Arbitration and Administrative Law – When Two Worlds Collide

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Arbitration is underpinned by natural justice. Article 18 of the Model Law, enshrining the right of the parties to be treated with equality, and given a full opportunity to present their case, was described by UNCITRAL in 1985 as the "Magna Carta of Arbitral Procedure".

Yet the Model Law does not in Articles 34 and 36 give an unfettered right to challenge an arbitral award for any alleged breach of natural justice. The grounds for set-aside, or refusal of recognition and enforcement, are specific. That specificity assists in promoting both uniform interpretation and arbitral autonomy.

The wild card is, of course, the public policy ground in Articles 34(2)(b)(ii) and 36(1)(b)(ii). Australia and New Zealand have adopted the Model Law with an explicit twist in this regard. Each country's implementing legislation deems an award to be in conflict with public policy where a *breach of the rules of natural justice* has occured (Australia: International Arbitration Act 1974 (Cth) (the *IAA*), s 19; New Zealand: Arbitration Act 1996 (the *1996 Act*), First Schedule, arts 34(6) and 36(3)).

This form of drafting opens the door to challenges to awards which: (a) are based on common law, including administrative law, notions of procedural fairness; and (b) require an intensive review of the reasoning adopted by the tribunal.

This year, in both jurisdictions, decisions have clarified the scope of this natural justice ground of challenge.

In Australia, the ground has been interpreted broadly:

• In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248*, the Victorian Court of Appeal overturned a first instance decision enforcing a Mongolian award. The Court relied primarily on a Dallah-style analysis to conclude that, under Mongolian Law, the award debtor was not party to the arbitration agreement. Separately, however, the Court held that the award was rendered in breach of natural justice as part of the public policy of Australia.*

• More recently, in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 1214*, Murphy J of the Federal Court held that any breach of natural justice is potentially sufficient to sustain a challenge. This conclusion was based upon the plain meaning of s 19(b) of the IIA. The Court was required to apply "common law principles of natural justice"; which in turn required a "close examination of the evidence of the hearing" to discern whether any breaches had taken place. His*

Honour went on to discuss administrative law concepts, including the "error of law doctrine", but concluded that the award should be upheld.

In New Zealand, after a false start, the natural justice ground has been interpreted more restrictively:

• Two High Court decisions have recently been given in the context of the same set-aside application – first at a strike-out stage, and then following a full set-aside hearing. The allegation throughout was that the rules of natural justice had been breached because the arbitrator lacked probative evidence for factual findings.

• The first judge, Courtney J, reasoned equivalently to (and hence was quoted with approval by) Murphy J: see *Ironsands Investments Ltd v Toward Industries Ltd*, CIV-2010-404-004879, 8 July 2011.

• The second judge, Ellis J, held that a lack of probative evidence cannot amount to a relevant breach of natural justice: see [2012] NZHC 1277. This was due to 2007 amendments to the 1996 Act which clarified that (optional) appeals on a question of law do not extend to whether the award was supported by evidence or the arbitral tribunal drew correct inferences. Her Honour reasoned that such challenges could not, nonetheless, have been preserved through the set-aside mechanism.

Standing back, the competing arguments are really manifestations of a wider debate as to whether, or to what extent, arbitration law should be informed by – or even subject to – rules of domestic administrative law.

That debate has not been openly pursued in New Zealand, which has tended to follow an orthodox Model Law approach.

In Australia, however, it may be gaining support. Last year, a majority of the High Court of Australia upheld a challenge to a 60-page insurance arbitration award, given by a three-member tribunal, due to the alleged inadequacy of the reasoning adopted: *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37*. In coming to this conclusion, the High Court stated, rather ominously, that:*

> No doubt it is true to say that the provision of an award under the Arbitration Act lacks distinctive hallmarks of the exercise of judicial power…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.

The High Court is now considering a further dimension of the *Castel* case, being the decision to enforce the award under Article 36. The award debtor is seeking judicial review against the entire Federal Court judiciary, claiming that the judges lack jurisdiction to enforce an award containing an error of law on its face, as doing so impairs the institutional integrity of the Court as an instrument of judicial power.

Space does not permit delving into the detail of the November 2012 argument. More significant is the wider controversy of which it is merely a symptom. As has been frequently noted, arbitration depends upon the support of the same court systems from which it seeks to free itself. There is thus an inherent tension between judicial approaches which emphasise party autonomy, and those which emphasise public law principles.

Australia is still feeling out its approach in this debate. But there is certainly a constituency in favour of using administrative law principles to regulate arbitration. It now remains to be seen how the High

Court handles its second major arbitration decision in just over a year.