Bulletin No 2 Spring 2012

Recent News and Events

Editorial:

Contributed by David L Bailey, Fellow AICA.

It was intended that a Bulletin would be published by August 2012. We apologise for the delay. The next Bulletin will be the Summer edition publishing in December/January next. Contributions on arbitration and related topics are welcome.

International notes

In this edition we have adopted a new feature of international notes to keep members apprised of developments of interest in overseas jurisdictions.

Arbitration in the Czech Republic

In this edition Dr Damien Cremean, AICA Fellow, provides a note on his recent visit to the Czech Republic. The comments on on-line arbitration are of much interest as this topic is presently the subject of a Working Group of UNCITRAL.

Arbitration and the Constitution

Private arbitration is a process that has been supported by the judicial system. When parties arrange for an arbitrator to deal with a dispute between them they do so as a matter of contract. The power and jurisdiction of the arbitrator rest entirely upon the arbitration agreement. The jurisdiction of the arbitrator is not seen as ousting the jurisdiction of the courts because the parties have agreed that their dispute may be so resolved. The resultant award amounts to an accord and satisfaction of the original cause of action that one party had against the other.

The enforcement of arbitral awards is dependent upon the support of the court system. Broadly there are two ways in which such support is provided. Firstly, the award itself may be sued upon as a cause of action. Secondly, under arbitration legislation the procedure has evolved whereby an award may be enforced by application to a relevant court to be entered as a judgment of the court.

Australia has been a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1974. The Convention is implemented by the *International Arbitration Act* 1974 (Cth). The Convention supports the process of arbitration by providing that a party to a foreign arbitration agreement may apply to plead the agreement to stay a legal proceeding brought by the other party to the agreement. It also provides for the recognition and enforcement of foreign arbitral awards. The IAA provides that an award creditor may apply to enforce a foreign award in a court of a State or Territory or the

Federal Court of Australia as if the award were a judgement or order of that court.

The constitutional validity of section 7 of the IAA dealing with the stay of litigation was considered by the Full Federal Court in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1998) 90 FCR 1. At issue was whether s7 constituted an impermissible interference with the judicial process. The argument was that s 7 constituted an inflexible mandatory rule proscribing the exercise of the court's jurisdiction. It had the result of placing in the matter in the hands of a foreign lay tribunal immune from the supervisory jurisdiction of the court.

Beaumont J stated that although the answer was not easily reached because questions of degree are involved he considered, on balance, that if any interference with judicial power was involved it was kept within permissible limits. In particular the Court could impose conditions for the grant of a stay. Emmett J held that s7 did not purport to direct the manner and outcome of the exercise by the Court of its jurisdiction. It merely laid down a general rule under which a party to an arbitration agreement was entitled to have that arbitration agreement given effect. It was giving effect to a contractual provision agreed upon by the parties.

What of the enforcement of foreign arbitral awards? When an application is made to a court to enforce a foreign arbitral award it might also be argued that the court is giving effect to the parties agreement to resolve their dispute by arbitration. By analogy of reasoning there is no usurpation of the court's power. However, the machinery of the court is being enlisted to enforce the award by the provision in s 8(2) and (3) that the foreign award may be enforced as if it were a judgment or order of the court. Recent cases where enforcement of foreign awards were concerned illustrate that the courts have not acted merely in an administrative capacity but have ensured that the statutory requirements for recognition and enforcement have been met, see for example, in this bulletin the recent case of ***Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty*** Ltd [2012] FCA 696.

The constitutional issue raised by enforcement of an award under the Model Law is currently listed for hearing in the original jurisdiction of the High Court as whether articles 35 and 36 of the UNCITRAL Model Law read with s 7 and Part III of the International Arbitration Act 1974 (Cth) purport to confer the judicial power of the Commonwealth on arbitral tribunals contrary to Ch III of the Constitution. Do such provisions impermissibly interfere with the judicial power of the Commonwealth and undermine the integrity of Ch III courts and are therefore invalid? The case is *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia and Anor* S 178 of 2012 and it is likely to be heard in November 2012. (Reference High Court Bulletin [2012] HCAB 8).

Launch of the Graduate Diploma in Commercial Arbitration by Victoria University, Melbourne

The Graduate Diploma in Commercial Arbitration (***Grad Dip Com Arb***) will be commenced in the Summer semester 2012/2013 by Victoria University Law School at it's Queen Street, Melbourne campus.

Delivered by the Sir Zelman Cowen Centre, this course is designed for lawyers, professionals, executives and those with an existing expertise in a broad range of professional, industrial and commercial activities.

It provides the only Australian university award course postgraduate qualification in commercial arbitration in managing and resolving commercial disputes.

The units are relevant to people negotiating or managing commercial contracts and operations.

They are also useful to people who interact with activities such as professional services in resolving disputes.

The AICA has approved this course as satisfying its requirements for membership and accreditation.

Enrolled students are eligible for membership as an Associate of the Institute, and graduates are eligible for membership as a Fellow (Certified Arbitrator) of the Institute (FAICA). Graduates may also be eligible for membership of other arbitration bodies.

Course Objectives

This course is designed for lawyers, professionals, executives and others with existing expertise in a broad range of professional, industrial and commercial activities who require a postgraduate qualification in managing and resolving commercial disputes.

Units and electives

The course requires the successful completion of either eight coursework units of study or six coursework units of study and the dissertation.

- Commercial Contracts
- Advanced Alternative Dispute Resolution
- Commercial Arbitration Law
- Commercial Arbitration Practice and Procedure
- International Commercial Arbitration
- Judgment, Decision and Award Writing
- Plus: Two units of study approved by the Course Co-ordinator or Dissertation.

Students who successfully complete four approved units of study are eligible to exit the course with the Graduate Certificate in Commercial Arbitration.

All enquiries should be directed to the Sir Zelman Cowen Centre, Victoria Law School on Ring us on +61 3 9919 6100 or download http://www.vu.edu.au/sites/default/files/student-connections/pdfs/A122-Victoria-University-internal-course-application.pdf

BILATERAL INVESTMENT TREATY ARBITRATION

TOBACCO PLAIN PACKAGING CASE

Phillip Morris Asia has initiated an arbitration against the Australian Government under the BIT between Australia and Hong Kong. The arbitration is being conducted under the UNCITRAL Arbitration Rules with a tribunal of three arbitrators namely, Prof Don McCrae, Uni of Ottawa (appointed by Australia), Prof Gabrielle Kaufmann-Kohler (by Phillip Morris), and, Prof Dr Karl-Heinz Böckstiegel as presiding arbitrator, appointed by the Secretary-General of the Permanent Court of Arbitration. Details of the arbitration can be accessed from the Commonwealth Attorney-General's Department website at www.ag.gov.au/InternationalLaw/Pages/Investor-State-Arbitration

INTERNATIONAL NOTES

Contributed by A A de Fina, Fellow AICA.

Public Policy and Enforcement – Recent Developments

Art V 2(b) of the New York Convention provides to the effect that a court before which an application is made for recognition and enforcement of an arbitral award is made may refuse to recognise and enforce on grounds of public policy.

Switzerland

A Brazilian footballer (soccer) in 2004 entered into a five year contract with a club in the Ukraine. After three years the footballer terminated the contract with immediate effect alleging just cause. Within a few days the footballer signed a three year contract with the Spanish Club Real Zaragoza SAD.

Real Zaragoza SAD executed a "hold harmless" provision undertaking to compensate

the footballer for any damages that might be incurred from the early termination of the original contract.

After two years at the Spanish club the player was transferred to the Italian club Lazio for a transfer of €5.1 million.

The Dispute Resolution Chamber of FIFA (the sport's governing body) ordered Matuzalém to pay damages to the Ukrainian club of €6.8 million.

On appear to the Court of Arbitration in Sport (CAS) both the player and the Spanish club were condemned to jointly and severally pay €13.6 million in damages to the Ukrainian club.

The Swiss Supreme Court upheld that award.

Neither the player nor the club paid any significant amount of the damages award.

The FIFA Disciplinary Committee fined both the player and the Spanish club each the sum of SFr 30,000 giving them 90 days to pay failing which

"the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player Matuzalem Francelino da Silva and/or six (6) points be deducted from the first team of the Club Real Zaragoza SAD in the domestic league championship."

The CAS upheld the decision on appeal.

The player challenged this appeal decision in the Supreme Court on public policy grounds.

The Supreme Court upheld the player's challenge and vacated the second arbitral award citing there where a determination

"disregards some fundamental legal principles and thus is wholly inconsistent with the essential, generally recognized values, which should be the foundation of any legal order according to the prevailing view in Switzerland."

Fundamental legal principles were cited as including

- *pacta sunt servanda*
- prohibition of misuse of rights
- good faith
- prohibition of expropriation without compensation
- discrimination
- corruption
- forced labour.

and, relevant to this case,

- core privacy
- personality rights

The Court found that the sanction imposed by FIFA was neither necessary nor appropriate to protect the overriding interests of the Federation such as to justify the infringement of privacy.

The Court noted that the Ukrainian club could enforce the first award against the player and the Spanish club (under the provisionsof the New York Convention) and that an unlimited ban on any football-related activity was disproportionate in FIFA's aim of ensuring strict compliance with its decisions.

In conclusion the Supreme Court voided the second arbitral award on grounds that the award contained serious personality rights infringement contrary to the public policy of the Swiss private International Law Act.

Greece

An award made in the Ukraine in a dispute between a Ukrainian vendor company and a Greek company for the supply of 80 tonnes of walnut kernels provided what was, in effect, punitive damages of some €79,000 against an acknowledged debt of €120,000 as well as legal costs of some €7,640. The punitive damages were based on a contractual provision of 0.5% of monies outstanding for every day the debt remained.

The vendor sought to have the award enforced in Greece under the provisions of the New York Convention.

The buyer resisted enforcement in a first instance Court which ordered enforcement.

The purchaser appealed to the Court of Appeal .

By majority the Court ruled that punitive damages do not violate international public policy however as in this case they were disproportionally large the ordering of the amount of punitive damages should be refused on public policy grounds.

Disproportionality is to be assessed on:

- the nature and significance of the debtor's breach of obligations
- the degree and extent of debtor's culpability
- the vendor's interests that were affected or put at stake
- the parties' moral and financial status
- the specific circumstances (in this case the financial position of Greece arising from the Global Financial Crisis)

CZECH ARBITRATION COURT

Contributed by Dr Damien J Cremean, Fellow AICA.

I recently had the pleasure of going to Prague, in the Czech Republic, and meeting with officials from the Arbitration Court there – including the President – who made me feel very welcome indeed.

The Arbitration Court was founded on 1 June 1949 as the Arbitration Court of the Czechoslovak Chamber of Commerce. Its name has changed twice since its foundation and of course there is now both the Czech Republic and Slovakia – two separate countries. The Soviet Union is no longer.

The published documentation of the Court (which is quoted below) gives a most useful outline of the Court and its processes.

Until 1994, arbitration proceedings in Czechoslovakia were restricted to international commercial disputes resulting in the Court being an international centre of importance. However the Arbitration Act (Act No. 216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards in force as of 1 January 1995), introduced arbitration proceedings as a means of resolving both international and domestic disputes

According to the Act all the property disputes can be subject to arbitration, with certain exceptions (e.g. disputes arisen in relation to execution of judgments). The legal issues in disputes are often very complex. The most frequently occurring disputes arise out of purchase contracts, for example payment of goods, defects in goods, breach of contract, damages, dealership contracts, consignment of goods, contractual matters.

To decide a case before the Arbitration Court, the existence of a valid Arbitration Agreement mentioning the Court is a key prerequisite. Usually it forms one of the provisions of a (frequently, commercial) contract between parties. If the Arbitration Clause is not a part of an initial agreement a subsequent agreement constituting the authority of the Arbitration Court can be negotiated.

The Arbitration Court can hold on-line proceedings, pursuant to its On-line Rules. This was particularly impressive, as it was explained to me. In this regard the On-Line Rules (section 3) provide as follows:

(1) The parties which have agreed in a valid arbitration agreement (arbitration clause, or agreement on arbitrator) to apply these On-line Rules and to submit to on-line arbitration at the Arbitration Court, shall be parties to the proceedings.

(2) These On-line Rules shall apply to the on-line arbitral proceedings from their commencement.

(3) When applying the On-line Rules, the parties and the Arbitration Court shall be

limited to use exclusively Internet means of communication. All submissions and documents in the proceedings shall be transmitted and served by that means. The arbitrator may allow another form, if [such procedure is]technically impossible.

(4) The Arbitration Court may decide that the arbitral proceedings shall not be conducted under the On-line Rules where a party obviously lacks the capacity to participate in the arbitration in accordance with the On-line Rules (in particular due to technological limitations), or where the Arbitration Court otherwise determines at its sole discretion, that arbitration proceedings should not be conducted under the On-line Rules. The Arbitration Court shall issue a ruling (order) in respect thereof. As from the date of the issue of such a ruling (order), arbitration proceedings shall continue pursuant to the Rules. All acts duly undertaken until that date shall remain valid. Unless the arbitrator has been already appointed, the President of the Arbitration Court shall be authorized to issue such a ruling (order).

(5) By agreeing to the On-line Rules, the parties expressly agree to the Portal Terms of the Arbitration Court in effect at the time of commencement of the on-line arbitration. Upon accepting the On-line Rules, the parties thereby authorize the Arbitration Court to administer the arbitration.

The On-Line Rules go on to provide a detailed procedure for on line hearings.

In addition, the Arbitration Court issued its Rules for Consumer Disputes (available in Czech only), based on European Commission Recommendation No. 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and Commission Recommendation No. 2001/301/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes. The Arbitration Court has also issued the Rules for Domestic Healthcare Payment Disputes (available in Czech only).

The Arbitration Court is open to using also other rules than its own Rules and Principles Governing Costs- for example UNCITRAL Arbitration Rules- if the parties agree.

The Court points out the following:

Advantages of arbitration proceedings compared to court proceedings:

- Deciding in one instance only – there is no appeal and the Arbitral Award becomes enforceable once delivered to the parties. This gives rise to great responsibility to ensure the Court |"gets it right" in the first place.
- Fast and informal procedure – it usually takes no more than a few months from submitting the Statement of Claim, to paying the Arbitral Fees, to issuing the Arbitral Award
- Awards enforceable both in Czech Republic and abroad – the most important Convention in the field of enforcing Awards is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 which currently applies in more than 140 countries, including the Czech Republic
- Proceedings not open to public. This ensures privacy and commercial confidentiality.

The Court suggests:

Recommended wording of the Arbitration Clause:

To engage the Court, suggested clauses are or are to the effect:

- All disputes arising from the present contract and/or in connection with it are exclusively to be decided with [by] the Arbitration Court attached to the Czech Chamber of Commerce and

Agricultural Chamber of the Czech Republic by one arbitrator appointed by the President of the Arbitration Court.

- All disputes arising from the present contract and/or in connection with it are exclusively to be decided with [by]the Arbitration Court attached to the Czech Chamber of Commerce and Agricultural Chamber of the Czech Republic by three arbitrators in accordance with the Rules of the Arbitration Court.

After establishing the country code ".cz domain" the Arbitration Court entered into the difficult area of name disputes. In 2005 the Arbitration Court acquired power to decide .eu domain name disputes, and in 2008 it was given status as a worldwide "Internet administrator", to become a dispute resolution provider for domain names including: .aero, .biz, .cat, .com, .coop, .info, .jobs, .mobi, .museum, .name, .net, and travel. From 2009 the Arbitration Court has also decided .co.nl domain name disputes.

It was apparent to me, after speaking with the Court's officials, that there is a lot we can do here in Australia to ensure a modernized and effective arbitration product is offered to users or potential users. Especially in the range of disputes which are regarded as arbitrable but particularly perhaps in the arbitral methods adopted such as on-line arbitration of disputes. In that regard, the Czech Republic has much to offer.

UNCITRAL Developments

- **New York Convention**

Tajikistan has deposited its instrument of accession to the New York Convention. It is the 147th country to become a party to the Convention. The Convention will enter force on 12 November 2012. Information regarding the status of the New York Convention and other instruments under the auspices of UNCITRAL can be obtained from the UNCITRAL site on the Internet.

- **New York Convention website**

A website has been launched by Shearman & Sterling, UNCITRAL and Columbia Law School under the address *NewYorkConvention1958.org*. This site represents an online platform disseminating and making freely accessible case law and other material on the Convention from a range of jurisdictions.

- **UNCITRAL Model Law**

A digest of case law dealing with the UNCITRAL Model Law has been launched. The Digest collects cases from the various jurisdictions that have enacted Model Law legislation according to the chapters and articles of the Model Law. The Digest was launched in Singapore. The Digest is accessible on the UNCITRAL site.

Legislation update:

In Western Australia the *Commercial Arbitration Act*, passed 24 August 2012 Act No 13 of 2011, has received assent and is expected to be proclaimed soon. Western Australia and joins the other States that have enacted the new regime based on the UNCITRAL Model Law.

Case notes:

***Rinehart v Welker* [2012] NSWCA 95**

This case attracted a great deal of publicity. It arose out of a dispute between Ms Gina Rinehart and three of her children in relation to the conduct of the affairs of a trust and the terms of a confidential settlement deed. Two issues are of interest here. First, was the dispute the subject of the proceedings one that fell within the scope of the dispute resolution clause such that it should be referred to arbitration. Secondly, was a dispute about the removal of a trustee one that was "arbitrable"?

The New South Wales Court of Appeal (Bathurst CJ, McColl and Young JJA) considered at some length the construction and scope of the dispute

resolution clause dealing with arbitration. Bathurst CJ reviewed in detail the authorities dealing with the construction of arbitration clauses in contracts. His Honour acknowledged that the authorities favoured a liberal approach to the construction of arbitration clauses but this did not mean that the words of a clause can be given a meaning that they do not have "to satisfy a perceived commercial purpose" [120].

His Honour disavowed the method of construction adopted by Lord Hoffman in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2007] All ER (D) 169 described as a "fresh start" to construe such clauses irrespective of the language in accordance with the presumption that the parties are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal unless the language makes it clear certain questions were intended to be excluded. Such an approach, he said, was contrary to the approach laid down by the High Court in relation to the construction of commercial contracts (at [121]).

Turning to the use of the words "under this deed" His Honour noted that such expression had been consistently given a narrower interpretation than phrases such as "arising out of this deed" or "in connection with the deed". The word "under" had been taken to mean "governed, controlled or bound by or in accordance with", see per Warren J (as she then was) in *BTR Engineering (Australia) Ltd v Dana Corporation* [2000] VSC 246 and per Hargrave J *in TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553 at [34].

Arbitrability:

The Court gave extensive consideration to the concept of arbitrability, or what types of dispute are capable of reference to arbitration. This concept is raised under both the New York Convention (in article V 2(b) and the UNCITRAL Model Law (34 (2)(b)(i)). The Court was concerned with the question whether a proceeding in the Court's equitable or statutory jurisdiction for removal of a trustee was susceptible to "private justice" by reference to arbitration.

At the outset it was observed that "there do not seem to be any firm principles that determine whether a particular dispute is capable of being resolved by arbitration" at [164]. Non arbitrability arises from the notion that some matters so pervasively involve public rights, or interests of third parties, which are uniquely subjects of governmental authority, that agreements to resolve such disputes by private arbitration should not be given effect. But this does not mean that parties cannot submit to arbitration issues involving rights conferred by statute, as for example, claims for misleading and deceptive conduct.

Bathurst CJ noted that in the United States of America it had become accepted that the parties to an arbitration are free to clothe the arbitrator with such powers as they may deem it proper to confer, so long as they do not violate any rule of law. It has been held that the parties may authorise an arbitrator to grant equitable relief including injunctions and specific performance (not also the provisions of the Model Law and the Commercial Arbitration Act 2010 (NSW) with respect to granting interim measures and specific performance). It appears therefore that only in limited circumstances will it be held that a dispute is non-arbitrable.

Accordingly, the Court considered that the trustee and the beneficiaries could agree to disputes concerning the trust be referred to arbitration.

***Cascaceli v Natuzzi S.p.A.* [2012] FCA 691**

This case concerned an application for a stay of a proceeding pursuant to s 7(2) of the International Arbitration Act 1974 (Cth) (IAA).

One of the respondents to the proceeding issued an interlocutory application notwithstanding rule 28.43 of the Federal Court Rules 2011 (FCR) which provided that an application for a stay of a proceeding under s 7 of the IAA must apply by originating application. The first respondent sought dispensation under the FCR from the failure to apply by originating application. The day before the date for hearing of the interlocutory application the applicant sought to have the hearing for dispensation heard separately from the substantive application.

Jagot J referred to the policy of the Practice Note ARB 1 dealing with proceedings under the IAA and observed that one purpose of the Practice Note was to ensure consistency in the way that the court deals with matters involving the IAA. Rule 28.43 also contributed to that process by ensuring that application were made by originating application. His Honour refused the application to adjourn the hearing of the substantive application and dispensed with compliance with the Rule.

Arbitrability:

The application for a stay related to a proceeding brought in respect of a dealership agreement between an Italian incorporated company and an Australian incorporated company. The dealership agreement contained an arbitration clause [27]. It was contended that the disputes referred to arbitration (including claims for damages under the Trade Practices Act 1974) were not "capable of settlement by arbitration" (or not arbitrable) as required by s 7(2)(b) of the IAA. The question arose as to under what law the claims were to be determined as capable of settlement by arbitration.

The applicants contended that the question as to arbitrability had to be answered with reference to Australian law despite the fact that the proper law of the dealership agreement was Italian law. His Honour did not accede to the applicant's contention. But in the result it did not matter.

There was also a submission by the applicants that the scope of the arbitration clause did not deal with the disputes in question. It was contended that disputes with respect to the sale of products were regulated by general terms and conditions of sale which included a choice of forum clause being courts of Hong Kong. This was regarded by the Court as a matter of contractual construction. The Court determined that the nature of the dispute in question was a dispute under the dealership agreement arising out of its termination (the general legal relationship of the parties) and not a dispute falling within the general terms and conditions dealing with sales. All of the claims related one way or another to the dealership agreement, entry into it, extension of it, or its operation.

A further objection to the application was that there were other parties to the proceeding who were not parties to the dealership agreement. This was accepted by the Court. However, the relevant point was that the matter under s 7(2) of the IAA was the dispute between the parties to the dealership agreement. The consequence was that the dispute in question would be referred to arbitration. The balance of the proceeding could be stayed to await the outcome of the arbitration as in *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 per Merkel J at [65].

Merkel J said:

[65] In the event that a proceeding includes matters that are not capable of being

referred to arbitration, but the determination of which is dependent upon the determination of the matters required to be submitted to arbitration, a court may, in the exercise of its discretion, stay the whole proceeding: see Tanning Research at 216 per Brennan and Dawson JJ. A court may also exercise a discretion to impose terms that the arbitration of the arbitrable claims not proceed prior to the determination of the non-arbitrable claims where the arbitrable claims are seen to be subsidiary to or significantly less substantial than, but overlapping with, the non-arbitrable claims: see *Hi-Fert [Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1998) 159 ALR 142] at 167-168 c/f *Dodwell & Co (Aust) Pty Ltd v Moss Security Ltd* Federal Court, Wilcox J (unreported, 11 April 1990) at [5] and [7]. The discretion may also be exercised to stay the proceedings where the non-arbitrable claims are the ancillary claims.

In the result the requirements of s 7(2) of the IAA were held to have been satisfied and a stay of the dispute between the parties to the dealership agreement were referred to arbitration. In the exercise of the Court's discretion the balance of the proceeding was stayed as well to await the outcome of the arbitration.

***Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696**

DKN (award creditor under two foreign awards) applied to the Federal Court for orders recognising and enforcing the awards under s 8 of the IAA. Beach contended that the arbitrator lacked jurisdiction on grounds that (a) it was not named as a contracting party on the face of the charterparty, and, (b) the arbitration clause was invalid by reason of the operation of s 11 of the *Carriage of Goods by Sea Act* 1991 (Cth) (COGSA).

Arbitrator's jurisdiction: onus of proof – award creditor or award debtor?

The first ground raised for consideration the requirements of s 9(1) of the IAA to be satisfied by an applicant for enforcement of a foreign award. Sub-section (1) required production of the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement or a duly authenticated copy thereof. Foster J decided that the production of duly certified copies of those documents constituted prima facie evidence of the fact that each award was made; the subject matter of each award; and, the fact that each award purports to have been made pursuant to cl 32 the arbitration clause in the charterparty.

Beach asserted that it was not named as charterer in the charterparty. Foster J said that such assertion was not sufficient to overcome the evidentiary effect provided by s 9(5) of the IAA in relation to the documents produced. If Beach were to succeed on that ground it would need to make out one of the grounds specified in s 8(5) and 8(7) of the IAA and prove it to the satisfaction of the court.

His Honour reviewed decisions on these requirements including the views of Mance LJ in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 at [10]-[12] where Mance LJ stressed the pro-enforcement bias of the New York Convention given effect by the municipal legislation. Once the award creditor establishes the foregoing matters the award debtor then must establish one or more of the statutory grounds for refusal to enforce the award. However, if the documents do not satisfy the prima facie requirements the court should move to an inter partes hearing.

His Honour also considered the joint judgment of Hansen JA and Kyrou AJA of the Victorian Court of Appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717. There their Honours considered that if the named

parties to the relevant arbitration agreement were X and Y and the award was made in respect of X and Z production of the arbitration agreement would not suffice for the making of an ex parte order for the enforcement of the award even if the award stated it was made pursuant to the arbitration agreement. Foster J noted that the views of Hansen JA and Kyrou AJA were not entirely consistent with those of Lord Mance since Lord Mance reasoned that as long as the documents produced established that the arbitrators had purported to act pursuant to the relevant arbitration agreement that was sufficient to move the relevant enquiry and the onus of proof to the award debtor. Hansen JA and Kyrou AJA seemed to require more than the prima facie proof.

Foster J stated that even if he were wrong on the nature of the enforcement court's power to consider questions relating to the foreign arbitral tribunal's jurisdiction the uncontested evidence before him established that the charterer was misdescribed in the charterparty and that the entity intended to be described was Beach and he found that it was the charterer under the charterparty.

The COGSA ground:

The second ground raised by Beach was that in the circumstances of the case s 11 of the COGSA was engaged. The consequence was that the charterparty had no effect insofar as it purported to preclude or limit the jurisdiction of the Australian courts by reason of the inclusion of cl 32 in the charterparty. His Honour held that the charterparty clearly fell within the meaning of a "sea carriage document" under the COGSA. It was also a non-negotiable document. The critical question was whether s 11(2)(b of the COGSA was engaged so as to preclude or limit the jurisdiction of the Australian courts in respect of a sea carriage document relating to the carriage of goods from one place in Australia to any place outside Australia or in respect of a non-negotiable instrument. His Honour held that cl 32 of the charterparty had no effect by reason of the operation of s 11(1)(a) and s 11(2)(b) of the COGSA. It followed that DKN could not rely upon cl 32 (the arbitration clause) as the source of the arbitrator's jurisdiction and power to make the awards. Section 2C of the IAA had the effect of carving out from the scheme of the IAA such maritime claims as are covered by s 11 of the COGSA.

***Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249**

This case concerned the application of a staged dispute resolution procedure under a construction contract. The issue that arose was as a result of the service of a notice of dispute under a project agreement whether the subject of the notice was to be determined by an independent expert (as defined) under the Accelerated Dispute Resolution Procedures (under cl 52) or whether (subject to the possibility of further agreement on procedure) the dispute must proceed to arbitration.

Croft J approached the question as one of construction of the relevant provisions of the project agreement. His Honour concluded that the parties to that agreement clearly contemplated that disputes with respect to certain claims might be subject of resolution by an independent expert.

His Honour considered the appropriateness of expert determination. His Honour noted recent decisions supporting expert determination if the parties had agreed to such a procedure including In the *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 per Einstein J; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] 244 CLR 305 and, *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135; [2005] 2 QD R 563.

His Honour said:

[60] On the basis of these authorities, I accept the plaintiff's submission that it is appropriate that this Court should similarly take a positive and expansive approach to expert determination as a form of alternative dispute resolution and, in the circumstances of this case, in the construction of the referring clause of the Project Agreement, subclause 26.16.

***Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451**

Sapphire sought leave to appeal on questions of law arising out of an arbitral awards pursuant to s 38 of the *Commercial Arbitration Act* 1984 (NSW).

To obtain leave Sapphire had to establish that (1) there was an error of law that substantially affected the parties rights; (2) either that there had been a manifest error of law on the face of the award or both that there is strong evidence of error and that the question is one which may or is likely to add substantially to the certainty of commercial law.

The dispute arose under futures contracts for the sale of grain by Sapphire to BSG. The issue before the arbitral tribunal was the identification of the terms and conditions of the contracts and the consequences that followed from the operation of the terms and conditions in light of the subsequent insolvency of BSG.

BSG was awarded payment arising out of the "close out" of three grain trading contracts on the business day following notice of the appointment of provisional liquidators of BSG to Sapphire.

Sapphire contended that the result of the amended final award was perverse in that it required a party who received no performance under the contracts in question, and was not in breach, to pay a substantial sum to the party who was in breach of the agreements. This it said was contrary to law.

Leave to appeal was granted in relation to one ground of appeal (number 5) on the basis that there was a manifest error on the face of the award in a finding and also there was strong evidence of error as to the construction of Trade Rules as to the consequences of what appeared to have been non-compliance by an insolvent party. The issue could add substantially to the body of commercial law having regard to the fact that the form of the grain contracts were of a standard form commonly used in the grain industry.

Manifest error:

Ward J referred to the meaning of "manifest error" as considered by the High Court in *Westport Insurance Corporation & Ors v Gordian Runoff Ltd* (2011) 281 ALR 593 adopting the approach of Kirby P and Mahoney JA in *Natoli v Walker* (1994) 217 ALR 201 at 212-215 and 233 and Sheller JA in *Promenade Investments Pty Ltd v State of New South Wales* (1992) 26 NSWLR 203 at 225-226.

Sheller JA said: The error must be more than arguable: it must be evident or obvious; there must be powerful reasons leaving little or no doubt on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law.

The High Court in *Westport Insurance* per French CJ, Gummow, Crennan and Bell JJ (Kiefel agreeing) said at [41]

An error of law either exists or does not exist; there is no twilight zone between the two possibilities. But what is required here is that the existence of error be manifest on the face of the award, including the reasons given by the arbitrator, in the sense of apparent to that understanding by the reader of the award.

Error on the face of the award:

The court had to consider whether reference to "face of the award" restricted reference to material contained in the award and reasons for the award? The traditional interpretation of the phrase was that the court was restricted to the award and the reasons. Difficulty can arise where there is doubt as to the intention of the arbitral tribunal as to whether material such as a contract referred to in the award forms part of the award. Reference was made to the statement by Lord Dunedin in *Champsey Bhara & Co v Jivraj Balloo Spinning & Weaving Co Ltd* [1923] AC 480 at 487 that:

An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous.

Reference was also made to a series of propositions about incorporation of documents into an award per Smith J in *Gianfriddo v Garra Constructions Pty Ltd* [1971] VR 289 at 290-291.

The tribunal in its reasons referred to the 'incorporation provisions' of two of the futures contracts as part of its reasoning. In those circumstances the Court considered that those parts of the contracts at least must be treated as part of the reasons of the award and reference could be made to them when determining whether there had been manifest error on the face of the award.

The implied undertaking:

During the hearing the question was raised as to the admissibility or use that might be made of certain documents in the proceeding (namely a defence, claimant's rebuttal and two statutory declarations) in other unrelated arbitration proceedings involving BSG and a different vendor of wheat.

The Court considered whether the implied undertaking applied to the documents. It was noted that the implied undertaking had been extended to proceedings other than civil litigation and that the High Court had held that it could extend to material produced in private arbitrations, *Esso Australia Resources Ltd v Plowman* [1995] HCA 19; 183 CLR 10.

Her Honour considered that it would be necessary to demonstrate that the material in question had been produced under some form of compulsion for the implied undertaking to apply [187]. There was no evidence, for example, to show whether the statutory declaration in question was served pursuant to any form of direction or order.

Ultimately Her Honour considered that reliance upon the confidentiality of the material in question would have had the result of arguably putting before the tribunal a misleading picture as to the events that had occurred (and on an issue relevant to the claim by BSG) and the interests of justice would have required the admission of the material. The same reasoning applied to material produced in the present proceeding.

***Yesodei Hatorah College Inc v The Trustees of the Elwood Talmud Torah Congregation* [2011] VSC 622**

The Congregation was an award creditor in an arbitration conducted under the *Commercial Arbitration Act* 1984 (Vic) and sought to enforce its award as a judgment of the Court. The College sought orders for leave to appeal and if granted to vary or set aside the award.

The reference to arbitration included the following provision:

2. Basic principles relating to arbitration

The parties agree that the arbitrator may determine any

question that arises for determination in the course of the arbitration by reference to considerations of general justice and fairness.

Croft J considered whether the requirements of s 38(5) of the Act had been met. His Honour had no difficulty deciding that the question of law raised by the appeal "could substantially affect the rights of one or more parties" [18]. His Honour considered on the basis of the authorities that the requirement of strong evidence of error is satisfied where a "strong prima facie case" of error is established. The same circumstances may attract both of the sub-paragraphs of s 38 (5)(b) of the Act.

As to the requirement that an appeal on the basis of an error of law also required a finding that the relevant question may add or be likely to add substantially to the certainty of commercial law.

The College submitted that the arbitrator had made errors of law in failing to apply s 22(2) of the Act to the matters in dispute including whether the parties had entered into a binding agreement for lease.

The arbitrator in his award expressly stated that in determining whether there was a concluded agreement for lease he applied the law and the common law principles relating to the formation of enforceable contracts. In this he said s 22(2) had not operation in determining this question.

The argument by the College was that the arbitrator erred in not applying s 22(2). Properly construed it was submitted that s 22(2) did not require the arbitrator to determine the issue strictly in accordance with common law principles of contract law but required him to have regard to wider considerations. Those considerations enabled him to temper the effect of evidentiary, procedural and technical rules.

Croft J undertook a detailed examination of authorities dealing with s 22(2) and similar concepts in other jurisdictions. On the basis of that analysis he concluded that:

… it is clear, in my opinion, that the provisions of s22(2) of the Act do not require an arbitrator to determine matters the subject of the arbitration in accordance with strict legal principles. The arbitrator may have regard to such principles, but is permitted and required to depart from them and to have regard to wider considerations in determining issues in dispute "by reference to considerations of general justice and fairness" according to the statutory mandate provided by s 22(2), a mandate which provides him with a very broad canvass encompassing the possibility of deciding matters ex aequo et bono or amiable compositeur.

However, the court may not "second guess" the application of considerations of general justice and fairness.

His Honour considered that for the reasons put by the College that the arbitrator had erred in determining that s 22(2) had no application in determining whether an agreement for lease had been reached by the parties. In these circumstances there was an error of law on the face of the award which went to the whole and fundamental basis of the arbitrator's mandate. The award in its entirety could not stand.

Articles and books of interest

Chang, *Inherent Power of the Arbitral Tribunal to Investigate its Own Jurisdiction,* (2012) 29 Jnl of Intl Arbn 171;

Fry, Greenberg and Mazza, *The Secretariat's Guide to ICC Arbitration,* ICC Publication No 729;

Goller, *The 2012 ICC Rules of Arbitration – An Accelerated Procedure and Substantial Changes,* (2012)29 Jnl of Intl Arbn 323;

Hwang, SC, *A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive*

Self-Governing Code, (2012) 29 Jnl of Intl Arbn 137;

Kostytska, *Declaratory Relief in International Arbitration,* (2012) 29 Jnl of Intl Arbn 1;

Kovacs, *Putting Australia on the Arbitration Map*, (2012) 86 Law Inst J 36.

Forthcoming address:

His Honour Chief Justice Keane of the Federal Court of Australia is to present a paper on "The Prospects for International Arbitration in Australia" as the AMTAC Annual Address on 25 September 2012. The Address will be videocast by the Federal Court of Australia to its District Registries in Adelaide, Melbourne, Perth and Sydney.

New Members

AICA proudly welcomes to its ranks as Fellows:

Lister Harrison, QC of the Queensland Bar

Ms Karyn Reardon, of the firm HWL Ebsworth

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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

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Judge Jonathon Williams

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