A Victorian Appeal Court decision will have important implications in relation to appeals against arbitral awards.

HOW DOES THIS AFFECT YOU?

- Parties considering agreements for international arbitration in Australia should ensure that they do not opt out of the Model Law.
- Parties should be aware of their appeal rights and carefully scrutinise the reasons of any award made against them.
- Arbitrators should be careful to give full reasons to ensure compliance with the relevant rules and procedural law.

INTRODUCTION

The recent decision of Oil Basins Ltd v BHP Billiton Ltd [2007] VSCA 255 upholding the judgment of Justice Hargrave, which set aside an arbitral award on the basis of inadequate reasons, came as a surprise to many in the arbitration community. The decision is important for a number of reasons, not the least because it reinforces the desirability of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) implemented by the International Arbitration Act 1974 (Cth) as the procedural law for an international arbitration in Australia rather than the respective Commercial Arbitration Acts of the various states. The approach taken by the Victorian courts represents a departure from previous authority.
THE DECISION

The first judgment of Justice Hargrave (BHP Billiton Ltd v Oil Basins Ltd [2006] VSC 402) set aside an arbitral award on the grounds that it did not disclose adequate reasons, which constituted a manifest error of law, and also on the basis that the arbitrators were guilty of technical misconduct in failing to consider important submissions and evidence presented by the parties. The judgment controversially held that the arbitrators were under a duty to give reasons of a standard equivalent to the reasons expected from a superior court judge deciding a commercial case. Justice Hargrave found that the requisite standard of reasons depended upon the circumstances of the case. For example, a lower standard would be required in a straightforward arbitration before a trade expert than would be required of a retired judge acting as arbitrator in a large-scale commercial litigation. The Victorian Court of Appeal upheld Justice Hargrave’s decision on all points. The Court of Appeal, however, pointed out that it was the way in which the evidence and submissions were presented that dictated the standard of the award rather than the other elements referred to by Justice Hargraves such as the fact that two of the arbitral panel were retired judges.

The relevant arbitral law in this instance was the Commercial Arbitration Act 1984 (Vic) (the CAA), which allows parties to apply to the court for an award to be set aside on the basis of a manifest error of law under s 38(5) of the CAA. Section 29(1) of the CAA requires arbitrators to include a statement of reasons. The court followed previous authorities in finding that the effect of an arbitrator’s failure to include an adequate statement of reasons could constitute a manifest error of law and thus render an award susceptible to being set aside. However, the BHP Billiton v Oil Basins decisions represent a departure from previous authorities regarding the standard to be applied when assessing the adequacy of the reasons.

Before Justice Hargrave’s decision, it was generally understood that awards were not equivalent to judgments. This approach was in keeping with the general principle that courts should not be overly zealous in scrutinising awards for defects and should, where possible, construe in favour of upholding the validity of an award. By agreeing to arbitrate, parties are said to acknowledge that rights of appeal and challenge are severely limited. In drafting their reasons, arbitrators, in theory, unlike judges, do not have to be mindful that an appellate court may need to interpret and scrutinise their findings of fact and law. This in itself helps to bring greater efficiency to the arbitral process compared with litigation.

THE IMPORTANCE OF CHOICE OF ARBITRAL LAW – THE CAA V THE MODEL LAW

Importantly, the provisions of the CAA differ to those of the International Arbitration Act (the IAA), which implements the Model Law in relation to international arbitrations conducted in Australia. The Model Law is an internationally adopted set of procedural laws developed by UNCITRAL to govern international commercial arbitrations. However, under the IAA, parties can opt out of the Model Law either expressly or implicitly and have been known to do so inadvertently. If parties opt out of the Model Law, Australian courts will apply the CAA as the procedural law governing an international arbitration in Australia to the extent that it is not inconsistent with the provisions in the IAA. As a result, parties to an international arbitration in Australia, where the arbitration clause has not been carefully drafted, may find that the broader provisions for setting aside arbitral awards in the CAA will apply.

While the Model Law contains a requirement that an arbitral award should stipulate the reasons on which it is based, it does not provide for an explicit right to challenge an award on the basis of inadequate reasons. Nor does the Model Law provide for an award to be set aside for manifest error of law or misconduct by the arbitrator(s), the two grounds applied in Oil Basins v BHP Billiton. The only basis on which a challenge for inadequate reasons could be brought under the Model Law would arguably be under article 34(2)(a)(iv), which provides that a court may set aside an award on the basis that the arbitral procedure was not in accordance with the agreement of the parties or the Model Law. The extent to which Australian courts will examine the adequacy of reasons in an international arbitral award under the Model Law remains to be seen. In the meantime, parties to an international arbitration wishing to provide for greater finality in the determination of their rights may wish to consider opting into the Model Law.
of their disputes should elect to arbitrate under the Model Law provisions in the IAA rather than under the CAA, or should otherwise provide for arbitration other than under the CAA.

OTHER IMPLICATIONS

Quite apart from the strong signal this decision sends in regard to judicial interference in arbitral awards, there are some important lessons for parties and arbitrators alike stemming from the decision.

In order to make their awards “challenge-proof”, arbitrators should be careful to:

• give full reasons for their decision, including supporting conclusions with reasoning;
• give reasons for preferring the evidence of one witness over the other, rather than simply stating the preference; and
• deal with the primary submissions of opposing parties to the arbitration and give reasons for rejecting or accepting the submissions.

Similarly, parties should now be aware that, if they are unsuccessful in an arbitration, the award rendered should be scrutinised carefully for flaws and potential grounds for challenge. Of course, parties should be aware that the Oil Basins v BHP Billiton decision represents the current position in Victoria under the CAA, and, while considered persuasive authority in states outside Victoria, it may not necessarily be followed by the courts in those states and territories.