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What is an Arbitration, and Does it Really Matter? (An Australian Perspective)

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The question of what constitutes an "arbitration" is unlikely to be one that arbitral practitioners have cause to ponder on a daily basis. In fact, such a question might appear at first to be purely theoretical or academic. A recent case (*ASADA v 34 Players*) from the Victorian Supreme Court in Australia, however, shows the important implications that such matters of definition might have.

In December 2014, the Australian Sports and Anti-Doping Authority ("ASADA") applied to the Supreme Court of Victoria seeking orders for the issue of subpoenas in aid of proceedings before the Australian Football League's ("AFL") Anti-Doping Tribunal. The Tribunal proceedings concerned allegations that 34 current and former AFL players had used prohibited substances during the 2012 AFL season in violation of an industry-based Anti-Doping Code. ASADA sought subpoenas from the Supreme Court to compel the attendance of two witnesses and to require four corporate entities to produce documents to the Tribunal. The proceedings before the Supreme Court relied upon section 27A of the *Victorian Commercial Arbitration Act 2011*, which provides that the Supreme Court may issue a subpoena to require a person to attend or produce documents to an "arbitral tribunal". The Act applies to "domestic commercial arbitrations", but does not define precisely what an "arbitral tribunal" is or what constitutes an "arbitration". A threshold issue for the Victorian Supreme Court was thus whether the Act applied at all to the proceedings before the Anti-Doping Tribunal.

So what characterises an "arbitration"?

The judgment of the Court was issued by Croft J on 19 December 2014. Croft J observed that providing "anything in the nature of a comprehensive and prescriptive definition of 'arbitration' is extremely difficult" (para 14). Ultimately, however, he adopted ten criteria from recent English case-law to assess whether the proceedings before the Anti-Doping Tribunal were an "arbitration" for the purposes of the Act. These were as follows:

> (i) It is a characteristic of arbitration that the parties should have a proper opportunity of presenting their case
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> (ii) It is a fundamental requirement of an arbitration that the arbitrators do not receive unilateral communications from the parties and disclose all communications with one party to the other party

> (iii) The hallmarks of an arbitral process are the provision of proper and proportionate procedures for the provision and for the receipt of evidence
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> (iv) The agreement pursuant to which the process is, or is to be, carried on ("the procedural agreement") must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties to the procedural agreement
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> (v) The procedural agreement must contemplate that the process will be carried on between those persons whose substantive rights are determined by the tribunal
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> (vi) The jurisdiction of the tribunal to carry on the process and to decide the rights of the parties must derive either from the consent of the parties, or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration
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> (vii) The tribunal must be chosen, either by the parties, or by a method to which they have consented
>
> (viii) The procedural agreement must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both sides
>
> (ix) The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law
>
> (x) The procedural agreement must contemplate a process whereby the tribunal will make a decision upon a dispute which is already formulated at the time when the tribunal is appointed

Despite endorsing these criteria, Croft J's judgment emphasised the non-definitive nature of the majority of them. In fact, he expressly acknowledged that at least six of the ten criteria were satisfied by the Anti-Doping Tribunal (being (i)-(iii), (vii), (viii) and (x)). In holding that the Tribunal was not an "arbitral tribunal" covered by the Act, Croft J appears to have found influential the following two, related, points:

1. "the Tribunal is a domestic disciplinary tribunal operating in a framework or web of contractual provisions", and
2. the decisions of the Tribunal are only enforceable by the AFL under contract, and not by domestic courts as arbitral awards.

Aside from having evident practical implications for the case at hand, the decision as to what constitutes an "arbitration" under the Victorian Commercial Arbitration Act has much broader significance, including for the following four reasons.

First, the Victorian Act is not unique among domestic statutes governing arbitral proceedings in leaving the concept of "arbitration" undefined. In Australia alone, each of the state-level Commercial Arbitration Acts mirror the Victorian Act's (non-)definition of the term "arbitration". The federal-level *International Arbitration Act 1974* is equally non?prescriptive. So too, other

jurisdictions' legislation leaves the concept undefined (see, for example, *the English Arbitration Act*, or the *Singapore International Arbitration Act*). This notwithstanding, the applicability of such legislation in any concrete case is predicated upon identification of an arbitral tribunal or arbitral proceedings.

Second, the UNCITRAL Model Law – upon which many domestic arbitration laws are based – itself leaves the concept of "arbitration" undefined. The Model Law adopts a rather circular definition of arbitration as "any arbitration whether or not administered by a permanent arbitral institution". The inclusion of this 'definition' was quite deliberate: the UNCITRAL Working Group discussed at some length how to define the concept but ultimately decided that it would be better not to provide a comprehensive definition. In adopting the Model Law, countries thus have discretion to develop their own definitions. Like Australia, however, many have not done so.

Third, in applying the criteria, Croft J distinguished the rules constituting the Anti-Doping Tribunal from other "arbitral" rules. The decision thus indicates that tribunals operating under certain rules are more likely than others to meet the definition of "arbitral tribunals" for the purposes of the Act. Croft J described as "well accepted" and in use by "domestic arbitral tribunals in this country" the arbitration rules of, for example, the Australian Centre for Commercial Arbitration, International Chamber of Commerce, and Singapore International Arbitration Centre (see para 23). This matches Croft J's acknowledgement that "in some cases the answer might be clear, and in others…the answer may need to be reached intuitively" (para 14).

Fourth, Croft J's judgment canvassed a range of sources to define the notion of "arbitration" under the Act. This included commentary to the Model Law, academic commentary generally, and English case-law. To the extent that it engaged with these sources, the Supreme Court entered into a dialogue of global reach about what an "arbitration" actually is.

The decision in *ASADA v 34 Players* grappled with definitional concepts of fundamental importance to arbitration practitioners. It will be interesting to see the extent to which such definitional criteria are picked up, developed or applied by the courts of other jurisdictions in the future, and to see whether different jurisdictions develop differing notions of this important concept.

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