Enforcing a foreign arbitral award: not as straightforward as it seems?

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248 | *Altain Khuder LLC v IMC Mining Inc & IMC Mining Solutions Pty Ltd* [2011] VSC 1

The (slightly) unusual facts

In 2007, an Australian company, IMC Mining Solutions Pty Ltd (IMCS), entered into discussions with a Mongolian company, Altain Khuder LLC (Altain) about the provision of mine operation services in Mongolia.

Further to those discussions, on 13 February 2008, IMC Mining Incorporated (IMCM), a British Virgin Islands company, entered into a contract – the 'Operations and Management Agreement' (OMA) – with Altain in respect of the services. The OMA was executed by IMCM. IMCS was not a party to the OMA. However, IMCS was involved in the project as a sub-contractor,[1] had a common director with IMCM – Mr Stewart Lewis – and the companies shared an office.

The OMA contained an arbitration clause in the following terms:

> The resolution of any and all disputes under this Agreement shall first be addressed through good faith negotiations between Altain Khuder LLC and IMC Mining Inc. All disputes between Altain Khuder LLC and IMC Mining Inc arising under this Agreement shall be referred to and considered by arbitration in Mongolia according to Mongolian or Hong Kong law.

On 12 May 2009, following termination of the OMA by Altain,[2] Altain commenced arbitration proceedings in Mongolia.[3] In its written claim Altain identified the respondent in the arbitration as IMCM and claimed damages. The claim did not identify IMCS.

On 16 June 2009, IMCM executed a power of attorney in favour of a Mr Bevan Jones in which he was appointed as IMCM's agent and, among other things, was given responsibility for 'submitting explanations to the client and others'. In turn, Mr Jones executed two powers of attorney in favour of Mongolian lawyers on relevantly similar terms. IMCM provided two written responses to Altain's claims both of which were signed by Mr Jones. Neither of those responses referred to IMCS.

On 7 July 2009 the arbitral tribunal heard an application by Altain for removal of the arbitrator nominated by IMCM. On 10 July 2009 the tribunal issued an interim award removing the arbitrator and directing that a new arbitrator be appointed. Neither the application nor the award referred to IMCS.

Following a preliminary hearing in the arbitration, on 24 July 2009 the tribunal issued a document setting out various matters that were discussed and agreed at the preliminary hearing.[4] Again, the document did not refer to IMCS. On the same date, IMCM filed a counter claim in the arbitration. The counter claim did not refer to IMCS.

On 7 September 2009, the Australian lawyers for IMCS wrote to the tribunal indicating that it did not stand behind IMCM and that it considered that IMCM may not have sufficient assets to meet any award made against it. It stated that IMCS did not agree to provide support for IMCM. Following receipt of this letter, the tribunal held a hearing at which it was informed that the Mongolian lawyers representing IMCM no longer represented the company.

A week later, at the hearing of the arbitration on 15 September 2009, neither IMCM nor IMCS was represented. On the same day the tribunal rendered an award finding in favour of Altain for $6.2million plus costs. The award described the defendant as 'IMC Mining Inc of Australia'. IMCS was not referred to in the award apart from in the last two sections. First, the tribunal made factual findings relating to IMCS's failing to direct IMCM concerning project costs and expenditure reports and in the course of that made a finding that Mr Lewis, a 'management member' of IMCS signed the OMA on behalf of the IMCM and this showed that IMCS 'has been involved in the project implementation from the very beginning' (although the exact significance of this finding is unclear). Second, the tribunal made an award not only against IMCM but also ordered that 'IMC Mining Solutions Pty Ltd of Australia, on behalf of IMC Mining Inc. Company of Australia, pay the sum charged against IMC Mining Inc. Company of Australia pursuant to this Arbitral Award'.

Subsequently, the award was confirmed by the Khan-Uul District Court in Mongolia. The order referred to IMCM as the defendant and otherwise referred to the award made by the arbitrators. Neither IMCM nor IMCS took steps to have the award reviewed in the Mongolian courts.

Altain sought enforcement of the award in Victoria against both IMCM and IMCS.

The judgment of Croft J: onus of proof is on the award debtor

The enforcement application came before Croft J, the arbitration list judge of the Supreme Court in Victoria. Altain sought and was given orders *ex parte* enforcing the award – pursuant to the terms of *International Arbitration Act 1974* (Cth) (IAA) and the New York Convention on the Enforcement of Foreign Arbitral Awards 1958 (Convention) – subject to the defendants' right to challenge such orders.[5]

IMCS challenged the orders of Croft J. It argued that the award should not be enforced on a number of different grounds, all of which relied upon the same underlying facts – namely, that IMCS was not a party to the arbitration agreement and did not participate in the arbitration. Five of the grounds were a number of the familiar ones identified in Article V(1)(a)–(e) and Article V(2)(a)–(b) of the Convention for resisting the enforcement of an award (sections 8(5)(a)–(e) and 8(7) of the IAA).[6] The one ground that IMCS did not pursue under Article V(1) was that contained in Article V(1)(b) (s 8(5)(b)): namely, that the arbitration agreement was invalid. The reason for this was that in addition to its Article V grounds IMCS argued that the award was not binding pursuant to s 8(1) and 8(2) of the IAA and that Altain, as the award creditor, had the onus of proving, pursuant to those sections, that IMCS was a party to the arbitration agreement.

Altain disputed that the award should not be enforced for any reason under Article V (or s 8(5)) but that question involved resolution of the straightforward issue of whether IMCS had shown that one of the grounds was made out. The interesting point of difference between the parties was the proper construction of s 8(1) of the IAA and which of them bore the onus of proving whether IMCS was a party to the arbitration agreement (and to what standard).

Altain argued that, for the purposes of enforcing an award, the IAA (and, by extension, the convention) only requires an award creditor to provide an authenticated copy of the award and the arbitration agreement pursuant to s 9(1).[7] Once it did so, the award creditor was entitled to have the award enforced subject only to any argument that the award debtor could raise that the award should not be enforced under one or more of the grounds set out in s 8(5) and s 8(7).[8] It followed that the onus was on the award debtor in this case to show that it was not a party to the arbitration agreement and that this was an available ground for resisting enforcement under the Act. In addition, Altain argued that IMCS held a 'heavy' burden in proving one of the grounds under s 8(5) or s 8(7) bearing in mind the 'pro-enforcement bias' and 'pro-arbitration environment' of the IAA and the NYC.[9] Altain relied upon a number of decisions of foreign courts that had taken the position argued by Altain.[10]

IMCS argued that the sections relied upon by Altain merely provided mechanistic requirements in relation to proof of the award and the arbitration agreement. Rather, the critical provisions were s 8(1) and 8(2) of the IAA. Section 8(1) provides that a foreign award is 'binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made'. According to IMCS, s 8(1) created a jurisdictional threshold for any award creditor requiring the creditor to show that the award debtor was a party to the arbitration agreement and, by extension, that it was properly subject to the terms of the award being enforced. It followed that it was the award creditor, Altain, that had the onus of showing that, IMCS *was* a party to the arbitration agreement. Altain challenged this, arguing that, consistently with international jurisprudence and the terms of the convention, s 8(1) created no threshold and should be construed subject to the application of s 8(3A) and s 9(1).[11]

His Honour accepted the submissions of Altain. In particular, he relevantly found:

1. Section 8(1) does not create any jurisdictional threshold requirement that the award creditor is required to meet. An award creditor must meet the requirements of s 9(1) and once it does so it is entitled to enforcement subject to the defences open to the award debtor. This was consistent with international authority and with international commentary.[12]
2. Section 8(5)(b) was the proper ground under which a party can challenge any award where that party claims that it was not a party to the arbitration agreement pursuant to which the award was made.
3. The onus of proving any of the grounds for resisting enforcement was placed on the award debtor. Further, the burden was 'heavy' and any evidence

should be 'clear, cogent and strict' in meeting that burden.[13]

4. The ruling of a court in the seat of the arbitration (i.e. the supervisory jurisdiction) may create an issue estoppel or other form of estoppel for the purposes of enforcement.[14]

5. In addition, on the evidence available to the court,[15] IMCS had failed to prove:

   a. That the arbitration agreement was not valid and binding on IMCS under Mongolian law. His Honour relied on the evidence of an Altain employee who attended the hearings.

   b. The evidence supported the conclusion that IMCS and IMCM were operating as a common enterprise or 'relationship of legal responsibility' and given this it was more probable than not that IMCS was aware of the arbitration proceedings.

   c. It was open to the arbitral tribunal to find that the arbitration agreement applied and extended to IMCS. IMCS was therefore bound by the arbitration agreement. IMCS failed to prove that it was not a party to the arbitration agreement or the proceedings and on that basis failed to establish defences under s 8(5)(d), 8(5)(e) and s 8(7)(b).

The Court of Appeal reverses the findings and the onus

IMCS appealed all of the findings of Croft J. The Court of Appeal, comprising their honours Warren CJ, Hansen JA and Kyrou AJA, allowed the appeal and set aside the entirety of the orders made against IMCS. In doing so, the majority in the court (Hansen JA and Kyrou AJA) also made factual findings in relation to whether IMCS's defences under s 8(5) were made out. They found that they were. Warren CJ delivered a concurring judgment based on different reasoning from the majority. Her Honour did not feel the need to re-examine the factual issues and only addressed the matters of principle raised.

The majority rejected the analysis of Croft J in relation to onus and threshold. In doing so, they relied upon a distinction between what they described as those matters that had to be proved by the award creditor on a 'prima facie' basis and those matters that had to be proved by the award debtor. They concluded that:

1. The relevant sections of the IAA (s 8(1) and s 8(2)) place an 'evidential onus' on the award creditor of satisfying the court, on a *prima facie* basis, that it has the jurisdiction to make an order enforcing a foreign award. Section 9(1) operates to assist the creditor in discharging the evidential onus.

2. In satisfying the evidential onus, the award creditor must show three things: first, that a foreign award has been made granting relief to the award creditor against the award debtor; second, the award was made pursuant to an arbitration agreement; and, third, the award creditor and the award debtor are parties to the arbitration agreement.

3. In most but not all cases, compliance with s 9(1) will discharge the evidential onus. In this case, the provision of the arbitration agreement and the award were insufficient to discharge the evidential onus (the arbitration agreement on its face did not show that IMCS was a party to the agreement).

4. In circumstances where a judge was not satisfied that the evidential onus under s 8(1) had been met by the provision of the material required under s 9(1) then – notwithstanding the procedure provided for in the Rules of the Victorian Supreme Court – it was inappropriate for the matter to proceed *ex parte* and the issue should be dealt with *inter partes*.

However, the majority concluded, contrary to IMCS's submissions, that the award debtor had the *legal onus* of proving that it was not a party to the arbitration agreement. The resolution of this issue turned upon the proper construction, and interaction between, sections 8(1), 8(3A), 8(5) and 8(7) of the IAA.

Section 8(3A) states that the enforcing court 'may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7)'. The section follows the prefatory language of Article V of the Convention and was modified in the recent amendments to the IAA to remove any doubt that the enforcing court does *not* have a residual discretion to refuse enforcement of an arbitral award (thereby nullifying one highly unsatisfactory aspect of the decision in *Resort Condominiums International Inc. v Bolwell* [1995] 1 Qd R 406).

The majority concluded that IMCS had the legal onus, and that s 8(3A) was not subject to the jurisdictional requirements of s 8(1) as IMCS had contended, because:

1. The terms of s 8(3A) were clear and unequivocal and if the parliament had intended that it was to be subject to s 8(1) it could have said so.
2. If s 8(3A) were subject to s 8(1) then it would create two anomalies: first, it would, notwithstanding the terms of s 8(3A), place the legal onus on the award creditor in certain circumstances – specifically, proving that the award debtor was a party to the arbitration agreement – but place the legal onus for all other grounds of resisting enforcement on the award debtor; second, it would raise the issue of whether someone was a party to an arbitration agreement to a threshold jurisdictional issue but not raise other, seemingly equally important, matters to the same level, such as the validity of the agreement or whether a party had received proper notice of the agreement.
3. The natural meaning of the phrase 'the arbitration agreement is not valid' under s 8(5)(b) was sufficiently wide to include the issue of whether someone was properly a party to the arbitration agreement.
4. Bearing in mind the conclusion noted in (3) above, it would create both duplication and inconsistency to read the IAA as requiring that legal onus of proving that someone was a party to the arbitration agreement be placed on the award creditor under s 8(1) while at the same time placing the legal onus on the award debtor under s 8(5)(b).[16]

In contrast, Warren CJ did not accept any distinction between an evidential onus and a legal onus. Her Honour's conclusion was the s 8(1) placed the legal onus on this issue on the award creditor. In particular, her Honour found as follows:

1. Altain's construction rendered s 8(1) as superfluous. The proper construction of s 8(1) was that it required the award creditor to show that there was a 'purported or apparent' arbitration agreement, that the award creditor and award debtor were parties to the agreement and the award was made against the award debtor in pursuance of the arbitration agreement.
2. Section 8(1) cannot be read as subject to s 8(3A). Section 8(3A) circumscribed the grounds upon which an award debtor can resist enforcement but only once an award creditor has discharged some preliminary burden.
3. An award debtor must be able to resist enforcement of an award on the basis that it was not a party to the applicable arbitration agreement. Section 8(5)(b) referred to whether the agreement is valid not whether a person is a party to that agreement. As such, it cannot be construed so as to cover arguments about whether IMCS was a party to the agreement. That must be left to the operation of s 8(1).
4. Section 8(1) operates to establish the elements of a cause of action for which the award creditor bears the legal onus of proof (on the balance of probabilities). The issue of the 'partyhood' of an award debtor is treated differently from the other bases on which an award debtor may resist enforcement under Article V and for which the award debtor bears the onus of proof.
5. This regime reflects a 'sensible policy decision' by the legislature to place the onus on the award debtor to 'impugn the agreement or the award' where the documents presented appear regular on their face but to require the award creditor to explain any apparent irregularity on the face of the documents. There is a difference between a question relating to *prima facie* irregularity (which is for the award creditor to explain) and a question relating to irregularity that is not readily apparent on the face of the documents (which is for the award debtor to explain).

Comment

The purpose of the New York Convention is to facilitate the enforcement of foreign arbitral awards by providing for a simple process of enforcement subject to certain minimal grounds on which enforcement can be resisted. In this case, four judges of the Victorian Supreme Court came up with three different answers about how a central part of the enforcement process works. The result is unsatisfactory conceptually but also in the uncertainty that it creates about the approach that the courts may take – in Victoria at least – in relation to enforcement.

One of the more troubling aspects of this case (and there are many) is the approach that all of the judges (with the exception, to a limited extent, of Croft J) took to the New York Convention.[17] While paying lip service to its role the judges paid little concrete attention to it in determining the case. That is curious given that one of the objects of the IAA is to give effect to the Convention and the Act requires an enforcing court to have regard to this: s 2D(d); s 39(1)(a)(i). The approach taken by the Court of Appeal is in marked contrast to, for example, the approach taken – in principle at least – by Foster J in *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 (at [21]).

A brief perusal of the language of the convention suggests that placing any onus on an award creditor in these circumstances was unlikely to have been intended. Article III states that each contracting state 'shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles'. Article IV then states that '*to obtain the recognition and enforcement mentioned* in the preceding article' (i.e., Article III) [emphasis added] the award creditor must provide a duly authenticated award and 'the original agreement referred to in Article II' where Article II refers to an arbitration agreement 'under which the parties undertake to submit to arbitration…'

Article IV is not entirely straightforward. It contemplates the provision of both the award and the arbitration agreement 'under which the parties undertake to submit to arbitration'. Given that the purpose of Article IV is enforcement of an award, the arbitration agreement can have no relevance to that process other than its relationship to the award. That explains the draftsman's use of the language in s 8(1) of the IAA linking the binding nature of the award on the parties 'to the arbitration agreement *in pursuance of which it was made*' [emphasis added] – a form of statutory expansion on what is implicit in Article IV. What Article IV does not explicitly deal with is a situation where a party is not a signatory of the arbitration agreement but, for whatever reason, becomes subject to a finding or an order in a subsequent award. That is the situation that confronted the court in this case. It is a situation that, while reasonably rare, is hardly wholly exceptional in practice.

If the correct construction of Article IV is the statutory formulation in s 8(1) then that suggests that the absence of a party from an arbitration agreement must necessarily affect the view that a court takes in relation to an award, even where that award makes an explicit finding and an order against a particular party. This is one explanation for the conclusion of the court. The court was confronted with just such an award: one that named a party but where there was no link with the arbitration agreement.

The problem of how to deal with this type of award was solved by the drafters of the English Arbitration Act 1996 by stating that an award will be recognised as binding 'on the persons as between whom it was made'. That approach is consistent with the purpose of the convention and the underlying issues of policy. The court in this case had no such statutory support. Croft J resolved the problem by taking a well-established proposition (in other countries at least) – that Article V(1)(b) related to situations where a party argued that it was not a party to the arbitration agreement – and concluded that this could not be read consistently with the contention that an award creditor had to prove the matters referred to in s 8(1).

That is correct (as is the approach in *Dardana*, that his Honour followed) but it doesn't really help: the problem is that the award seeks to bind a party for reasons *independent* of the arbitration agreement. Ordinarily, where an award makes an order against a party then that order will relate to a party to the arbitration agreement; where it makes an order against a party simply on the basis that the party is a third party without any consideration of how that party can be bound by the award then it would be apparent that such an award contravened Article IV(1)(b) (by reason of the linkage with Article II). However, in most cases where a third party (a third party to the arbitration agreement, that is) has been made subject to an award it will be on some legal basis that has nothing to do with the arbitration agreement. In this context, there is no award binding 'on the parties to the arbitration agreement in pursuance of which it was made'. It is binding for some other, usually non-contractual, reason.

The Court of Appeal sought to deal with this dilemma with a narrow interpretation of what Article IV was designed to do on the basis of the words in s 8(1). It

is clear that the Court of Appeal was concerned by the absence of IMCS from the arbitration agreement and this fact then determined all that followed given the terms of s 8(1). But, for the reasons noted above, the answer to that question does not answer the question – at least not entirely – of whether the award should bind the party in question. It also leaves open whether s 8(1) is a proper reflection of the purpose of Article IV and, properly construed, the overall purpose of the Convention. Article III – which to a limited extent, s 8(1) is designed to follow – leaves matters of procedure to the domestic law of the enforcement jurisdiction. The real difficulty in this case is that Article IV does not clearly address the issue and s 8(1) appears to narrow what might otherwise be a broader interpretation of Article IV.

Given this, the Court of Appeal's conclusion was understandable; unfortunately, it was, it is submitted, also incorrect as a matter of principle. While Article IV does not explicitly address the problem at hand it is clear that the prefatory words indicate that what is intended is the simple presentation of a valid agreement to arbitrate and a valid award as the basis for enforcement. The documents speak for themselves and there is no need to go behind them. The purpose of the convention is to make enforcement akin to an administrative procedure where the entire onus is placed on the award debtor. That should apply equally in a case like this given the presence of an award naming a party against whom enforcement is sought. It is anomalous to read Article IV in any contrary fashion. Such an outcome does not disadvantage the award debtor; it merely places the onus, as it is for everything else, of proving that the award should not be enforced.[18]

In this case, that involved not an examination of the arbitration agreement but rather the conduct of the parties and of the arbitration. One further troubling feature of this case is that the type of award that seeks to bind a party that is not a party to the original arbitration agreement must do so on the basis of very clear evidence and legal principle. Insofar as one can tell from the material referred to in the judgments the award in question was poorly reasoned, poorly expressed and singularly failed to identify the basis upon which it purported to make findings against a party that was neither a party to the original arbitration agreement nor, seemingly, a party whose conduct or corporate structure could be said to have provided a basis for a finding against it. The reliance placed by Croft J on evidence that both opinion and hearsay evidence further compounded the difficulties of the original award.

The result is a mess. One view of this case might be that, broadly, the first instance judge came to the wrong answer but for the right reasons and that the Court of Appeal came to the right answer but for the wrong reasons. The Court of Appeal judgment may prove to be the arbitral equivalent of *Junior Books v Veitchi*: a peculiar case on its facts that may have been correct in its particular circumstances but has unacceptable policy implications for the development and operation of the law. The best way to solve the problem in this case is not by judicial correction but by further statutory modification. The case is also another fine example of what happens when an arbitral award, so often characterised as floating in the transnational firmament, falls to earth and becomes subject to the terrestrial preoccupations of an enforcement court.

By Jonathan Kay Hoyle

Endnotes

1. IMCS entered into a contract with IMCM described as a 'Consulting Services Agreement' in which IMCS undertook to perform some of IMCM's obligations under the OMA.
2. On 5 March 2009, Altain sent a letter to IMCM purporting to terminate the OMA with immediate effect (following on from a letter directing IMCM to cease work allegedly due to IMCM's 'default actions').
3. The arbitration was commenced with the Mongolian National Arbitration Centre.
4. Mr Bevan Jones was present at the hearing and there was a factual dispute in relation to whether he was present on behalf of both IMCM and IMCS or just IMCM.
5. The defendant was given 42 days from the date on which the orders were served to file proceedings contesting the enforcement. This approach is mandated by the Rules 9.04 and 9.05 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Vic)* and *Practice Note No2 of 2010 (Arbitration Business).* A similar approach exists in other jurisdictions.
6. Roughly speaking, the award was not enforceable because: (a) IMCS had not received proper notice of the arbitration; (b) the award dealt with a difference not contemplated by or falling within the terms of the submission to arbitration.
7. Along with some miscellaneous requirements concerning translation (if needed) and certification that the country where the award was made is a signatory to the New York Convention: s 9(3).
8. These provisions mirror the provisions of Article V of the New York Convention.
9. Altain argued that, in any event, IMCS was estopped denying the validity of the award given its participation in the proceedings and its failure to challenge the award in the courts of the seat of the arbitration (i.e., Mongolia).

10. Notably, *Dardana v Yukos Oil Company* (2002) 2 Lloyd's Rep 326; *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* (2006) SGHC 78; *Sarhank Group v Oracle Corporation* 404 F 3d 657.
11. Section 8 (3A) provides that 'The court may only refuse to enforce and award in the circumstances mentioned in subsections (5) and (7)'. Section 9(1) provides that 'in any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce' an authenticated copy of the award and the 'original arbitration agreement under which the award purports to have been made or a duly certified copy'.
12. The judge relied upon commentary from Gary Born in International Commercial Arbitration at [2795].
13. His Honour further held that an award debtor is not entitled to re-litigate matters already dealt with by the arbitral tribunal by re-opening issues heard by the arbitrators.
14. IMCS was estopped because the judge found that the evidence disclosed that Mr Bevan Jones appeared at the preliminary hearing on behalf of both companies (and thereby, IMCS in any event submitted to the jurisdiction of the tribunal), the tribunal determined that it had jurisdiction to make the award against IMCS and IMCS raised no objection by seeking to have the award set aside.
15. The nature, extent and admissibility of the evidence placed before Croft J became a significant issue. Relevantly, Altain relied upon two affidavits sworn by Mr Batdorj, who was a representative of Altain, and an expert opinion of Professor Tumenjargal. A large number of objections were raised by IMCS to the Batdorj affidavits but these objections were ultimately not dealt with by Croft J. Despite this, Croft J proceeded to rely upon the evidence although it is unclear whether counsel for IMCS did not ultimately press its objections. IMCS relied upon affidavits from Mr Lewis and Mr Jones.
16. This reasoning, in relation to legal onus at least, is consistent with the analysis of the English Court of Appeal in *Dardana* and with the implicit recognition of this point by the UK Supreme Court in *Dallah Real Estate and Tourism Holding Company v The Government of Pakistan* [2010] UKSC 46.
17. Croft J did refer to Gary Born's analysis of the Article IV provisions of the Convention but did not undertake any examination of the Convention himself as an exercise of statutory construction and legal analysis.
18. One further difficulty of the case is that is hard to see how a distinction between the 'evidential onus' and the 'legal onus' in relation to s 8(1) will operate. It is doubtful that Article IV is properly read merely as an 'aid' to proving a requirement elsewhere in the Convention. In addition, it is difficult to see what the difference between an 'evidential onus' (as formulated by the majority) and a 'legal onus' (as formulated by Warren CJ) is likely to be.

Appeals against arbitral awards

Westport Insurance Corporation v Gordian Runoff Limited [2011] HCA 37

In *Westport* the High Court dealt with important questions in relation to the availability of appeals against arbitral awards pursuant to the (now repealed) section 38 of the *Commercial Arbitration Act 1984* (NSW) (CAA) and the requirement to give reasons for an award.

Background

Gordian Runoff Limited (Gordian) underwrote directors' and officers' liability policies for FAI Insurance Limited on the basis that it covered claims made and notified within seven years (FAI Policies). It obtained reinsurance for its policy portfolio from Westport Insurance Corporation (Westport) on the basis that the reinsurance covered policies under which claims were made and notified within three years.

Westport refused indemnity under the reinsurance treaties for claims made on the FAI Policies (all but one of which was made and notified within three years), contending that the reinsurance did not respond to the seven year policies, even where claims were made and notified within three years. The reinsurance treaty was governed by New South Wales law and required any arbitration to be conducted in accordance with the CAA. The dispute was referred to arbitration before a panel of three arbitrators on the basis of detailed pleadings, extensive evidence on which witnesses were cross-examined, and a full transcript.

Gordian claimed that Westport was not entitled to refuse indemnity for claims made and notified within three years by reason of s 18B of the *Insurance Act 1902* (NSW) (IA), which provides that, where the circumstances in which an insurer is bound to indemnify are defined so as to exclude or limit liability on the happening of particular events or the happening of particular circumstances, the insured shall not be disentitled to indemnity by reason only of the limitation or exclusion if the loss was not caused or contributed to by the happening of the events or circumstances giving rise to the limitation or exclusion, unless in all the circumstances it is not reasonable for the insurer to be bound to indemnify.