THE DOMESTIC AND INTERNATIONAL ARBITRATION LANDSCAPE IN AUSTRALIA

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1. Introduction

Commercial arbitration in Australia is governed by two distinct statutory regimes. The first is State-based and regulates domestic arbitration. The second is Federal and regulates international arbitration. The International Arbitration Act 1974 (Cth) ('IAA') was amended in 2010, to ensure that the current arbitration law and, more importantly, the current arbitration practice complies with internationally accepted norms. The domestic legislation is also the subject of significant reform with all States committed to introducing uniform legislation. To date, three Australian States, New South Wales (2010), Victoria (2011) and South Australia (2011) have enacted the uniform legislation. The Northern Territory and Tasmania have passed the legislation and it is awaiting commencement, while in Western Australia and Queensland it awaits assent. The only jurisdiction which has not introduced a bill is the Australian Capital Territory.

2. Domestic Arbitration

Prior to 2010, domestic commercial arbitration in Australia was governed by the so-called "Uniform Acts" that were based on the English *Arbitration Act 1979*. Following concerns that domestic commercial arbitration in Australia was not providing the advantages which had been originally intended by the Uniform Acts, the Standing Committee of Attorneys General in 2009 formulated a new domestic arbitration regime modelled upon the 2006 UNCITRAL *Model Law on International Commercial Arbitration* ('Model Law'). The state of New South Wales was the first to enact the Bill on 1 October 2010 as the *Commercial Arbitration Act 2010* (NSW). Victoria followed suit on 18 October 2011 with its *Commercial Arbitration Act 2011* (VIC), and South Australia on 22 September 2011. At the date of writing, the other states are expected to enact the regime shortly.

Three of the more significant amendments that were introduced by the *Commercial Arbitration Act 2010* ('CAA') will be discussed, including the court's power to grant stays of court proceedings, confidentiality, and the parties' recourse against an award. The underlying policy agenda is to minimise court intervention and promote finality in arbitral awards, while simultaneously endeavouring to enhance the arbitration process.

2.1 Stays of court proceedings

Under s53 of the pre-2010 Acts, the court had a discretion to grant a stay of court proceedings.[3] The *CAA* has since removed that discretion by repealing s53 and replacing it with s8 which is in

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[3] The conditions to the court granting a stay of the court proceedings pursuant to s53 of the pre-2010 CAA included that the applicant was required to satisfy the court that there was no "sufficient reason" why the matter should not be referred to arbitration and that the applicant was "ready and willing" to do all things necessary for the proper conduct of the arbitration.

identical terms to Art 8 of the *Model Law*. Section 8(1) stipulates that the court "must" grant a stay of the court proceedings and refer the matter to arbitration where an applicable arbitration agreement exists between the parties, unless the agreement is found to be "null and void, inoperative or incapable of being performed".

2.2 Confidentiality of proceedings

The High Court of Australia in *Esso Australia Resources Ltd v Plowman*[4] distinguished the concept of confidentiality from privacy, finding that a term imposing a general obligation of confidentiality was not implied into an arbitration agreement. Departing from *Esso v Plowman*, s7E of the *CAA* imposes a statutory duty of confidence, now stipulating that neither the parties nor the arbitral tribunal may disclose confidential information, unless an exception to the duty (found in ss27F, 27G, 27H and 27I) applies or unless the parties consent to "opting-out" of the statutory duty as permitted by s27E(1). This reform thereby enhances the arbitration process by reinforcing its traditional private nature with a statutory duty of confidentiality. Section 27E and particularly the "opt-out" option of s27E(1) has immediate implications which must be considered by parties when drafting an arbitration agreement under the reformed legislative regime.

2.3 Right to appeal

One of the most significant amendments to the *CAA* has been the narrowing of the right of appeal from an arbitral award. Under the pre-2010 Acts, leave to appeal the decision of an arbitral tribunal could be granted pursuant to ss38 where there was a "manifest error of law on the face of the award" or "strong evidence" that the arbitrator had made an error of law, and where the determination of the question would substantially add to the certainty of commercial law. Section 34A(1) of the *CAA* allows an appeal only where the parties have chosen to "opt-in", by stipulating in the arbitration agreement that such an appeal may be made or doing so subsequently. Where the parties agree that there is to be a right of appeal, as with the pre-2010 Act, an appeal is only possible in respect of an error of law. If the parties do not agree to "opt-in", either in their arbitration agreement or within three months of the date of the award, an appeal is not available. Even where the parties agree, the court must still grant leave to appeal. To appeal, the applicant must satisfy the court that the decision was "obviously wrong" or that the question of law is one of "general public importance" and is open to at least serious doubt, and that despite the agreement of the parties to the appeal, it is "just and proper" for the court to determine the question of law asked.[5]

Section 42 of the pre-2010 Act provided a further avenue for the review of an arbitrator's conduct, by reference to the concept of "misconduct". The common law concept of misconduct is no longer used in the new legislation. Instead, s34(2) of the *CAA* has adopted the more limited circumstances outlined in Article 34(2) of the *Model Law* which limits recourse against the award to six specific circumstances. Those six circumstances are:

(a) a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid under the law to which the parties have subjected it;

(b) the party seeking to set the award aside was not given notice of the appointment of the tribunal or of the arbitral proceedings or was otherwise unable to present its case;

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[4] (1995) 183 CLR 10 ('Esso v Plowman').

[5] See for example *Commercial Arbitration Act 2010* (NSW), s34A(3).

(c) the award deals with matters outside the submission or otherwise outside the jurisdiction of the tribunal;

(d) the composition of the tribunal was not in accordance with the agreement, unless the agreement was in conflict with the Act;

(e) the subject matter of the dispute is not capable of settlement by arbitration;

(f) the award is in conflict with public policy.

Hence the domestic regime narrows the recourse available against an award and reinforces the legislature's underlying pro-enforcement attitude in four ways:

- s34A prohibits an appeal unless both parties have consented;
- even where consent is given, pursuant to s34A, the party seeking to appeal must obtain leave. As seen above the test for whether leave should be granted is difficult to satisfy and it will be interesting to see how many cases satisfy that test. The legislation also requires that applications for leave be determined without a hearing, unless the court determines that a hearing is necessary;
- s34 (which mirrors Article 34 of the Model Law) is also available but requires a serious error, of a jurisdictional nature, to be made. That is, recourse to the award will not be permitted unless it can be shown that the arbitrators did not have jurisdiction or failed to exercise the jurisdiction correctly. Even where such matters are made out, the court retains a discretion as to whether there will be any consequence;
- further, before determining whether to set aside an award, when requested by either party, a court may pursuant to s34(4) and s34A(7) and (8) suspend its own process for a time, to give the arbitrators an opportunity to resume the arbitral proceedings or take other action for the purposes of eliminating the grounds for setting aside.

Together with s8 of the *CAA* in respect to the stay of proceedings, these key amendments to the *CAA* evince a clear legislative intention that court intervention in arbitration should be minimised and that a paramount consideration of the legislature is the finality of arbitral decisions. The *CAA* overall illustrates the shift in attitude from that which prevailed at the time the Uniform Acts were enacted, towards a greater acceptance of arbitration as a dispute resolution mechanism.

3. Recent developments in international arbitration in Australia

Australia is a signatory to both the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID'). The International Arbitration Act is Federal legislation which covers the field of international arbitration and excludes any role for the domestic legislation in respect to issues of stay, recourse to the award, confidentiality and enforceability of interim measures. Prior to the introduction of the amendments in 2011, the existing legislation physically attached, the New York Convention, ICSID and the Model Law as schedules to the IAA and incorporated them, subject to minor amendment, into the law of Australia. As a result, international arbitration awards made outside Australia were (and remain) enforceable pursuant to the New York Convention and the Model Law. International arbitration awards made in Australia were (and remain) subject to challenge for the reasons permitted by the Model Law (and no other). Accordingly, the limited bases for contending that a foreign international arbitration award should not be enforced are mirrored in the Australian lex

arbitri, so that the basis for review of an Australian international arbitration award and the reasons for refusing to enforce a foreign award are substantially the same.

A number of the recent amendments to the IAA are directed at clarifying the legislature's intent that an international arbitration award (whether subject to Australian law or merely enforced in Australia) will not be subject to challenge, except for the limited reasons recognised by the New York Convention or Model Law. The more significant amendments are discussed below.

3.1 Confidentiality

As with the domestic legislation, the decision in *Esso v Plowman* which held that there was no implied term imposing a general duty of confidence, has been replaced by s23C(1) of the *IAA* imposing a statutory duty of confidence.

3.2 Section 21 of the amended IAA and the case of *Eisenwerk*

Prior to 2010, parties were able to "opt-out" of the Model Law as the law governing the conduct of their international commercial arbitration subject to Australian law. This could be done expressly or the intention to do so could be inferred. Debate as to what would constitute an effective "opt-out" was triggered by the decision in *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dip-Ing Burkhardt GmbH.*[6] In that case, the Queensland Court of Appeal held that if the arbitration agreement specified the use of procedural rules such as the International Chamber of Commerce (ICC) Arbitration Rules, the parties had thereby "opted out" of the application of the Model Law to their arbitration agreement.[7] By designating the Model Law as the mandatory "supervisory procedural law" for all international arbitration with their seat in Australia,[8] s21 of the *IAA* eliminates the possibility of either an express or implied opting-out of the IAA. As a consequence, it is no longer possible for parties to opt out of IAA for the purpose of opting into the domestic regime to take advantage of the limited right to appeal an arbitral award which was available if the arbitration was governed by the domestic regime.

3.3 Limiting the grounds to refuse enforcement and the cases of *Resort Condominiums* and *Altain Khuder*

Prior to 2010, the court's ability to refuse enforcement of an arbitral award, notwithstanding that the grounds for refusal stipulated by the New York Convention had not been made out, was subject to intense discussion following the highly-criticised decision in *Resort Condominiums Inc v Bolwell and Another.*[9] In that case, it was held that Article 5 of the New York Convention did not set out definitely the grounds which justified a court refusing enforcement. Section 8(3A) of the *IAA* was introduced to make it clear that *Resort Condominiums*, if it was ever good law, is no longer good law. Section 8(3A) states, in terms, that the court has no residual discretion to refuse enforcement of

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[6] *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dip-Ing Burkhardt GmbH* [2001] 1 Qd R 461('Eisenwerk').

[7] See further, S Kitharidis. 'Australia's Reputation as a Centre for International Arbitration: *Wagners Nouvelle Caledonie SARL v Vale Inco Nouvelle Caledonie SAS:* Missing a Critical Opportunity to Reverse the Eisenwerk Decision,' (2011) 23 *Bond Law Review* 102.

[8] L Nottage and R Garnett, (eds) *International Arbitration in Australia* (Federation Press, 2010), 82.

[9] *Resort Condominiums Inc v Bolwell and Another* [1993] 118 ALR 655, 675-676 ('Resort Condominiums').

an arbitral award on any grounds other than that provided in ss8(5) and 8(7) (which reproduce the grounds embodied in Art 5 of the New York Convention).[10]

In *IMC Aviations Solutions Pty Limited v Altain Khuder LLC*,[11] a Mongolian arbitral tribunal made an award in favour of the Mongolian company Altain Khuder, against IMC Mining Inc and a related Australian entity, IMC Mining Solutions Pty Ltd (now, IMC Aviation Solutions Pty Limited). The latter was not a party to the original arbitration agreement. When IMC Mining failed to pay the award of approximately US$5.9 million, Altain Khuder applied to the Victorian Supreme Court for an enforcement order against both IMC Mining Inc and IMC Aviations. At first instance, Justice Croft made an order for enforcement against both respondents, rejecting IMC Aviations' arguments that it was not bound to the arbitral award because it was not a party to the arbitration agreement, had not been given notice of the arbitration and therefore had not had an opportunity to be heard. On appeal, the Victorian Court of Appeal overturned Justice Croft's pro-enforcement decision, declaring that the Mongolian arbitral tribunal had exceeded its jurisdiction by making an award against a non-party. *Altain Khuder* stands for three propositions: first, that the courts have jurisdiction to re-consider jurisdictional questions pertaining to an arbitral tribunal; secondly, an award creditor must *prima facie* show, on the balance of probabilities, that the award debtor was a party to the original arbitration agreement, and once that onus is discharged, the award debtor bears the onus of establishing one of the grounds for refusal under ss8(5) and 8(7) of the *IAA* if a court is to refuse enforcement; and thirdly, that whether an award debtor was a party to the arbitration agreement may be determined by applying alter-ego/agency principles. The latter was not established on the evidence available.

Altain Khuder demonstrates the practical importance of taking particular care to include in the arbitration agreement not only the main controlling entity but also any relevantly related third parties involved in the business venture of the parties. In *Altain Khuder*, the orders enforcing the award against IMC Mining Solutions, which was a party to the arbitration agreement, remained unchallenged. Rather, the problem for Altain Khuder as award creditor was that IMC Mining Solution had no relevant assets to satisfy the award. Accordingly, for the award to be of value, Altain Khuder needed to establish that the second respondent, IMC Aviations, had been party to the arbitration agreement (by use of the alter ego doctrine). Altain Khuder ultimately failed to discharge this limited onus and accordingly the award was not enforced against IMC Aviations.

3.4 The case of *Gordian Runoff* and the interplay between domestic and international arbitration frameworks in Australia

Concerns have been raised both locally and internationally that two Australian decisions -- *Oil Basins v BHP Billiton Ltd*[12] and *Westport Insurance Corp v Gordian Runoff*[13] -- in respect of the form and quality of reasons were inappropriate and made Australia an undesirable jurisdiction to enforce an international award or for conducting an international arbitration. These concerns ignore the obvious point that both cases relate to the domestic arbitration regime and are unlikely to have

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[10] R Garnett and M Pryles, 'Recognition and Enforcement of Foreign Awards Under the New York Convention in Australia and New Zealand,' (2008) 25(6) *Journal of International Arbitration - Kluwer Law International* 899, 904-905.

[11] *IMC Aviations Solutions Pty Limited v Altain Khuder LLC* [2011] VCA 248 ('Altain Khuder').

[12] *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 139 ('Oil Basins').

[13] *Gordian Runoff Ltd v Wespoint Insurance Corporation* [2010] NSWSC 57, [221-223]; *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 281 ALR 593; [2011] HCA 37, [52] ('Gordian Runoff').

much or any application to an award made pursuant to an international commercial arbitration agreement. The case of *Gordian Runoff* is authority for a number of issues. Of significance to this Correspondent Report was the Court's consideration of the requirement in s29 of the pre-2010 *CAA* that an arbitral award must "state the reasons upon which the award was based". In *Oil Basins,* the Victorian Court of Appeal said "the requirement (for reasons) is no different to that which applies to a judge".[14] Rejecting *Oil Basins*, the New South Wales Court of Appeal in *Gordian Runoff* considered that s29 would be satisfied if the arbitrator provided a "crisp summary" along the lines enunciated by Donaldson LJ in the English Court of Appeal decision of *Bremer Handelsgesellschaft mbH v Westzucker GmbH*[15] -- that the arbitrator need only "set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in light of what happened they have reached their decision and what that decision is".[16] The High Court rejected the requirement that an arbitrator's reasons should always be of a judicial standard. The standard of reasons required will depend upon the particular circumstances of the case.[17]

There is little difference in the wording of s29 of the pre-2010 Act and its successor in respect of domestic arbitration, s31(3) of the *CAA*. Accordingly, *Gordian Runoff* remains authoritative for the standard of reasons expected to be given by an arbitrator in an arbitration governed by the new domestic regime.[18] The High Court in *Gordian Runoff* held that a failure to provide reasons (or the provision of inadequate reasons) would constitute an error of law. The new s34A(1) of the CAA relating to domestic arbitration now provides that there is no right of appeal, unless the parties agree. Accordingly, it is difficult to see how a challenge on the grounds that failure to provide reasons constitute an error of law could be maintained in respect of a domestic arbitration, absent agreement that there be a right of appeal and leave having been granted. The position is even clearer in respect of international arbitration.

Article V of the New York Convention is now bolstered by s8(3A) of the *IAA* which provides that recourse to the award is limited to the matters identified in Article V. There is no provision for an appeal on a question of law provided pursuant to Article V of the New York Convention. Enforcement may only be refused in respect of a foreign international arbitration award and a local international arbitration award may only be set aside because the award debtor has established one of the grounds set out in Article V of the New York Convention (in respect of enforcement) or Article 34 of the Model Law (in respect of setting aside a local international arbitration award).

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[14] *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 139, at 367-8.

[15] *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130.

[16] *Gordian Runoff Ltd v Wespoint Insurance Corporation* (2010) 267 ALR 74; [2010] NSWSC 57, [219] (Allsop P, Spigelman and Macfarlan JJA agreeing) citing the test in *Bremer Handelsgesellschaft mbH v Westzucker Gmbh (No 2)* [1981] 1 Lloyd's Rep 130, 132-3.

[17] *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 281 ALR 593; [2011] HCA 37, [53] (French CJ, Gummow, Crennan and Bell JJ)and [170] (Kiefel J). The High Court considered that the arbitrator's reasons were inadequate because the arbitral tribunal had failed to explain why the "various integers in that complex statutory provision" in question were satisfied; at [55-56] (French CJ, Gummow, Crennan and Bell JJ). One of those more important "integers" related to the fact that the statutory provision being applied by the arbitrators turned on the point of whether it was "reasonable" for the insurer to be bound to indemnify the insured; at [170] (Kiefel J).

[18] C Miles, S Luttrell, and S McCornish, 'Understanding Australia's New Domestic Arbitration Regime: A Comparison of the Australian State Commercial Arbitration Acts and the New Model Commercial Arbitration Bill,' available via www.ciarb.net.au

Accordingly, *Gordian Runoff* has little, if any, practical application in an international arbitration in Australia.

4. Looking to the future

The recent comprehensive reform to arbitration law at domestic and international level heralds a reinvigoration of arbitration practice in Australia. The State arbitration Acts enhance the image of arbitration as a dispute resolution mechanism, by minimising court intervention and promoting finality in arbitral awards.

Likewise, the amendments to IAA maintain the position that the New York Convention and Model Law are incorporated into the lex arbitri of Australia, and the effect of decisions (usually made by judges at first instance) which are inconsistent with internationally accepted norms, have been effectively reversed.