The Australian High Court in Sydney

AUSTRALIA: Apex court speaks out on adequacy of arbitral reasons

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Albert Monichino SC, a senior counsel and arbitrator at List A Barristers in Melbourne, considers a recent decision of the High Court of Australia that tackled conflicting case law on the standard of reasons required of an arbitrator in a domestic arbitration context (with potential impact on the Model Law scheme).

Albert Monichino SC

On 5 October 2011, the High Court of Australia handed down a decision in *Westport Insurance Corporation v Gordian Runoff* which was expected to resolve the apparent conflict between the lower

court decision in the case - the 2010 New South Wales Court of Appeal judgment in*Gordian Runoff v Westport Insurance Corporation* - and the 2007 Victorian Court of Appeal judgment in *Oil Basins v BHP Billiton*. This conflict concerned the standard of reasons required of an arbitrator under section 29 of the uniform Commercial Arbitration Act, which until recently regulated domestic arbitration in Australia.

Section 29(1) provides that, "[u]nless otherwise agreed in writing by the parties to the arbitration agreement", the arbitrator shall "include in the award, a statement of the reasons for making the award". It is in substantially identical terms to article 31(2) of the UNCITRAL Model Law, which provides:

The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms…

From 1990 until June 2010, the Commercial Arbitration Act had uniform status throughout Australia. However, since June 2010, the Act has been repealed and replaced with revised legislation based on the Model Law (already passed in Tasmania, South Australia, the Northern Territory and Victoria, and currently before the parliaments of Western Australia and Queensland). It is hoped and expected that Australia will soon have a new uniform domestic arbitration law – the revised Commercial Arbitration Act – consistent with Australia's International Arbitration Act 1974 (which regulates international arbitration seated in Australia) and, like it, based on the Model Law.

Oil Basins

The Victorian Court of Appeal in the 2007 judgment of *Oil Basins v BHP Billiton* decided that the standard of reasons required of an arbitral award depended on the circumstances of the case and that in particular the nature of the dispute in question; and that the arbitrators' reasons in the case before it called for reasons of a judicial standard.

The underlying arbitration in Oil Basins involved the proper interpretation of a royalty agreement made in 1960 in respect of oil produced and recovered from an oil field in Bass Strait, off the Victorian Coast.

The trial judge (whose decision was affirmed on appeal) described the arbitration under consideration as:

a large commercial arbitration involving many millions of dollars…attended with many of the formalities of legal proceedings, including the exchange of points of claim and defence and substantial witness statements [with a] hearing [occupying] 15 sitting days [and in] addition to oral argument, substantial written submissions [...] The arbitrators were retired judges of superior courts. Both sides were represented by large commercial firms of solicitors and very experienced Queen's Counsel.

The Victorian Court of Appeal observed that the adoption by parties to an arbitration of procedures used in complex commercial litigation, and the selection of retired judicial officers as their arbitrators, may reflect the nature of the dispute and therefore the nature of the reasons required.

It found that, in the case before it, the arbitrators' reasons fell short of the required standard because they were inconsistent and ambiguous; failed to identify the evidence upon which findings of fact were based; failed to contain an intelligible explanation why some (expert) evidence was preferred over other competing (expert) evidence; and failed to deal with substantial contentions and evidence.

Gordian

The underlying arbitration in *Gordian Runoff v Westport Insurance Corporation* involved a claim made by an insurer against a reinsurer. The arbitral panel consisted of a retired judge and two expert insurance lawyers. Like *Oil Basins*, the arbitration in *Gordian* was conducted in the style of common law commercial litigation, with detailed pleadings, witness statements and cross examination.

The panel concluded that it was reasonable for the reinsurers to be bound to indemnify the insurer under section 18B of the New South Wales Insurance Act 1901. One of the issues on appeal to the New South Wales Court of Appeal was whether the arbitrators had erred in law in failing to adequately express the reasons for this conclusion.

Whether or not section 18B applied to reinsurance involved a question of statutory interpretation. This was a novel question of law. Whether or not the conditions contained in section 18B were satisfied, including whether in all the circumstances it was reasonable for the reinsurer to be bound to indemnify (notwithstanding that on its proper interpretation the reinsurance treaty did not respond), involved questions of fact.

The Court of Appeal treated section 29(1)(c) as being inspired by article 31 of the Model Law. This involved some stretch of the imagination as the Commercial Arbitration Act 1984 (NSW) predated the Model Law, which was introduced in 1985 (although article 31 of the Model Law is substantially identical to, and no doubt inspired by, article 32(3) of the UNCITRAL Arbitration Rules, introduced in 1976).

It thus considered section 29(1)(c) in a wider context, including the context of international arbitration practice.

It held that insofar as the Victorian Court of Appeal suggested that an arbitrator's duty to give reasons for an award was equivalent to a judge's duty to give reasons, that decision was plainly wrong. It is exceptional for an intermediate court of appeal in Australia not to follow the decision of another like court in relation to the interpretation of uniform legislation. Nevertheless, the New South Wales Court of Appeal observed that the issue is of such importance as to require exposure.

Instead, the court adopted the relatively low standard laid down by Donaldson LJ in the 1981 case of *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)*:

all that is necessary is that the arbitrators should set out what, in their view of the evidence, did or did not happen and should explain succinctly why, in light of what happened, they have reached their decision and what that decision is. That is all that is meant by a 'reasoned award'.

Gordian reinforces that the required reasons are the reasons for making the award - not a statement of reasons for not making the award. Therefore, an arbitrator is not required to consider alternative arguments which are unnecessary for the purposes of reaching the arbitrator's conclusion.

In its process of reasoning, the court stressed the fundamental difference between arbitration and litigation:

Though courts and arbitration panels both resolve disputes they represent fundamentally different mechanisms of doing so. The court is an arm of the state; its judgment is an act of state authority, subject generally in a common law context to the right of appeal available to parties. ***The arbitration award is a result of a private consensual mechanism*** *intended to be shorn of the costs, complexities and technicalities often cited (rightly or wrongly, it matters not) as the indicia and disadvantages of curial decision making* [emphasis added].

The court noted that the fact that parties may mimic court procedures in complex arbitrations should be seen as a failure of procedure in the arbitration rather than as reflecting any essential character of the arbitral process which would assist in the conclusion that arbitrators should be held to the standard of reasons required of judges.

The court disagreed with the Victorian Court of Appeal in terms of an arbitrator's obligations to set out the evidence upon which the arbitrator has made his findings of fact and to give reasons why some evidence is preferred over other evidence. The New South Wales court said:

The Model Law article 31(2) and the CAA section 29(1)(c) do not say that the arbitrator must deal with every substantial argument put forward by the contending parties. Nor do they state that the arbitrator should state the evidence from which he or she draws his or her findings of fact and give reasons for preferring some evidence over other evidence.

The better view is that an arbitrator need not state the evidence from which he draws his findings of fact, and need not (in general) give reasons for preferring some evidence over other evidence (although the position might be different in relation to expert evidence which involves something in the nature of an intellectual exchange).

But, with respect, I think it going too far to suggest that an arbitrator need not deal with every substantial argument put forward by the contending parties (especially if that argument may affect the conclusion reached by the arbitrator).

Westport

Let me now turn to the Australian High Court decision in *Westport Insurance Corporation v Gordian Runoff*. Reflecting the importance of the decision for arbitration in Australia (and the risk of collateral damage to the Model Law scheme), five parties appeared as amici curiae in the High Court: the Federal Attorney-General, ACICA, the Australian International Dispute Centre, the Institute of Arbitrators and Mediators Australia and the Chartered Institute of Arbitrators, Australia. In their written submissions, the amici curiae all argued that an arbitrator's duty to give reasons for an award was not equivalent to a judge's duty to give reasons for judgment.

When the matter came before the High Court in early February 2011, the appellant conceded that the appropriate test to apply was the test in Bremer (which, of course, was the test applied by the New South Wales Court of Appeal). Therefore, it was not necessary for the High Court to resolve the differences in approach between the Victorian and New South Wales Courts of Appeal.

The High Court held that:

- the reference in *Oil Basins* to reasons of a 'judicial standard' was an 'unfortunate gloss';
- the statement by the English Court of Appeal in *Bremer* was apt to describe the content of the obligation in section 29(1)(c) of the Commercial Arbitration Act;
- what is required by way of reasons in any given case will depend on the circumstances of the case;
- whether article 31(2) of the Model Law is to be construed in a similar manner to section 29(1)(c) of the Commercial Arbitration Act, alternatively requires something less in terms of the standard of reasons, was left for determination on another day.

On the facts of the case, the High Court held that the arbitral tribunal had not met the test in*Bremer* because in the relevant respect the tribunal had merely stated its conclusion and not the reasons for arriving at that conclusion (including any findings of fact upon which the conclusion was based).

The two intermediate appellate decisions lay down inconsistent approaches to important practical questions as to whether arbitrators are required (and if so, to what extent) to:

- identify the evidence upon which their findings of fact are based;
- explain why some evidence is preferred to other evidence;
- deal with every substantial argument put by the parties.

Unfortunately, the High Court's decision does not provide any practical guidance in this regard.

What is clear, however, from all three decisions, is that an arbitral award in which the ultimate basis of the decision cannot be discerned because of ambiguity, inconsistency or incompleteness of reasoning or findings will not satisfy the required standard of reasons. This is consonant with the guiding principle that the award should make clear to the winning and (especially) the losing party exactly why they have won or lost.

As can be seen above, the two intermediate appellate decisions took different approaches to the relevance of the selection of senior lawyers as arbitrators and the adoption of court-like procedures in the arbitration, as indicating the relevant standard of arbitral reasons. The High Court, without referring to the judicial tension below, seemed to prefer the Victorian approach. In other words, the complexity of the arbitration will be relevant in considering the content of the statutory requirement to provide reasons for the award.

Following the grant of special leave to appeal and prior to the hearing of the High Court appeal, the Chief Justice of the Federal Court of Australia, Keane CJ, speaking extra-curially, described the strict approach adopted by the Victorian Court of Appeal of equating the exercise of decision-making power conferred on an arbitrator by private contract to the exercise of the adjudicative power of the state exercised by the courts as problematic, both as a matter of principle and practice

As a matter of theory, Keane CJ noted that:

- the giving of a comprehensive statement of reasons explaining why the power of the state is to be exercised against the losing party (who does not necessarily consent to that exercise of power) is an essential requirement of the exercise of judicial power. On the other hand, the losing party has agreed to the exercise of power by the arbitrator;
- judicial decisions, unlike arbitral decisions, affect not only the immediate parties to the dispute but other parties in like cases, given the precedential value of court judgments.

The above considerations readily explain why the reasons of a superior court judge need to be more elaborate than the reasons of an arbitrator.

At a practical level, Keane CJ noted that adoption of the *Oil Basins* strict approach will tend to slow the arbitral process and diminish the value of the parties' choice to resolve their dispute by arbitration.

In *Westport*, the majority of the High Court addressed the juridical nature of arbitration, and its relationship with the court system. They said at paragraphs 19 and 20 of the judgment:

*[The] statutory provisions [under the Commercial Arbitration Act] indicate that **the making of an award** in arbitration proceedings **is more than the performance of private contractual arrangements between the parties** which yields an outcome which rests purely in contract. They also suggest the importance which the provision of reasons by arbitrators has for the operation of the statutory regime. That statutory*

regime involves the exercise of public authority, whether by force of the statute itself or by enlistment of the jurisdiction of the Supreme Court. It also, as explained later in these reasons, displays a legislative concern that ***the jurisdiction of the courts*** *to develop commercial law* ***not be restricted by the complete insulation of private commercial arbitration****.*

No doubt it is true to say that the provision of an award under the [Commercial Arbitration Act] lacks distinctive hallmarks of the exercise of judicial power, namely the maintenance of public confidence in the manner of its exercise and in the cogency or rationality of its outcomes, and the operation of the appellate structure and of the case law system. However, ***it is going too far to conclude that performance of the arbitral function is purely a private matter of contract, in which the parties have given up their rights to engage judicial power, and is wholly divorced from the exercise of public authority*** [emphasis added].

The above observations do not apply with equal force to the Model Law regime, which has now been adopted in the revised Commercial Arbitration Act. The new Act redefines the relationship between arbitration and the courts. Similarly, in the 2006 House of Lords judgment in *Lesotho Highlands Development Authority v Impregilo*, Lord Steyn noted that the English Arbitration Act 1996 had brought about radical changes:

The [UK] Act has… given English arbitration law an entirely new face, a new policy, and new foundations… ***the Act embodies a new balancing of the relationships between parties****, advocates,* ***arbitrators and courts*** *which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature*[emphasis added].

While arbitration under the Model Law may not be 'purely a private matter of contract', it is to a much larger degree insulated from intervention by the court. Indeed, section 5 of the revised Commercial Arbitration Act (which implements article 5 of the Model Law) provides that:

In matters governed by this Act, no court must intervene except where so provided by this Act.

The Solicitor-General, who appeared for the Federal Attorney-General as amicus curiae in*Westport*, sought to distinguish section 29 of the Commercial Arbitration Act from article 31 of the Model Law. He contended that article 31 required no more than a statement of reasons to demonstrate whether the arbitrators had addressed the dispute referred to determination. The High Court refused to be drawn and said that the proper construction of the Model Law may be left for determination on another occasion.

Notwithstanding the similarity in language between section 29 of the Commercial Arbitration Act and article 31 of the Model Law, it does not follow that the Model Law should be interpreted in the same manner. Section 2A of the revised Commercial Arbitration Act mandates that in interpreting the Act, regard should be had to the need to promote, so far as is practicable, uniformity between the application of the Act to domestic commercial arbitrations and the application of the Model Law (as given effect by the International Arbitration Act) to international commercial arbitrations. In turn, the revised Commercial Arbitration Act and the International Arbitration Act contain interpretation provisions which require regard to the international origins of the Model Law.

The Model Law is of course a compromise between different nation states, including civil law and common law states. It would indeed be peculiar for article 31 of the Model Law to be interpreted as requiring a standard of reasons equivalent to the reasons of a judge in a common law jurisdiction. The New South Wales Court of Appeal noted that this had never been suggested. One would hope and expect that article 31 of the Model Law, as given effect by the revised Commercial Arbitration Act and the International Arbitration Act, will be interpreted by Australian courts in a manner consonant with international arbitration jurisprudence.

Judicial distrust of arbitration?

The dissenting judgment of Heydon J in *Westport* illustrates continuing judicial distrust of (or even antipathy towards) arbitration in certain judicial quarters. This is notwithstanding that there is a shift under way in Australian courts towards greater judicial support and less judicial intervention in the arbitral process. In Victoria, we are fortunate to have a Chief Justice who is extremely supportive of arbitration. We also have a specialist Arbitration List (List G) presided over by a judge with international and domestic arbitration expertise (Croft J). Sydney is also a very arbitration-friendly jurisdiction.

Heydon J said at paragraph 111 (on "the merits of arbitration"):

The arbitration proceedings began on 15 October 2004 *when Gordian served points of claim.* ***This appeal comes to a close seven years later****. The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy. It is not intended to make any criticisms in these respects of the arbitrators, of Einstein J, or of the Court of Appeal, for on the material in the appeal books none are fairly open. But it must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point* ***it is unlikely that the arbitrators had any greater relevant expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal****. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three. Comment on these melancholy facts would be superfluous* [emphasis added].

The above remarks are unfortunate and, with respect, were wholly unnecessary. As *GAR* has observed, they do little to promote Australia's reputation as an 'arbitration-friendly' jurisdiction.

The observation about the relative expertise of the arbitral tribunal is highly debatable. The tribunal comprised an ex-Court of Appeal judge and two expert reinsurance lawyers. It is difficult to imagine a more expert panel to determine the dispute at hand.

As for the delay point, the fact that the parties became embroiled in a dispute which took seven years to resolve is highly unfortunate. The revised Commercial Arbitration Act and the International arbitration Act provide for much narrower judicial recourse against an award. Therefore, the risk of parties to an arbitral award (whether domestic or international) being sucked into the judicial appellate vortex (as alluded to by Heydon J in his remarks above) is substantially diminished.

Finally, let me turn to the privacy point. Both the revised Commercial Arbitration Act and the International Arbitration Act (unlike the Commercial Arbitration Act) contain confidentiality provisions. However, they are silent on the question of whether arbitration-related proceedings in court are to be held open court or in private. In contrast, the arbitration Acts in Hong Kong and Singapore contemplate that arbitration-related proceedings in court shall be heard otherwise than in open court, thus protecting the confidentiality of the underlying arbitration.

The English Arbitration Act 1996 is similarly silent on the question of whether arbitration-related proceedings in court are to be held in open court or in private. Yet, the English court rules contemplate that in general arbitration-related matters will not be heard in open court. One would hope that Australian courts adopt the English approach. It would be a shame if the advantages brought about by the imposition of a statutory duty of confidentiality were to be eroded by the hearing of arbitration-related applications in open court (as alluded to by Heydon J in his remarks referred to above).

Conclusion

The High Court decision in Westport concerns the standard of reasons of domestic arbitral awards under a now largely repealed legislative regime. It has no direct relevance to the content of reasons required by Article 31 of the Model Law which is the relevant standard under the revised Commercial Arbitration Act,

(which in future will regulate domestic arbitration in Australia) and also under Australia's International Arbitration Act (in respect of international arbitrations seated in Australia).

The High Court rejected the notion that domestic arbitrators are required to provide reasons of a judicial standard. The content of an arbitrator's reasons will depend upon the nature of the case. Generally, the greater the complexity and amount involved, the more elaborate should be the reasons. In other words, a principle of proportionality has emerged. In this regard, it should be noted that a 'proportionality' test was adopted by Croft J in the 2010 Victorian Supreme Court judgement of *Thoroughvision v Sky Channel*.

But there remains some uncertainty as to the practical content of the standard of reasons – in particular, whether domestic arbitrators under the old uniform Act are required to identify the evidence supporting their findings of fact and, further, whether they are required to deal with all serious arguments put before them. Common sense dictates that the prudent arbitrator should provide more rather than less and 'not be tempted to stay close to [the] cliff edge' to quote Justice Byrne in the 2003 Victorian Supreme Court judgment of *Peter Schwarz (Overseas) Pty v Moreton*.

For more discussion of the implications of the reform of the domestic arbitration legislative regime in Australia, see Albert Monichino's paper, 'Arbitration law in Victoria comes of age', presented to the Victorian Department of Justice's 'The New Commercial Arbitration Act 2011' seminar on 30 November 2011 in Melbourne

Cases referenced:

Westport Insurance Corporation v Gordian Runoff Ltd [2011] HCA 37 ('Westport')

Gordian Runoff Ltd v Westport Insurance Corporation [2010] NSWCA 57 ('Gordian')

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Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2) [1981] 2 Lloyds Rep 130:

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