Interpretation of commercial arbitration Acts

Cameron Australasia Pty Ltd v AED Oil Ltd [2015] VSC 163

The use of commercial arbitration in Australia for the resolution of disputes has increased significantly in recent years.

Following the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration[1] (Model Law) for both domestic and international arbitration, Australian courts have demonstrated a clear shift towards deference to arbitration.

The recent decision of the Supreme Court of Victoria in *Cameron Australasia Pty Ltd v AED Oil Ltd*[2] (*Cameron*) confirms that the Australian commercial arbitration Acts are to be interpreted in accordance with international authority dealing with the Model Law.

Regulation of arbitration in Australia

Commercial arbitration – domestic and international – is commonly used to resolve energy, resources and construction disputes in Australia. Commercial arbitration is considered to be domestic if both parties to the arbitration have their places of business in Australia, and it is regulated by the relevant commercial arbitration Act in each state.[3]

An arbitration will be considered international when:

- the parties to an agreement have their places of business in different countries;
- the place of arbitration is situated outside the country in which the parties have their places of business; or
- the parties have expressly agreed that the subject matter of their agreement relates to more than one country.[4]

When international arbitration is seated in Australia, it is regulated by the *International Arbitration Act 1974* (Cth) (IAA). The state commercial arbitration Acts and the IAA have been reformed in recent years to adopt the provisions of the Model Law.

Australian courts' approach to arbitration

Prior to the adoption of the Model Law throughout Australia, there was inconsistency in the approach to arbitration taken by state courts, with some courts demonstrating a readiness to overturn arbitral awards in a range of circumstances. This judicial interference had a negative impact on Australia's reputation as a destination for arbitration.

However, since the adoption of the Model Law, the approach taken by the courts has shifted in favour of deference to arbitration. The recent decision of the Supreme Court of Victoria in *Cameron*[5] reaffirms the view that a consistent approach to the interpretation of the Model Law should be taken in the practice of both domestic arbitration and international arbitration in Australia, and importantly, that this approach should align with international best practice.[6]

Facts

Cameron Australasia Pty Ltd (the applicant) made an application under section 34(2) of the *Commercial Arbitration Act 2011* (Vic.) (the Act) to set aside an arbitral award made in an arbitration between the applicant and AED Oil Limited (the respondent). The applicant argued that the arbitrator made two procedural rulings which prevented it from fully presenting its case and which were not in accordance with the agreed arbitral procedure, namely:

- The arbitrator rejected an application by the applicant six months after the arbitration hearing finished but prior to the arbitral award being made to allow the applicant to reopen the hearing so that it could amend its defence to positively dispute the existence of a duty of care
- The arbitrator did not allow the applicant to rely upon an expert report in circumstances where that expert was not going to be called as a witness in the arbitration.

Decision

In determining the application, Croft J held that, given the express inclusion of provisions in the Act[7] that recognised the international origin of the Model Law, it was "entirely appropriate" to consider the decisions of courts in other jurisdictions in the interpretation of the Act.[8]

His Honour considered the general principles which have been applied by courts to set aside arbitral awards. In particular, his Honour referred to the decisions of:

- Hong Kong Court of Appeal in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No.1)*[9] where it was held that in determining an application to set aside an award, "the Court will not address itself to the substantive merits of the dispute, or to the correctness or otherwise of the award, whether concerning errors of fact or law";
- Singapore Court of Appeal in *AKN v ALC*[10] where Menon CJ commented, "just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. The courts do not and must not interfere with the merits of an arbitral award, and in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases"; and
- Victorian Court of Appeal in *Sauber Motorsport AG v Giedo van der Garde BV*[11] where it was held that, "courts should not entertain a disguised attack on the factual findings or legal conclusions of an arbitrator 'dressed up as a complaint about natural justice'. Errors of fact or law are not legitimate bases for curial intervention."

His Honour applied these principles in considering each of the procedural rulings.

The court rejected the appeal in relation to the first ruling on the basis that the applicant was not prevented from presenting its case. His Honour commented that the applicant's submissions were effectively of the nature of a merits appeal or an appeal on questions of law, and on the basis of *AKN v ALC*, it was not appropriate for the court to consider the merits of the arbitration.[12]

A recent court decision has confirmed that Australia's commercial arbitration Acts are to be interpreted in accordance with international authority dealing with the UNCITRAL Model Law. Report by **Annie Leeks** and **Raghav Gupta**.

In relation to the second ruling, his Honour acknowledged that the Act gives the arbitrator broad powers to conduct the arbitration in such a manner as it considers appropriate, however these powers are subject to any procedure agreed to by the parties.[13] It was held that minor breaches of the agreed procedure will not result in an award being set aside.[14]

The court also held that the applicant's challenge on this ground was, in substance, an appeal against a ruling of the arbitrator "dressed up" as a breach of the agreed arbitration procedure.[15]

Conclusion

This decision confirms the willingness of the Australian courts to consider international arbitration jurisprudence when interpreting the provisions of the commercial arbitration Acts in domestic commercial arbitration.

This is consistent with the overarching principles underpinning the Model Law, including that arbitration is an efficient, impartial, enforceable and timely method to resolve commercial disputes and that arbitral awards are intended to provide certainty and finality.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee. Annie Leeks is a senior associate at Herbert Smith Freehills and a member of the committee. Raghav Gupta is a solicitor at Herbert Smith Freehills.

Notes

1 UNCITRAL Secretariat, *Status 1985 UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006.*
2 [2015] VSC 163.
3 *Commercial Arbitration Act 2013* (Qld) s1.
4 Article 1 of the Model Law.
5 [2015] VSC 163.
6 See also *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142 at [24]-[27].
7 *Commercial Arbitration Act 2013* (Qld) ss1AC, 2A.
8 [2015] VSC 163 at [19].
9 [2012] 4 HKLRD 1 at 7 [7].
10 [2015] SGCA 18.
11 [2015] VSCA 37.
12 [2015] VSC 163 at [48].
13 *Commercial Arbitration Act 2013* (Qld) ss19(1), (2).
14 [2015] VSC 163 at [53].
15 [2015] VSC 163 at [59].