Court Supervision of Commercial Arbitration – contemporary Australasian trends

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The Model Law in Australasia

- The Model Law is not yet 30 years old
- Yet, in its short lifetime, it has revolutionised international commercial arbitration, including in Australasia
- The effects of that revolution are now being felt in domestic commercial arbitration
- But few revolutions are entirely complete, and the Model Law departs from prior common law approaches and authorities
- From time to time, common law reasserts itself

The clash of civilisations

- The tension between the old order and the new can be expressed through several dualities:
  - uniformity / autonomy
  - merchant law / common law
  - modernity / tradition
  - finality / fairness
  - global / local
- The main battleground continues to be the extent of court supervision – particularly with respect to recourse against awards

New Zealand and the Model Law

- In 1991, the New Zealand Law Commission recommended New Zealand enact a new arbitration law
- Having considered several alternatives, the Law Commission proposed a draft Act – the Arbitration Act 1996 – based largely on the Model Law
- This was enacted on 2 September 1996, coming into force on 1 July 1997
- Following reviews in 2001 and 2003, the Act was amended in October 2007, including by enacting the 2006 amendments to the Model Law
- Despite some minor speed wobbles, New Zealand courts have fallen broadly into line with international orthodoxy

The NZ 1996 Act: a balancing act

- Act applies to all arbitrations, whether commercial or not
- A balance between uniform rules and tailored solutions was achieved through two schedules:
  - Schedule 1 contains rules applying to arbitration generally, and essentially adopts the Model Law
  - Schedule 2 contains additional optional rules
- Section 6 of the Act provides that:
  - Schedule 1 applies to all arbitrations held in New Zealand
  - Schedule 2 applies to:
    - international arbitrations only if the parties so agree, and
    - domestic arbitrations unless the parties otherwise agree

Recourse against awards in New Zealand

- Set-aside – Schedule 1, art 34 – mandatory:
  - *Methanex Motunui* [2004] 3 NZLR 454 (CA)
- Appeal on question of law – Schedule 2, cl 5 – optional:
  - unless expressly included, or expressly excluded, requires leave of the High Court
  - creates risk of layers of appeal on leave application
  - test for leave developed in *Gold & Resource Developments v Doug Hood* [2000] 3 NZLR 318 (CA)
  - now excludes collateral factual, "*insufficient weight*", or "*improper inference*" challenges: cl 5(10)

Australia and the Model Law

- International Arbitration Act 1974 (Cth) (*IAA*) amended in 1989 to give effect to the Model Law for international commercial arbitrations
- Amended again in 2010, to widespread approval
- Model Law art 34 is sole recourse mechanism
- State and Territorial arbitration laws left to govern domestic commercial arbitration
- These laws are now being rapidly replaced by Commercial Arbitration Acts (*CAAs*), with rights to appeal on question of law still possible on an 'opt-in' basis, with leave from the Court: s 34A

Early Australian rebellion

- *Eisenwerk* [2001] 1 Qd R 461, infamously applied s 21 of the IAA, which read:

  If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.

- Following academic criticism, *Eisenwerk* was not followed in *Cargill International SA* [2010] NSWSC 887 and *Wagners* [2010] QCA 219

- In 2010, rebellion was suppressed by the amendment of s 21 to remove ability to exclude Model Law in favour of State/Territorial laws. The new s 21 now reads:

  If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.

A Pax Australia?

- Since 2010, Australian States and Territories have implemented an updated national framework on domestic commercial arbitration based upon the Model Law, by introducing the CAAs:
  - NSW: Commercial Arbitration Act 2010 (commenced 01.01.10)
  - Victoria: Commercial Arbitration Act 2011 (commenced 17.11.11)
  - SA: Commercial Arbitration Act 2011 (commenced 01.01.12)
  - NT: Commercial Arbitration (National Uniform Legislation) Act 2011 (commenced 01.08.12)
  - Tasmania: Commercial Arbitration Act 2011 (commenced 01.10.12)
  - WA: Commercial Arbitration Act 2012 (assented 28.08.12)
  - Queensland: Commercial Arbitration Bill (re-introduced 30.10.12)
  - ACT: No bill yet introduced

But rebels not entirely vanquished…

- *Westport Insurance v Gordian Runoff* [2011] HCA 37:
  - appeal brought on question of law under former NSW Act
  - HCA relies upon defective reasoning of award to conclude that a "*manifest error of law on the face of the award*" exists sufficient to grant leave to appeal
  - complex arbitration: 3-member tribunal, lengthy award (96 paras), resembled "*commercial cause in superior court*"
  - resolves conflict between Courts of Appeal in NSW (case on appeal) and Victoria (*Oil Basins* [2007] VSCA 255) concerning required standard of reasoning in arbitration awards, by rejecting a rigid "*judicial standard*" in favour of a contextual approach
  - arguably extends the scope of judicial review of awards under the former State/Territory laws

Implications of *Westport Insurance*?

- It remains to be seen whether:
  - broad approach to appeals on a question of law is also taken under the new CAAs: cf "*manifest error of law*" and "*obviously wrong*"
  - requirement for reasons (see Model Law, art 31(2)) can also be used to challenge an IAA award: expressly left open by the Court: at [23]
  - case has wider systemic ramifications for Court supervision of arbitration. See, *eg*, (at [20]):

    [I]t 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.

The Australasian 'natural justice' gloss – a key battleground in a wider conflict?

- By the 1989 amendments, s 19 was inserted into the IAA, engrafting a 'gloss' onto the public policy exception:

  Without limiting the generality of Articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of any doubt, that, for the purposes of those Articles, an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if:

  (a) the making of the interim measure or award was induced or affected by fraud or corruption; or

  (b) ***a breach of the rules of natural justice occurred in connection with the making of the interim measure or award****.* [Emphasis added]

- In the 2010 amendments, s 8(7A) was inserted to like effect for foreign enforcement applications
- New Zealand's 1996 Act includes an almost identical gloss with respect to set-aside and enforcement/recognition: see arts 34(2)(b)(ii) and (6), and 36(b)(b) and (3)

Recent interpretation of the natural justice gloss

- In New Zealand:
  - *Ironsands v Towards Industries (I)* (HC, CIV-2010-404-004879, 8 July 2011)
  - *Ironsands v Towards Industries (II)* [2012] NZHC 1277 (8 June 2012)
- In Australia:
  - *IMC v Altain Khuder* [2011] VCSA 248, at [346]
  - *Castel v TCL (II)* [2012] FCA 1214
- *Cf* G Born: providing wide procedural protection through public policy limb creates an "*unruly horse*" (at 2632)

The next frontier – administrative/constitutional law

- *Castel v TCL (I)* [2012] FCA 21
- Judicial review: *TCL v The Judges of the Federal Court of Australia* (S178 of 2012), heard by the HCA on 6 November 2012
- A seemingly simple enforcement application has given rise to a far-reaching constitutional challenge
- From TCI's brief (At [14]):

  The IAA takes arbitration beyond the agreement of the parties, removes the supervision of the courts and mandates enforcement on the basis of a fiction, namely that there is a valid and binding award so deemed by the IAA.

TCL judicial review: basic argument

- Simplified summary of argument:
  - historically parties to arbitrations could agree to judicial error correction prior to being compelled to abide by awards
  - the IAA, however, enlists federal court power to give effect to awards without permitting any substantive involvement
  - effect is that even awards bearing manifest and egregious legal errors must be enforced
  - this impairs the institutional integrity of federal courts and impermissibly vests judicial power on arbitral tribunals
- Numerous high-powered interveners opposing
- All in all, low likelihood of success

Pulling the threads together

- Key issue is one of basic organisational principles: options for dissenters are 'voice' or 'exit'
- Unlike NYC, Model Law art 34 restricts domestic grounds for annulment (by applying NYC art V to set-aside applications)
- CAAs permit optional rights of appeal on questions of law, as does New Zealand 1996 Act (and s 69 of UK 1996 Act)
- Main critique in the *TCL* judicial review is no possibility of review for error of law, even if parties so desire
- *TCL* thus bears similarities to both *Methanex Motunui* (NZ CA) and to *Hall Street Associates v Mattel* 522 U.S. 576 (2008), which held that the Federal Arbitration Act's grounds for review were exclusive and non-expandable

Challenges to Court supervision: three scenarios

Methanex Motonui (NZCA)	• Parties sought to *exclude* judicial review of awards by agreement
Hall Street v Mattel (U.S. SC)	• Parties sought to *expand* judicial review of awards by agreement
TCL judicial review (HCA)	• Party seeks to expand judicial review of awards by arguing error correction is constitutional function

Is natural justice gloss an answer?

- In *Hall Street*, majority relied on distinction between procedural and substantive review: "'*Fraud' and mistake of law are not cut from the same cloth*" (587-588)
- Properly understood, FAA preserves "*national policy of limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway*" (at 589)
- Decision in *Methanex Motunui* that art 34 is mandatory relied upon the role of art 34 in regulating natural justice – a role made explicit by the natural justice gloss (at 480)
- HCA may reason similarly. If so, natural justice gloss may come to be seen not as threat, but as safety valve: judicial integrity preserved by Court ability to ensure *robustness of process*, rather than *correctness of result*