INSIGHT

Is Australia unfriendly to arbitration?

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Australia is a great friend to international arbitration. In recent years, it has renewed its commitment to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] by strengthening and modernising the provisions of the International Arbitration Act 1974 (Cth). The state of Victoria boasts a world-class, highly specialised Commercial Bar with deep expertise in arbitration law. Its highest court, the Supreme Court of Victoria, has taken significant steps towards the timely and consistent recognition of domestic and foreign arbitral awards, including the creation of a full-time Arbitration List, the appointment of a specialist arbitration judge and the creation of tailored procedures for timely enforcement.[2] In the global world of arbitration, Victoria and Australia have taken every step towards being open for business.

And yet, recent months have seen some troubling headlines. In particular, an August 2011 decision of the Supreme Court of Victoria relating to a Mongolian arbitral award appears to have caused some concern in the international arbitration community.[3] In that case, *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*[4] ('*Altain Khuder*'), the Victorian Court of Appeal refused to enforce an arbitral award made in Mongolia.

The decision has caused some commentators and experts to speculate that Australia may be unfriendly to arbitration, raising fears of uncertainty and the lack of a 'pro-arbitration' approach. Some comments have evoked the spectre of long-gone days of judicial tinkering behind the face of arbitral awards.

Such speculation and concern is unfounded.

The decision in *Altain Khuder* turned on its facts: facts unlikely to arise in all but the most unusual of cases. In ordinary circumstances, the enforcement of foreign arbitral awards in Australia remains the subject of a streamlined, certain and efficient system. As one judge in *Altain Khuder* remarked, the general principle remains that, 'in all but the most unusual cases, application to enforce foreign arbitral awards should involve only a summary procedure'.[5]

Among other objectives this analysis seeks to highlight that, in the very special circumstances of the *Altain Khuder* case, justice required the approach and the findings reflected in the Victorian Court of Appeal's judgment. These aspects are discussed below.

The facts

In 2008, a mining operations agreement (the 'agreement') was executed between Altain Khuder LLC ('Altain') and IMC Mining Inc (IMC). The agreement contained a dispute resolution clause, referring any disputes to arbitration in Mongolia. A sister company of IMC, then named IMC Mining Solutions (IMCS), was not named in the dispute resolution clause or referred to in any other part of the agreement.

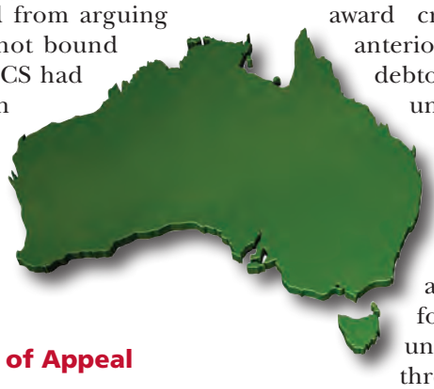
In early 2009, a dispute arose concerning the provision of services under the agreement. The dispute was heard in September 2009 by an arbitral tribunal sitting in Mongolia and an award was made

in favour of Altain (the 'Award'). Under the award, IMC was ordered to pay a sum of money to Altain. The tribunal further ordered that IMCS was to pay this amount to Altain 'on behalf of' IMC. The Award was then verified in the Mongolian courts.

In 2010, Altain filed an originating motion in the Trial Division of the Supreme Court of Victoria seeking enforcement of the Award against both IMC and IMCS. Consistent with the prevailing practice, the trial judge made an order for enforcement in the absence of both IMC and IMCS, with provision for either party to apply to the Court for the enforcement order to be set aside.

IMCS duly applied to the Court, contending that it was not a party to the agreement pursuant to which the Award was made.[6] The trial judge dismissed the application on a number of bases, including, primarily, that IMCS had failed to prove that it was not bound under the agreement. The trial judge further found that IMCS was estopped from arguing in Australia that it was not bound by the agreement, as IMCS had not contested the issue in either the tribunal hearing or the verification proceeding in Mongolia.

IMCS appealed to the Victorian Court of Appeal.



Decision of the Court of Appeal

The appeal by IMCS raised a number of questions about the operation of the International Arbitration Act 1974 (Cth) (the 'ICA Act'). The ICA Act gives effect in domestic law to Australia's obligations under the New York Convention and incorporates the UNCITRAL Model Law on International Commercial Arbitration.[7]

Of particular significance in the appeal was the burden of proof under the ICA Act; specifically, the question of who bears the burden of proof in establishing that an award debtor is (or is not) bound by the relevant arbitration agreement. In support of its contention that it was not a party to the agreement, IMCS submitted that the award creditor (Altain) had the legal burden of proof on this question.

Altain argued that this interpretation was inconsistent with the prevailing international jurisprudence concerning the enforcement of foreign arbitral awards.

This argument required consideration of section 8(5) of the ICA Act, which sets out a number of circumstances in which a court may refuse to enforce a foreign arbitral award. Of particular significance is section 8(5)(b), which refers to agreements that are invalid under the relevantly applicable law. A number of international decisions have held that such a provision extends to circumstances where an award debtor argues that it was not a party to the relevant arbitration agreement.[8] It has been recognised that the burden of proof in such cases rests on the award debtor challenging enforcement.[9]

A majority of the Court of Appeal agreed with Altain that the legal burden of proof under section 8 rests on the award debtor.[10] It rejected the submission that the legal burden of proof rested on the award creditor. In reaching this finding, the Court consciously followed the weight of international authority in cases such as *Dallah*.[11]

The Court also stated, however, that an award creditor must satisfy an anterior step before the award debtor must rely on a defence under section 8. It held that the party seeking enforcement must first prove to a prima facie standard that the award debtor was a party to the arbitration agreement.[12] It found that Altain was unable to satisfy this threshold test in the circumstances of the case.[13] It is the recognition of this prima facie threshold test that has caused some concern in international arbitration circles.

It is important to recognise, however, the extent to which this finding arose out of the unusual circumstances of the case. The award debtor IMCS was not named in the agreement. Further, and perhaps of even greater significance, the tribunal made no specific finding that IMCS was a party to that agreement. Although the Award ordered IMCS to pay 'on behalf of' IMC, the tribunal did not state that IMCS was a party to the agreement, nor did it state its reasons for ordering IMCS to pay for IMC.[14] Indeed, by the very reference in the award to IMCS paying 'on behalf of' IMC, the tribunal appeared to acknowledge that IMCS was separate to IMC and *not* therefore a party to the agreement.[15]

In these most unusual circumstances, the Court found that there was not sufficient

material before it to require consideration of the defences under section 8(5)(b) of the ICA Act.[16] In a typical case, however, where the award debtor *is* named in the arbitration agreement or *is* found by the relevant tribunal to be a party to the arbitration agreement, one might expect that this would satisfy the prima facie standard. The most unusual factors in this case included the absence of either basis for inferring that IMCS was a party to the agreement.[17] In the ordinary course, however, an award creditor should have little difficulty satisfying the threshold prima facie test. In such a case, consistent with international practice, the legal burden to prove that it was not a party to the relevant arbitration agreement will fall on the award debtor.

The Court of Appeal further overturned the findings of the trial judge relating to estoppel, concluding that IMCS had no obligation to participate in the tribunal proceedings in Mongolia. Once again, however, the decision here was consistent with international practice, following the approach taken by the UK Supreme Court in *Dallah*.[18]

The Court of Appeal therefore made orders in favour of IMCS, refusing to enforce the Award.

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Taken alone, the outcome in *Altain Khuder* may suggest an element of disinclination in relation to the *administrative* enforcement of foreign arbitral awards. The Court's reasoning, however, tells a different story.

Indeed, the Court was careful to emphasise the weight to be given to international comity and the promotion of international arbitration (albeit subject to the applicable domestic rules of statutory interpretation).[19] These remain strong objectives under the ICA Act, which requires Australian courts to have regard to the need to 'facilitate the use of arbitration agreements made in relation to international trade and commerce', 'facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce' and to give effect to Australia's obligations under the New York Convention.[20]

One should have little doubt that these objectives will also loom large in future proceedings involving the enforcement or recognition or arbitral awards in Victorian and Australian courts.

Indeed, with relatively little fanfare or comment, a more recent decision on the enforcement of arbitral awards has demonstrated the pro-arbitration approach of Australian courts. In proceedings concerning the enforcement of a domestic arbitral award, the High Court of Australia in *Westport Insurance Corporation v Gordian Runoff Ltd*[21] rejected the argument that the reasons provided by an arbitrator (in this case, under domestic arbitration legislation) must be of a judicial standard. In doing so, the Court recognised the virtue of flexibility and efficiency in arbitral procedure.[22] The pro-enforcement approach of the Court in that case is far more representative of the Australian approach than the unusual circumstances that prevailed in *Altain Khuder*.[23]

Conclusion

It is sometimes said that hard cases make bad law, but often it is more correct to say that hard cases make *limited* law. That is to say, decisions made in unusual circumstances create precedent that is limited to similarly unusual circumstances. The flexibility to accommodate the unusual case, while still leaving rules or principles of general application in place, is one of the great strengths of the common law.

It is also a reason why common law countries such as Australia – and world arbitration leaders like the UK and Singapore – provide not only the certainty needed for efficient arbitral enforcement, but also the flexibility to fully accommodate the requirements of justice in unusual circumstances.

International arbitration has a strong future in Victoria and Australia. The decision in *Altain Khuder* is an outlier that turned on considerations of fairness arising out of a most unusual set of facts. Properly understood, the decision has little to say about the general willingness of Australian courts to enforce foreign arbitral awards. There is no doubt that Australian courts are supportive and facilitative to international arbitration.

G John Digby QC is a member of the Victorian Bar. He appeared for IMC Aviation Solutions Pty Ltd in this case.

Notes

1 Adopted in 1958 by the United Nations Conference on International Commercial Arbitration ('New York Convention').

2 See Justice Clyde Croft, 'Arbitration law reform and the Arbitration List G of the Supreme Court of Victoria', *BDPS News*, Issue 39 (July 2010), 4.

3 See, eg, A Ross and M Epstein, 'Australian court forges its own path on enforcement', *Global Arbitration Review*,

31 August 2011 (**www.globalarbitrationreview.com**); Jonathan Kay Hoyle, 'Enforcing a foreign arbitral award: not as straightforward as it seems?' *Bar News* (New South Wales) Summer 2011–12, 38.

4 (2011) 282 ALR 717, [2011] VSCA 248.

5 [2011] VSCA 248 at [3] (Warren CJ).

6 *Altain Khuder LLC v IMC Mining Inc & Anor* (2011) 276 ALR 733, [2011] VSC 1; *Altain Khuder LLC v IMC Mining Inc & Anor (No 2)* [2011] VSC 12.

7 Adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade law on 7 July 2006.

8 See, eg, *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 ('*Dallah*') at [77].

9 *Dardana Ltd v Yukos Oil Co* [2002] 1 All ER (Comm) 819 at [12]; *Dallah* [2011] 1 AC 763 at [12].

10 Hansen JA and Kyrou AJA provided the majority decision. The minority reasons of Warren CJ placed the legal burden of proving the parties to an arbitration agreement on the award creditor. Except where otherwise indicated, all references in these endnotes are to the majority decision.

11 At [184].

12 At [135].

13 A difficult question concerns the relevant law to apply in determining, at the prima facie stage, who the relevant parties to the arbitration agreement are. The Court in its reasons did not state which law it was applying to determine whether Altain had met the prima facie onus, and appeared to apply Australian law to the question. However, it is likely that the prima facie analysis should take place according to the proper law of the contract, which was in this case Mongolian law.

14 At [236].

15 *Ibid.*

16 Having said that, the Court went on to find that, had it been required to consider the question under s 8(5)(b), it would have found that IMCS was not bound by the agreement.

17 Indeed, none of the relevant documents filed with the tribunal referred to IMCS as a party, including the relevant claim document or the additional claim document.

18 At [319]–[320].

19 At [127]–[130].

20 Sections 2D and 39 of the ICA Act.

21 (2011) 85 ALJR 1188, [2011] HCA 37.

22 Albeit that the relevant award was ultimately set aside on the basis that, even on the low threshold applied, the tribunal had stated only its conclusions without reasons.

23 For a recent example of this approach, see *Castle Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21.

FROM THE CONSTRUCTION LAW CAMPUS

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Training international construction lawyers: a proposal

Training in the practice of construction law is different from learning construction law doctrine. This instalment of 'From the Construction Law Campus' proposes a new, experience-based model for training international construction lawyers.

There is a significant gap in the training available to international construction lawyers. The following reflections are primarily based on my experience of lawyer training in the United States, but I suspect that a similar gap exists elsewhere. Existing academic and professional programmes lack opportunities for lawyers to gain intensive, hands-on experience negotiating international construction agreements and resolving international construction disputes.

This column briefly describes the strengths and weaknesses of the existing academic and professional models of lawyer training and proposes a new model to supplement the existing ones. I use the word 'training' rather than 'educating' advisedly. Academic programmes do a very good job of educating students in the legal doctrines applicable to international construction work. Professional programmes are, in large measure,