



2011 ICC ASIA PACIFIC CONFERENCE

AUSTRALIA: ADVANCES IN ARBITRATION DOWN-UNDER

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Enforcement of Foreign Arbitral Awards

A true test of the new regime



THE ULTIMATE TEST

“the scope of judicial review of arbitration awards necessarily determines the utility of the arbitration process.”

- O.Antoine, *“Judicial Review of Arbitral Awards”* (1999) *Dispute Resolution Journal* 23, 24.

THE PAST

“Can Australian Courts get their act together on international commercial arbitration?”

“Meeting Disputants’ Needs in the Current Climate: What has gone wrong with arbitration and how can we repair it?”

“At times, there has been a perception that the courts have hindered effective commercial arbitration, both by intervening too much in the arbitral process and by interpreting the arbitral law in an interventionist rather than a supportive way.” - The Hon. Justice Clyde Croft, Supreme Court of Victoria

THE PAST - CASES

- Resort Condominiums Inc v Bolwell (1995)
- Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-ing GmbH (2001)
- Oil Basins Ltd v BHP Billiton (2007)
- Clough Engineering Ltd v Oil and Natural Gas Corp Ltd (2008)
- Paharpur Cooling Towers Ltd v Paramount (WA) Ltd (2008)

WHERE WE ARE HEADING

“Federal Court confirms Australia’s pro-arbitration policy”

“Uganda carrier pursues Australian minnow in court”

“The New Australian International Arbitration Regime in Practice
– Less Court Intervention, Greater Enforceability, Lower Costs”

2010 – THREE BIG THINGS

International Arbitration Amendment Act 2010 (IAA) amends the *International Arbitration Act 1974*

Model Uniform Commercial Arbitration Bill 2010

Based on Model Law. Aims to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay and expense

Australian International Dispute Centre (AIDC)

- Opened in August 2010
- Australia's first international dispute resolution centre
- Sole authority to appoint arbitrators under Art 11(3) and (4)

OVERRIDING OBJECTIVE OF THE IAA AND CAA ACTS- A NEW FEDERALISM & IMPLICATIONS FOR ENFORCEMENT

IAA Act

A court must:

“have regard to:

- a) The objects of the Act; and
- b) The fact that:
 - i. arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
 - ii. awards are intended to provide certainty and finality.”

COMMERCIAL ARBITRATION ACT

Section 1C – Paramount object of Act

“The paramount object of the CAA “to facilitate the fair and final resolution of commercial disputes without unnecessary delay or expense”

AUSTRALIAN CASE LAW

Growing support amongst judiciary for arbitration in recent cases:

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011) FCA 131

Gordian Runoff Limited v Westport Insurance Corporation [2010] NSWCA 57

Altain Khuder LLC v IMC Mining and Anor (2011) VSC 12

UGANDA TELECOM LTD V HI-TECH TELECOM 2011

- Arbitration agreement-”any lawsuit, disagreement, or complaint with regards to a disagreement, must be submitted to compulsory arbitration”.
- No provision for seat, number of arbitrators, rules or the procedures for appointment.
- Foster J in NSW Supreme Court found that Ugandan law was the law of the arbitration and that it was not void for uncertainty under that law.
- Foster J rejected an argument that “public policy” included an error of law by the tribunal.
- The Court upheld the international standard of public policy

GORDIAN- IMPLICATIONS

- A domestic arbitration law decision with international implications
- If high bar is set then foreign awards may be refused enforcement
- Act 31(2) Model Law requires a statement of reasons for making the award NOT a statement of reasons for not making a different award – *Allsop CJ [2010 NSWCA 57, Gordian Runoff]*
- Case demonstrates the logical differences between the standard required of a judicial as opposed to an arbitral award
- But the High Court is yet to speak

THE ULTIMATE TEST – *ALTAIN KHUDER V IMC*



- Arbitration clause nominates Hong Kong and Mongolian law
- Queensland law is the governing law of the contract

- Altain Khuder LLC contracts with IMC Mining Inc
- A related company IMC Solutions not named in the contract



IS THIS THE VERY MODEL OF A MODERN ARBITRATION?

- May 2009 - arbitration commenced
- 24 July 2009 – preliminary hearing
- 15 September 2009 – award rendered
- 20 August 2010 – ex-parte application before Croft J. In Supreme Court of Victoria
- 21 September 2010 – summons filed by IMC Solutions
- 30 September 2010, 4,5 and 12 November 2010 - hearing
- 28 January 2011- judgment for Altain
- 3 February 2011- indemnity costs awarded to Altain
- 29-30 March 2011- appeal heard

ALTAIR-SOME KEY FINDINGS

- A party seeking enforcement need only produce to the Court the award and the arbitration agreement
- The onus on the party seeking to set aside the award is high and that party bears a “very heavy burden” with “clear, cogent and strict proof”
- A choice of law clause that applies to the contract does not automatically apply to the arbitration agreement
- A party seeking to resist enforcement of an award is not entitled to re-litigate issues the subject of the arbitration
- Deference is to be given to tribunal findings on jurisdiction
- Where a party fails to challenge the award in the seat then it is not for the enforcing court to revisit issues of jurisdiction

MAR
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Thank you

