to arbitration except to the extent that those disputes were finally resolved by expert determination. The intermediate step of expert determination was an option offered by the standard terms that formed part of their contract. Initially, the parties agreed to adopt that option through the mechanism provided in the standard terms of indicating in Annexure Part

A that the option applied. When they subsequently agreed to "waive" that option, they must have intended to dispense with the option they had previously agreed to adopt. They could not have intended at the same time to dispense with their agreement ultimately to resolve all disputes by arbitration. That would involve a fundamental change to the dispute resolution mechanism they had agreed to adopt."

This interpretation leaned heavily on principles of commercial contract construction, focusing on the parties' intentions and the contract's commercial purpose. The Court also referred to statutory provisions under the *Commercial Arbitration Act 2010* (NSW), affirming the act's purpose to uphold arbitration agreements unless clearly null, void, inoperative, or incapable of being performed.

Significance

The *Icon Si v. ANSTO* decision marks a significant contribution to the body of jurisprudence surrounding arbitration in commercial disputes in Australia. Its core significance lies in the Court's determination that an arbitration agreement stands resilient, even when its prerequisites are waived by the parties.

This ruling directly addresses a nuanced area of dispute resolution law by clarifying that parties' agreement to bypass certain pre-arbitration steps, such as expert determination, does not inherently invalidate or render the subsequent arbitration agreement inoperative.

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