Setting Aside an Arbitral Award

International Arbitration Act 1974 (Cth) and *Commercial Arbitration Act 2011* (Vic)

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Art.34 Model Law and s.34 CAA

- Art.34(2) essentially provides four categories of grounds for setting aside and award
- Invalidity – Article 34(2)(a)(i):

  (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- Natural Justice or Procedural Fairness – Article 34(2)(a)(ii):

  (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

Art.34 Model Law and s.34 CAA

- Jurisdiction – Article 34(2)(a)(iii) and (iv):

  (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

  (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;
- Public Policy – Article 34(b)(i) and (ii):

  (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

  (ii) the award is in conflict with the public policy of this State.

Points to Note

- Art.34 of the Model Law is exclusive ground for setting aside an international arbitral award
- The Courts having jurisdiction to set aside an international arbitral award under Art.6 and s.18(3) of the IAA are the Federal Court and if the place of arbitration is in a State the Supreme Court of that State
- The CAAs are based on the Model Law
- S.34 CAA is almost in identical terms to Art.34
- The Court's jurisdiction under s.2 is in the Supreme Court but parties may agree to the County Court or Magistrates' Court having jurisdiction under s.6
- The CAAs in s.34A provide for appeals against awards on a question of law as well
- The grounds are limited
- No merits review, no re-agitation of factual matters
- Finality and certainty
- International cases on Art.34 may be relevant to s.34
- Art.34 and s.34 contain a discretion

Practical Matters

- Middleton J is the Arbitration Judge in the Federal Court in Melbourne
- Croft J is the Arbitration Judge in the Supreme Court in Victoria
- Federal Court Rules – Division 28.5 and Form 53
- For international arbitrations – Supreme Court Arbitration Amendment Rules 2014 – Rule 9.10 and Form 2-9K
- For domestic arbitrations – Supreme Court Arbitration Amendment Rules 2014 – Rule 9.19 and Form 2-9W
- Supreme Court Practice Note No.8 of 2014 – Commercial Arbitration Business is helpful

Invalidity – Capacity – Invalidity of Arbitration Agreement – Art.34(2)(a)(i) and s.34(2)(a)(i)

- Apart from mental capacity issues, capacity often arises as to whether an employee or representative was authorised to enter into the arbitration agreement on behalf of one of the parties
- Sometimes an arbitration agreement is invalid because it was not in writing
- Objection to validity of an arbitration agreement must be raised not later than the submission of the defence – Art.16(2), s.16(4)

Natural Justice – No proper notice – Inability to present case – Art.34(2)(a)(ii) – s.34(2)(a)(ii)

- *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; (2014) 311 ALR 387 – TCL complained about the manner of the arbitral tribunal's findings of fact and that they were not supported by evidence, that this was a denial of procedural fairness and involved the award being in conflict with public policy of Australia
- The Full Court considered that **if** the rules of natural justice require probative evidence of the finding of facts and the need for logical reasoning to factual conclusions, there is a risk that the international commercial arbitration system will be undermined by a re-litigation under the guise of procedural fairness
- The Full Court said for an arbitral award to be set aside there must be **real** unfairness or **real** practical injustice – this should be able to be demonstrated without re-examination of the facts in a given case

Natural Justice – No proper notice – Inability to present case

- ***Ringwood Agricultural Company Pty Ltd v Grainlink (NSW) Pty Ltd*** [2013] NSWSC 191 – plaintiff elected not to participate in arbitral proceeding both as to liability and quantum. Plaintiff then claimed an order setting aside arbitral award on the grounds the procedure was not in accordance with the agreement or in accordance with the CAA because tribunal declined to give it an oral hearing which it claimed it was entitled to and was not given a reasonable opportunity to present its case.
- The Court noted the plaintiff was entitled to an oral hearing on those issues but did not then and did not now seek that. The plaintiff had the opportunity from the outset to present its case in full, which it elected not to do. The procedure was therefore not otherwise than in accordance with the agreement of the parties nor the CAA
- Conduct complained of must be serious even egregious before the Court can find a party was otherwise unable to present its case

Natural Justice – No proper notice – Inability to present case

- ***Front Row Investment Holdings (Singapore) PTE Ltd v Daimler South East Asia PTE Ltd*** [2010] SGHC 80 – award set aside where arbitrator misapprehended that Front Row had abandoned reliance on further representations and arbitrator had dismissed Front Row's counterclaim without considering the grounds of its counterclaim in full because of the misapprehension. Award in respect of counterclaim and costs set aside

Jurisdiction – Art.34(2)(a)(iii) and (iv) and s.34(2)(a)(iii) and (iv)

- These paragraphs deal with:
  - First, a dispute not contemplated or not falling within the terms of the submission to arbitration
  - Second, decisions on matters beyond the scope of the submission to arbitration but severance can apply
  - Third, composition of the arbitral tribunal or procedure was not in accordance with the agreement of the parties unless overridden by the Model Law or the CAA
- One needs to look carefully at the scope of the arbitration agreement, the subject matter and the parties involved in the dispute to ensure all come within the arbitration clause
- ***ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc & Movie Group Inc*** [1997] 2 VR 31 – Brooking JA set out the principles in relation to severance

Public Policy – not capable of settlement by arbitration – conflict with public policy – Art.34(2)(b)(i)

- Non-arbitrability – not capable of settlement by arbitration under law of Australia or Victoria
- Where dispute impacts upon non-parties to the arbitration or there is a legitimate public interest in the dispute being resolved in the Courts
- Questions of non-arbitrability can arise in some areas of competition law, patent, trademark, copyright, securities, insolvency, taxation, crime or other corrupt practices which can arise if the arbitral tribunal would be carrying out the function of the statutory body
- Must be real and genuine public dimension so as to preclude arbitration
- Does not stop disputes between parties under, for instance, a licence agreement: ***Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd*** [2011] NSWSC 268 at [67]

Public Policy – not capable of settlement by arbitration – conflict with public policy

- In ***TCL Airconditioner*** the Full Court stated public policy is limited to the fundamental principles of justice and morality of the State recognising the international nature of the subject matter – international commercial arbitration
- The Explanatory Memorandum in 1988 leading to the insertion of s.8(7A) in the IAA referred to procedural justice and substantive principles of law and justice to be complied with in arbitrations. Thus instances such as corruption, bribery, fraud and breach of the principles of natural justice are contrary to the public policy of Australia
- Illegal contracts are an obvious difficulty giving rise to public policy considerations

Domestic Arbitration – s.34A CAA Appeals

- S.34A(1)-(5) provides:

"(1) An appeal lies to the Court on a question of law arising out of an award if—

(a) the parties agree, before the end of the appeal period referred to in subsection (6), that an appeal may be made under this section; and

(b) the Court grants leave.

(2) An appeal under this section may be brought by any of the parties to an arbitration agreement.

Domestic Arbitration – s.34A CAA Appeals

(3) The Court must not grant leave unless it is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more parties; and

(b) that the question is one which the arbitral tribunal was asked to determine; and

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong; or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

Domestic Arbitration – s.34A CAA Appeals

(4) An application for leave to appeal must identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The Court is to determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required."

Domestic Arbitration – s.34A CAA Appeals

- **First Requirement** – s.34A(1)(a) – Agreement of Parties
  - Likely to be in arbitration clause or before award
- **Second Requirement** – s.34A(3)(a) – Substantially effect the rights of one or more parties
  - Requires substantial impact on the rights of the parties
  - Need to show how and why the particular point impacted the party
- **Third Requirement** – s.34A(3)(b) – Question the tribunal was asked to determine
  - The question must have been raised before the tribunal

Domestic Arbitration – s.34A CAA Appeals

- **Fourth Requirement** – s.34A(4)(c)(i) – Decision obviously wrong
  - Must be easily discernible or an obvious readily apparent error of law
  - Purpose is to minimise judicial supervision and review
  - s.34A(5) – No hearing unless Court considers necessary
  - ***Westport Insurance Corporation v Gaudron Runoff Ltd*** (2011) 244 CLR 239; [2011] HCA 37 at [42]-[48] may well be decided differently today
  - Alternatively – s.34A(3)(c)(ii) – The question is one of general public importance and open to serious doubt
  - Not all standard contractual clauses involve questions of general public importance
  - The phrase 'open to serious doubt' is broader than the Nema Guideline of 'probably wrong' and also the phrase 'strong prima facie case' in old CAAs

Domestic Arbitration – s.34A CAA Appeals

- **Fifth Requirement** – s.34(3)(d) – just and proper in all the circumstances:
  - There are no guidelines in relation to this exercise of discretion
  - In ***Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*** [2012] WASCA 50 decided under the IAA one party's disingenuous approach to its pleading in accepting at first instance the old CAA applied but on appeal challenged the applicability of the old CAA and as a consequence the jurisdiction of the Court to enforce an award, caused the Court to conclude it would be antithetical to the interests of justice to grant leave to appeal