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Bulletin of recent News and Events

Editorial:

This is the first issue of the AICA Bulletin of recent News and Events in the field of arbitration. The Bulletin is intended to be a "plain vanilla" publication giving our members the latest information about matters concerning domestic and international arbitration in Australia in a summary but useful way. We welcome your feedback and suggestions.

Australia now has a recently amended International Arbitration Act and the Australian States and Territories have recently enacted or are about to enact new uniform legislation with respect to domestic arbitration.

The regime for both international and domestic arbitrations in Australia is based in each case on the UNCITRAL Model Law for International Commercial Arbitration. The domestic legislation contains some additional provisions which are specifically mentioned in the notes to the State and Territory legislation. The most controversial of these is the so called med-arb provision under s 27 D.

Arbitration legislation based on the Model Law has now been enacted in a large number of jurisdictions including many of Australia's trading partners including the Canadian provinces, Germany, Greece, Hong Kong, India, Japan, Malaysia, New Zealand, Philippines, Republic of Korea, the Russian Federation, Singapore, parts of the United States of America including California and Texas. Current details of the status of the Model Law legislation can be obtained from the UNCITRAL website. According to UNCITRAL the Model Law "reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world".

The new domestic regime replaces the 1984 uniform Commercial Arbitration legislation and there is much in the new regime that is different from the 1984 legislation. Some commentators have described the new domestic regime as effecting a cultural change that will improve the climate for arbitration.

Whilst the new regime improves the structure for the conduct of arbitration that alone does not guarantee that the number of arbitrations conducted in Australia will increase. In Victoria statutory incursions in fields of dispute that were capable of arbitration have seen removal of disputes in retail tenancies and domestic buildings from private arbitration in favour of determination by the Victorian Civil and Administrative Tribunal.

The AICA Bulletin will seek to keep its readers abreast of developments in the application and interpretation of the recent legislative

changes as well as news in the field of arbitration. Contributions are sought and welcomed from readers. The AICA Bulletin is to be published quarterly.

David L Bailey

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AICA News – new Fellows appointed

It is with great pleasure that the Council of AICA announces that it has appointed additional Fellows as a result of responses to its recent call for expressions of interest. The appointees also become included on AICA's list of certified arbitrators.

Recent Australian cases:

Abbreviations and references:

CAA – Commercial Arbitration Act (followed by year and State)

IAA – refers to the International Arbitration Act 1974 (Cth) as amended;

Model Law refers to the UNCITRAL Model Law on International Commercial Arbitration (as adopted in 2006 and implemented by the IAA);

NY Convention or Convention – refers to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;

UNCITRAL – the United Nations Commission on International Trade Law - www.uncitral.org/unictral/en/uncitral_texts/arbitration.html

ESCO Corporation v Bradken Resources Pty Ltd [2011] FCA 905

Adjournment of proceedings to enforce foreign award – confidentiality of award - provision of security – factors to be considered in granting adjournment and posting security

ESCO had obtained an award in an arbitration conducted in Portland, Oregon, USA against Bradken. ESCO took steps to have the award confirmed by a US district court in Oregon. Bradken resisted confirmation of the award. The District Court entered final judgment for ESCO and ESCO applied to the Federal Court of Australia to enforce the award under s 8(3) of the IAA. Bradken lodged a notice of appeal from the judgment on 11 May 2011 (prior to the commencement of this proceeding in the Federal Court on 9 June 2011).

Bradken applied to the Federal Court for the adjournment of the application by ESCO to enforce the award.

Justice Foster made an order pursuant to s 50 of the Federal Court of Australia Act 1976 preserving the confidentiality of the award to the parties.

Justice Foster observed that the award was a foreign award within the meaning of the IAA made in pursuance of an arbitration agreement. The award was made in a Convention country other than Australia. The award was therefore prima facie liable to be enforced in Australia. The question arose as to the power of the Court to adjourn the application for enforcement.

Section 8(8) of the IAA is in the following terms:

(8) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

His Honour noted that s 8(8) of the IAA might not be the only source of power to enable the court to adjourn the proceeding, as the court
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had power to control its own processes.

His Honour, being satisfied that Bradken had applied to the US District Court and the US Appeals Court for an order setting aside the award in part and that the applications were bona fide considered that the threshold requirements for the application of s 8(8) existed.

ESCO applied for security to be provided. The question arose as to what was "suitable security". His Honour noted at [72] that factors to be considered by the court when ordering security would include the subject matter of the award; the history of the parties dealings (especially with each other) since the making of the award; the enforcing party's prospects of enforcing the award; and the potential for the party against whom enforcement is sought to resist enforcement by, for example, applying to suspend or set aside the award in the jurisdiction in which it was made. The use of the word "suitable" called into play the exercise of a discretion. In exercising its discretion the court had to have regard to the objects of the IAA and the rationale underlying the New York Convention.

Bradken relied upon a number of factors in supporting its application for an adjournment (at [74]) including that:

- The parties chose Oregon as the seat of the arbitration;
- The US District Court was chosen by the parties to have primary jurisdiction and supervision of the arbitration and the award;
- The parties chose the laws of the US to determine the validity of the award;
- ESCO commenced proceedings in the US District Court to confirm the award;
- The US proceedings to confirm the validity of the award and the current appeal were initiated before the enforcement proceedings in Australia;
- Bradken's applications in the US were brought bona fide;
- The US District Court and the US Appeals Court were more appropriate venues;
- An adjournment was in in the interests of comity and likely to avoid conflicts of laws problems arising;
- ESCO was forum shopping;
- Appropriate security had been offered by Bradken;
- Bradken and its group were substantial companies;
- The balance of convenience favoured an adjournment; and,
- An adjournment was consistent with the IAA and its objects and equivalent provisions based on the NY Convention.

Foster J considered that many of the above factors were factors which other courts had considered significant in tipping the scales in favour of adjournment. In particular he noted the leading UK authority of Soleh Boneh International Ltd v Government of the Republic of Uganda [1993] 2 Lloyd's Rep 208 where Staughton LJ held that the mere existence of proceedings to challenge an award in another jurisdiction did not of itself require UK courts to adjourn the enforcement proceeding. The enforcing court should examine for itself the strength of the arguments in the foreign jurisdiction for setting aside or suspending the award. Requiring security or not would depend on the weakness or strength of the arguments.

Foster J considered that the enforcing court's assessment of the strength of the arguments would ordinarily be undertaken on incomplete material and on the briefest consideration of the arguments. He did not consider it sensible for the enforcing court to "second guess" the role of the foreign court or authority.

ESCO opposed the adjournment or alternatively if an adjournment was to be granted security should be required. It pointed out that the court ought not be too quick to accept the bona fides of Bradken's attempts to set the award aside in the US; it was not forum shopping as Bradken had substantial assets in Australia and it was its country of origin; Bradken had initially told ESCO that it would pay all the legal costs which the arbitrator had awarded; it would suffer substantial prejudice if enforcement was delayed; and, the delay could be as much as two years.

The adjournment was granted taking into account that the set aside application was made bona fide and the grounds were arguable. Also the US courts had a close connection with the dispute. ESCO had delayed in bringing its proceeding in Australia until after bringing proceedings in the US. There was evidence that delay would not detrimentally affect ESCO's chances of recovery as Bradken was a substantial company and there was no suggestion of it moving assets to avoid payment. ESCO could be adequately protected by the requirement of security.

Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd [2011] WASC 1

ED: NOTE APPEAL FROM THIS HAS NOW BEEN HANDED DOWN AND WILL BE REVIEWED IN THE NEXT BULLETIN: Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd [2012] WASCA 50

Applications for leave to appeal against arbitral awards under s 38 Commercial Arbitration Act 1985 (WA) - applications for security for costs – application for payment of amount of awards into court

The applicant (Koolan) had two arbitral awards in its favour against the respondent (Rizhao). The awards, which totalled USD 114 million had been registered as judgments of the court. Rizhao applied for leave to appeal against both awards under s 38 of the CAA (WA) 1985. Koolan applied for security for the costs as well as for payment of the amount of the awards into court.

Koolan sought security on the basis that the awards had not been stayed, they had been registered. Also even if the appeal were successful Rizhao would remain liable for about 62% of the amount of the awards. Rizhao was foreign corporation based in China that was about to restructure.

Orders for security for costs were regarded as non-controversial because Rizhao was manifestly a foreign corporation based out of WA.

Application for payment into court of the amount of the awards was more controversial and put on two bases. First, under the Rules of Court governing appeals, and, secondly, by reference to the Court's inherent jurisdiction.

Kenneth Martin J considered that O 65 r 13 of the Rules of Court did not provide a basis to support the application for payment into Court of the amount of the awards.

As to inherent jurisdiction His Honour held that there was no power to make such an order. There was no abuse of process by Rizhao. Nor was it contended that a Mareva order should be made.

The question was whether the case was one within the inherent jurisdiction of the court to render its orders, processes and procedures effective. Such orders were not justified in the circumstances, and, such an application was considered novel.

Joel Passlow v Butmac Pty Ltd [2012] NSWSC 225

Proceedings are stayed against foreign supplier under arbitration agreement

An exclusive importer agreement between an Australian importer and a Swiss supplier contained a provision requiring any dispute arising from the

agreement to be dealt with under an alternative dispute resolution procedure, followed by, if the dispute was unresolved, reference to arbitration by either party.

The importer brought a cross claim against the supplier in a proceeding brought against the importer by a local consumer. The supplier sought a stay on the basis that the agreement to arbitrate required the court to stay the cross claim and refer it to arbitration under the International Arbitration Act 1974 (Cth).

The supplier cross claimant argued that the arbitration agreement was "null and void, inoperative or incapable of being performed" on the basis that the dispute resolution clause was uncertain such as to render the dispute procedure including arbitration unenforceable.

Foster J of the Federal Court upheld the dispute resolution and arbitration provisions to be enforceable. In particular the dispute resolution procedure enabled a certain end to the pre arbitration process which triggered a right in each party to refer the dispute to arbitration at [16] and [17].

Further it was contended that the arbitration clause was "infected" by the uncertainty of the dispute resolution procedure under the previous provision. His Honour held that the two provisions read together constituted a "staged procedure" but it was not unenforceable.

It was also argued that as the agreement did not set out the costs to apply in an arbitration and such amounted to uncertainty which rendered the arbitration agreement void for uncertainty. His Honour also rejected this proposition [26] to [29].

Another argument was raised with respect to the jurisdiction of the arbitration and the arbitrability of a statutory claim for contribution. His Honour held that this issue fell for determination by the arbitrator.

A further argument that the matter ought not be referred to arbitration because the prior dispute procedure had not been followed was also rejected. It was rejected on the basis that s 7(2) of the IAA and art 8(1) of the Model Law were not dependent for their operation on the parties compliance with the terms of the arbitration agreement.

Larkden Pty Limited v Lloyd Energy Systems Pty Limited [2011] NSWSC 268

Commercial Arbitration Act 2010 (NSW) – jurisdiction of arbitrator to rule on own jurisdiction – arbitrability – dispute about patents – whether issues raised were hypothetical and not capable of arbitration

The dispute concerned whether disputes about contractual rights dealing with patents under a licensing agreement could be the subject of a private arbitration. Objection to arbitration on the basis of non arbitrability was raised by Larkden who claimed that Lloyd was seeking impermissibly to have determined by private arbitration eligibility to the grant of applications for patents and that such was something which only the Commissioner of Patents could do under the Patents Act 1990 (Cth).

The arbitrator appointed to deal with the dispute had ruled that he had jurisdiction.

Hammerschlag J held that the dispute was capable of determination by arbitration. Whilst the Patents Act only conferred powers to grant a patent or make a declaration of eligibility and decide where the grant of a standard patent is opposed on the Commissioner of Patents there was no impediment to the parties investing in the arbitrator power to resolve a dispute as between the parties as to their rights in and entitlements to a patent application or an invention.

It was further contended by Larkden that some of the issues in the notice of dispute

were purely hypothetical and therefore not capable of arbitration. It submitted that for a controversy to constitute a dispute it must give rise to a "live factual question between the parties" [86]. His Honour considered that a purely hypothetical dispute not susceptible to determination would not be a dispute within the meaning of the licensing agreement. However, in this case the fact that the dispute involved an element of futurity did not mean that it was hypothetical. The issues involved whether certain prospective conduct would result in a liability to pay fees under the licensing agreement. Accordingly the challenge to jurisdiction on that basis failed.

Westport Insurance Corporation v Gordian Runoff Ltd (2011) 85 ALJR 1188

High Court – Commercial Arbitration Act 1984 (NSW) s 29(1)(c) – extent of reasons supporting award – failure to state reasons for interpretation of statutory provision amounted to an error of law

Much fanfare preceded this decision due to differing judicial formulations of the scope of the need and extent for arbitrators to state reasons supporting an award by the Courts of Appeal in New South Wales and Victoria. In Victoria reference had been made to reasons in complex cases being of "judicial standard" (Oil Basins Ltd v BHP Billiton (2007) 18 VR 346 at 353. By contrast in New South Wales the Court of Appeal in Gordian Runoff Ltd v Westport Insurance Corporation (2010) 267 ALR 74 where Allsop P (with whom Spigelman CJ and MacFarlan JA agreed) considered that equating the responsibilities of arbitrators and judges in relation to that matter was not in accordance with the content of s 29(1)(c) of the Commercial Arbitration Act or the Model Law or with international arbitration practice.

The issue before the arbitral tribunal concerned the application of s 18B of the Insurance Act 1902 (NSW).

The High Court observed that the requirement that an award be supported with reasons was dependent upon the nature of the dispute and the circumstances of the case. It held that the reasons in this case did not articulate why the arbitral tribunal had applied the section the way it had. The failure to do so constituted an error of law.

Kiefel J noted that the arbitrators could not apply s 18 B (1) without determining whether it was reasonable to hold the reinsurers liable to indemnity Gordian in all the circumstances. More was required than a statement of conclusion only.

The plurality referred to the intervention of the Commonwealth Solicitor-General as amicus curiae seeking to distinguish the provisions of the Commercial Arbitration Act from the IAA as regards the giving of reasons. The Court left to one side the interpretation of the obligation under the Federal legislation (Model Law art 31 (2)) for arbitrators to state reasons and made its decision only in relation to the Commercial Arbitration Act 1984 (NSW).

Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd [2012] FCA 21

Foreign and non-foreign awards – jurisdiction of Federal Court – Federal Court has jurisdiction to enforce non-foreign award

Castel was an Australian distributor of products supplied by TCL under a General Distribution Agreement. The parties conducted an arbitration of a number of disputes that had arisen between them and an award was made in favour of Castel. The arbitration was conducted under the Model Law in Australia. Castel sought to enforce the award in the Federal Court of Australia. TCL submitted there was no jurisdiction in that Court to enforce the award in Australia because it was not a "foreign award" under the IAA.

Murphy J held that the Federal Court had jurisdiction to enforce a non- foreign award.

His Honour observed that the Model Law did not distinguish between foreign and non-foreign awards in its enforcement regime under articles 35 and 36. The drafters of the Model Law intended that a common approach should apply to the enforcement of both types of awards. Although there was no specific mention of jurisdiction to enforce non-foreign awards under the IAA in the Federal Court His Honour found that jurisdiction was supported by s 39B(1A)(c) of the Judiciary Act.

Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2) [2012] FCA 276

Enforcement of foreign award – respondent to award had no assets in jurisdiction of enforcement - public policy- no basis not to enforce foreign award

An award was made in an arbitration conducted in England between a Luxembourg company (Traxys) and an Indian company (Balaji). Traxys applied to the Federal Court to recognise and enforce the award in Australia. The arbitration was conducted under the LCIA rules and Balaji participated fully in the arbitration.

Balaji commenced proceedings in India to have the award set aside or stayed and obtained an injunction against Traxys restraining it from putting the award into execution. In the meantime the English High Court ordered that T had permission to enforce the award in the same manner as a judgment or order of that court and also granted an interim anti suit injunction against B.

Balaji raised three contentions against the enforcement of the award in Australia namely:

(1) The Court had no power to enter a judgment or make an order enforcing the award as enforcing the award did not required or even permit entry of judgment;

(2) The party against whom the award was to be enforced had to have assets in the jurisdiction in which the award was to be enforced;

(3) To enforce the award would be contrary to public policy.

Foster J held that the award was enforceable in Australia.

As to the first argument he noted that before any enforcement of the award could be made by T in the Federal Court there had to be a judgment of the court. Steps had to be taken to render the award a judgment or order of the Court. He rejected the first contention.

With respect to the second contention His Honour held that there was no requirement that prevented an Australian court from entering judgment or making and order in terms of the award if there was evidence that the party against whom judgment was sought had not assets in the jurisdiction. But even if that were the case His Honour found that there were in fact assets within the jurisdiction.

The third ground of attack was that the award was contrary to public policy. It will be recalled that s 8(7)(b) of the IAA provides that an enforcing court may refuse enforcement of a foreign award on the ground that to enforce the award would be contrary to public policy. S 8(7A) provides that public policy applies if the making of the award was induced by fraud or corruption or if a breach of the rules of natural justice occurred in connection with the making of the award.

His Honour expressed the view that the public policy ground could afford a general discretion on an enforcing court to refuse enforcement of an award and might provide a loophole for refusing enforcement. He made the following important observation:

[90] Clearly the pro-enforcement bias of the Convention, as reflected in

the IAA, requires that the public policy ground for refusing enforcement not be allowed to be used as an escape route for a defaulting award debtor. That ground should not be made available too readily, lest it undermine the purpose of encouraging and facilitating the enforcement of foreign arbitral awards embodied in the Convention and in the IAA…….. If the enforcement of awards is to be subjected to the vagaries of the entire domestic public policy of the enforcement jurisdiction, there is the potential to lose all of the benefits of certainty and efficiency that arbitration provides and which international traders seek."

Previous Australian authority (Corvetina Technology Ltd v Clough Engineering Ltd [2004] NSWSC 700) suggested that the courts had a wide discretion under s 8(7)(b) of the IAA and a general discretion to refuse to enforce a foreign award. His Honour' s view was that the amendments effected to the IAA in 2010 have made clear that no such discretion remains.

The complaint made was that the assessment of general damages by the arbitral tribunal was excessive because the arbitrator failed to consider costs and expenses that would have to be incurred to earn the gross income likely to be earned. This type of complaint was quintessentially the type of complaint which ought not be raised as a reason for refusing to recognise a foreign award. The time to have raised the matter was during the arbitration hearing.

As to the meaning of public policy Foster J considered that the expression "public policy" means those elements of the public policy of Australia which are so fundamental to our notions of justice that the courts of this country feel obliged to them even in respect of claims that are based fundamentally on foreign elements and contained in foreign awards. Too rigid an application of the public policy of the domestic jurisdiction runs the risk of undermining the purpose of the IAA. As put in a leading US decision Parsons & Whittemore Overseas Co Inc v Société Générale De L'Industrie Du Papier (RAKTA) [1974] USCA 2 836 the enforcement of foreign arbitral awards should only be refused where enforcement would "violate the forum state's most basic notions of morality and justice".

ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat" and Another (2012) 285 ALR 444; [2011] FCA 1371

Interim measures ordered by Court under Model Law art 17 J – freezing orders – security for undertaking – in support of arbitration outside Australia

Interim measures were ordered by way of a freezing order against a significant asset of the Respondent (MMK) in Australia (shares held in Fortescue Metals) in the following circumstances.

The Applicant (ENRC) had commenced arbitration proceedings in Zurich against MMK seeking substantial damages of AU 850 million. ENRC had a concern that MMK was about to transfer the Australian assets and thereby remove access to a significant asset in Australia.

ENRC applied to the Federal Court for interim measures under art 17 J of the Model Law. Art 17 J is in the following terms:

17J A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

ENRC proferred the usual undertaking as to damages to support the grant ex parte of a freezing order. However, ENRC had no assets or presence within the

jurisdiction. The court held that it had an inherent or implied power to require security for an undertaking as to damages as an incident of its ability to condition the making of its own orders. ENRC provided an irrevocable undertaking to be given to its London bank to pay AU 30 million into its solicitor's trust account and Rares J granted the freezing orders sought until further hearing of the matter.

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248

Foreign arbitral award – enforcement under IAA – enforcement against non - party to arbitration agreement – onus – enforcement order against non-party overturned on appeal

An award had been made by an arbitral tribunal in Mongolia in a dispute between Altain Khuder (Altain) and IMC Mining Inc ("IMMC"). Altain and IMMC were parties to an agreement containing an arbitration clause. The award was also made against IMC Aviation Solutions Pty Ltd (IMCS), which company was not a party to the arbitration agreement.

Proceedings to enforce the award were brought in the Supreme Court of Victoria and the judge at first instance made orders for the enforcement of the award and consequential orders for interest and costs but reserving to the defendants the right to apply to set aside the orders. Such an application was brought by IMCS and dismissed by the judge. The plaintiff relied upon the fact that the arbitral tribunal had already decided the issue that IMCS sought to agitate, that was the reasoning the Mongolian arbitral tribunal had used in making its award. In substance it was that the Mongolian tribunal had decided that the arbitration agreement was binding on IMC Solutions and that IMCS had participated in the arbitration. The judge awarded costs against IMCS on an indemnity basis applying a principle derived from a Hong Kong decision to the effect that the court at first instance will generally award indemnity costs against an unsuccessful party in an application to challenge or resist enforcement of an arbitral award.

The Court of Appeal

On appeal the orders of the trial judge in relation to IMCS were reversed. The Chief Justice considered that as IMCS was not named as a party to the arbitration agreement Altain had the burden of establishing that IMCS was a party to the arbitration agreement and the matter should be remitted for reconsideration.

Hansen JA and Kyrou AJA re considered the enforcement application on appeal. Much of their judgment deals with the question of on whom the onus of proving that ICMS was a party to the arbitration agreement lay. They noted that s 8(2) of the IAA required that the award creditor must satisfy the Court on a prima facie basis that an award had been made by foreign tribunal; that the award was made pursuant to an arbitration agreement; and, that the award creditor and award debtor were parties to the arbitration agreement. But if on the face of the arbitration agreement and the award the person against whom the award was made was not a party to the arbitration agreement the prima facie evidence of the arbitration agreement and the award is insufficient to invoke the Court's jurisdiction to enforce the award.

If the contents of the arbitration agreement and the award do not confirm the foregoing matters the Court ought not proceed ex parte but should require the award creditor to give notice of the proceeding to the award debtor and the proceeding should continue on an inter partes basis. The onus then rests upon the award creditor to satisfy the Court of the requirements of the IAA. On

the other hand if the Court is satisfied on a prima facie basis that the award debtor was a party to the arbitration agreement in pursuance of which the award was made the onus is on the award debtor to prove that it was not a party to the agreement.

The Court considered the evidence before the judge as to the participation in the arbitration by ICMS. Upon a consideration of that evidence the Court could not see how the judge could have been satisfied on a prima facie basis that ICMS was a party to the arbitration agreement. Furthermore the key documents i.e. the agreement which included the arbitration agreement, the claim documents , the interim award, the preliminary hearing document and the award only referred to ICMM as a party to the arbitration agreement and not to ICMS. The Court considered that the evidence adduced at the hearing could not support findings that ICMS was represented at the preliminary hearing or had consented to become a party to the arbitration.

The Court disapproved the indemnity costs principle derived from the Hong Kong case and preferred the line of authorities in the Court that required the existence of special circumstances before an award of costs on an indemnity basis could be made.

Sugar Australia Pty Limited v Mackay Sugar Ltd [2012] QSC 38

Misconduct of arbitrator in failing to allow party opportunity to address point critical to arbitrator's reasoning but not raised by parties

This case arose under s 42 of the 1984 Commercial Arbitration legislation.

In this case the applicant complained that no submissions had been made to the arbitrator which went to his reasoning as to the exclusion of a particular clause of an agreement. Under s 4 of the 1984 legislation "misconduct" was defined so as to include a breach of the rules of natural justice.

McMurdo J held that neither party had addressed the point raised by the arbitrator and that natural justice included a party's entitlement to be given the opportunity to respond. The principle was one that was well established and referred to by the English Court of Appeal in Interbulk Ltd v Aiden Shipping Co Ltd (The "Vimeira") [1984] 2 Lloyd's Rep 66. In that case Goff LJ said at 74-5:

"There is plain authority that for arbitrators so to decide a case, without giving a party any warning that the point is one which they have in mind and so giving the party no opportunity of dealing with it, amounts to technical misconduct and renders the award liable to be set aside or remitted…. In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. "

His Honour held that the point taken by the arbitrator was not one that the parties could have anticipated would be taken. Consequently there had been a failure on the part of the arbitrator to accord natural justice to the parties. The arbitrator had taken a view of the meaning of a contract that neither party had taken and specifically it meant that the applicant's claim was dismissed on such basis.

Section 42 of the 1984 legislation is not replicated in the recent uniform Commercial Arbitration based on the Model Law which has now been adopted in most Australian States and Territories. However, the new legislation does require that the parties must be treated with equality and each party

must be given a reasonable opportunity of presenting the party's case, s 18. Recourse against the award may be made if the award is in conflict with the public policy of the State, s 34 (b)(ii). There is, however, no definition of public policy in the CAA as compared with the IAA.

Just how s 18 will be interpreted in Australian jurisdictions remains to be seen but reference may be made to overseas jurisdictions with similar provisions as adopted under Model Law legislation. In New Zealand the concept of what a reasonable litigant might have done and, for example, not foreseen the point adopted by the arbitral tribunal, as informing a breach of natural justice has been adopted, see Trustees of Rotoaria Forest Trust v A-G [1999] 2 NZLR 452.

Chen & Anor v Kevin McNamara & Son Pty Ltd & Anor [2012] VSCA 63

Arbitration not in respect of matter covered by Domestic Building Contracts Act 1995 – matter could be arbitrated

In Victoria the Domestic Building Contracts Act 1995 prohibits arbitration clauses in domestic building contracts or agreements. Under a contract for the construction of a large domestic water tank there was an arbitration clause and the builder triggered an arbitration. The arbitrator decided at a preliminary conference that he had jurisdiction as the construction of the water storage tank was not a domestic building matter. The owners issued proceedings in the Supreme Court of Victoria.

The Victorian Court of Appeal held that the works involved in the construction of the water tank, although including some matters such as retaining walls, were not within the definition of domestic building works.

State of Victoria v Grawin Pty Ltd [2012] VSC 157

Appeal against award – Commercial Arbitration Act 1984 (Vic) – leave to discontinue – costs

An application to set aside an award by the State was sought to be discontinued as the subject of the arbitration had become moot. Grawin did not oppose discontinuance but sought costs on an indemnity basis. His Honour found that there were no "special circumstances" as would justify an order of costs on an indemnity basis.

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Domestic legislation:

Current status of uniform Model law domestic arbitration legislation:

Commercial Arbitration Act, New South Wales 2010 No 61

Commercial Arbitration Act (National Uniform Legn) Act Northern Territory

Commercial Arbitration Act 2011 South Australia No 32

Commercial Arbitration Act 2011 Tasmania No 13

Commercial Arbitration Act 2011 Victoria No 50

Bills

Commercial Arbitration Bill 2011 Queensland

Commercial Arbitration Bill 2011 Western Australia

Commonwealth:

Federal Court

Practice Note ARB 1 dealing with proceedings under the International Arbitration Act 1974 (Cth) was issued on 1 August 2011. At the same time the Federal Court Rules 2011 came into effect. The Practice Note is to be read in conjunction with Division 28.5 of the Federal Court Rules. New forms have been issued under the Rules. For details refer to www.fedcourt.gov.au.

New South Wales

A new Practice Note No SC Eq 9 regarding the Commercial Arbitration List was issued on 20 February 2012 by the Chief Justice of the Supreme Court of New South Wales. It deals with arbitrations under the International Arbitration Act 1974 (Cth) as well as arbitrations under the
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Commercial Arbitration Act 2010 (NSW). The judge administering the list is Hammerschlag J. The Practice Note may be accessed on the website of the Supreme Court, New South Wales.

Judicial mediation in Victoria

A recent Practice Note No 2 of 2012 dated 30 March 2012 provides for Judicial Mediation Guidelines. It should be referred to in respect of the procedures for such mediations. It deals with the criteria for referral to judicial mediation, preparation for a judicial mediation, confidentiality, attendance at mediations, meeting separately with the parties, adjournment and no participation in any subsequent trial by the judicial mediator.

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Recent articles and notes on arbitration:

Bathurst, Chief Justice New South Wales, "*Address at forum on the Australian Arbitration Option", Mumbai and Delhi, February 2012, available on website of New South Wales Supreme Court*

Croft, Justice Clyde, *"Arbitration Law Reform and the Arbitration List G of the Supreme Court of Victoria"*

de Fina, *"Public policy and Arbitration in Australia" paper delivered to the IAMA National Conference, Sydney 16-18 June 2011,*

de Fina, "Swings and Roundabouts – *Developments in Arbitration in Australia", article Mealeys Arbitration Journal 2012*

Hunt – *"Are Disputes Arising under the Security of Payments Legislation Arbitrable? Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd [2011] NSWSC 195*

I-Ching Tseng – *"Some Thoughts on the Recognition and Enforcement of Foreign Arbitral Awards in China" ; (2011) 30 The Arbitrator and Mediator No 2 at 21*

Limbury – *"Handling the Combined Mediation and Arbitration Process under s 27D of the Commercial Arbitration Act, 2010 (NSW); (2011) 30 The Arbitrator and Mediator No 2 at 11*

Rares, Justice Steven – *" The Federal Court of Australia's international arbitration list" (FCA) [2011] Fed J Schol 17*

Mc Ardle, Hugh – *"Spread the Word" (2012) 86 Law Inst Journal 44*

Megens & Peters – *"International Arbitration Amendment Act 2010 (Cth) – Towards a New Brand of Australian International Arbitration, (2011) 30 The Arbitrator and Mediator No 1 at 43*

Megens & Vincent – *"To Stay or Not to Stay – Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies [2011] ACTSC 59, Case note in (2011) 30 The Arbitrator and Mediator No 2 at 57*

Monichino SC; *"International Arbitration in Australia: The need to centralise judicial power"; (2012) 86 ALJ 118*

Prescott; *Letter to the Editor ALJ in response to the article by Monichino; (2012) 86 ALJ 153*

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Conferences on arbitration

Circulated with this Bulletin are details of forthcoming conferences/seminars to be conducted by the Association for International Arbitration – further details should be obtained directly from the AIA – Association for International Arbitration

June 21, 2012: Current issues in arbitration in CIS countries

Location: Vrije Universiteit Brussel, Karel Van Miert Building, Pleinlann 5, 1050 B, Brussels, Belgium

Content: The conference will cover a wide range of topics about arbitration in CIS countries such as investment disputes involving parties from the CIS, interim measures at the stage of recognition and enforcement of international arbitral

awards on the territory of Ukraine, arbitration in Kazakhstan, CIS related arbitration in the energy sector, arbitrability of corporate and real estate disputes under Russian law, WTO dispute settlement system and the CIS experience.

September 3 – 15 2012: EMTPJ Mediation Training

Location: HUB University, Stormstraat 2 Rule d'Assaut, Brussels

Content: EMTPJ is an intensive 2 weeks mediation training that purports to create mediators specialized in cross border mediation. The EMTPJ project is a milestone for mediation in Europe and its content is recognised by mediation centres (in and beyond Europe), allowing successful participants to apply for accreditation within different states. The ultimate goal is to introduce "European Mediators" and to promote cross-border mediations in civil and commercial matters.

More information about both these events can be obtained from AIA at www.aiaconferences.com

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Fellows (current)

Hon Justice John R Dixon

Alistair Wyvill, S.C.

Allan Hughes

Antonino A de Fina

Charles Sweeney, QC

David H Denton, RFD S.C.

David L Bailey

David M Bennett, QC

Derek Minus

Dr Anton Trichardt

Dr Bruno Zeller

Dr Christopher Kee

Dr Damien Cremean

Dr Henry D Gabriel

Dr Joshua Wilson, S.C.

Hon Neil Brown, QC

Hon Nimal Wikramanyake, S.C.

Hon Terrence Cole, AO RFD QC

John Karkar, QC

Judge Jonathon Williams

Lister Harrison QC

Mark Williams, S.C.

Peter Jopling, QC

Peter Murdoch QC

Phillip Kennon, QC

Richard J Manly, S.C.

Stewart Anderson, S.C.
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