Westport Insurance Corporation v Gordian Runoff Ltd

The tension between transparency in decision making and the efficiency of arbitration proceedings is currently the subject of an appeal before the High Court in the case *Westport Insurance Corporation v Gordian Runoff Ltd*.

In the appeal, Corrs acted for Australia's leading arbitration bodies (ACICA, IAMA, CIArb and AIDC) under the auspices of the Australian Centre for International Commercial Arbitration (ACICA).

Introduction:

Section 29(1)(c) of both the NSW and Victorian *Commercial Arbitration Acts* require an arbitrator to include in an award a statement of the reasons for making that award.

To date, inconsistent decisions in the appellate courts of NSW and Victoria have given rise to uncertainty as to the sufficiency of reasons that an arbitrator must provide.

The High Court is expected to clarify an arbitrator's obligations when it hands down its decision in the appeal from the decision of the NSW Court of Appeal in *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57.

Given that a similar requirement to s.29(1)(c) of the *Commercial Arbitration Acts* is found in article 31(2) of the UNCITRAL Model law, adopted by the 2010 amendments to the *International Arbitration Act (Cth)*, this decision will be of great interest to all users (and administrators) of commercial arbitration in Australia.

The facts:

The initial arbitration concerned a claim by Gordian (the Insurer) against Westport (the Reinsurer) for indemnity under three excess reinsurance treaties. The dispute stemmed from a disagreement over whether the terms of the reinsurance responded to claims under the relevant reinsurance contracts, subject to s.18B of the *Insurance Act 1902* (NSW) which operates to limit and exclude liability.

The arbitration panel, comprised of a prominent retired judge and two reinsurance experts, held in favour of Gordian stating:

"We are comfortably satisfied that it would not be reasonable within the meaning of s.18B of the Insurance Act, and entirely consistent with 'considerations of general justice and fairness' within the meaning of the reinsurance treaties, for the reinsurance treaties to apply".

Westport sought leave to appeal under s.38 of the NSW *Commercial Arbitration Act*, arguing that the arbitrators had erred in law by failing to provide adequate reasons for their decision. Leave was granted by Einstein J and Westport was successful on appeal in the NSW Supreme Court.

Westport sought special leave to appeal to the High Court. Gordian cross-appealed.

NSW Court of Appeal decision:

The NSW Court of Appeal overturned the decision of Einstein J, finding no manifest error on the part of the arbitrators under s.38 of the *Commercial Arbitration Act*. The Court of Appeal held that the only requirement of an arbitrator's award was that it:

- set out the arbitrator's determination, based on his/her view of the evidence, of what did or did not happen;
- explain succinctly why, in the light of what happened, the arbitrator reached his/her decision; and
- state what the arbitrator's decision is.

The Court of Appeal observed that arbitration awards, unlike court judgments, are the outcome of a private consensual mechanism that is *"meant to be shorn of the costs, complexities and technicalities often cited… as the disadvantages of curial decision making".* For this reason, the court declined to follow the decision of the Victorian Court of Appeal in *Oil Basins v BHP Billiton Ltd* [2002] VSCA 255, that arbitrators, at least in the context of a complex commercial arbitration, must provide reasons of the same standard expected from a judge.

Special Leave and the Appeal to High Court

Before the High Court, Westport argued that:

- The relationship of the facts found by the arbitrators in relation to their ultimate conclusion was impenetrable because no process of reasoning was provided. The proviso to s.18B requires consideration of all the circumstances, and required a statement of reasons to identify why the arbitrators decided to disregard facts

favourable to Westport.

- The arbitrators were not involved in an intuitive fact finding exercise incapable of precise explanation.
- A complex dispute attended by the formalities of legal proceedings requires reasons of a judicial standard. The Court of Appeal erred in its presumption that all parties to arbitration expect the process to be shorn of complexities and technicalities, particularly where evidence of the conduct of arbitration and the contractual intention of the parties suggests otherwise.
- A requirement for reasons of a judicial standard does not mean that arbitrators must produce an award of the same standard expected of a judge. It would be sufficient for relevant findings to be stated succinctly in reference to the evidence.

In response, Gordian argued that:

- The content of the obligation to give reasons reflects the arbitrator's role in enabling parties to access their limited rights of appeal under s.38. In this instance, reasons of a judicial standard would not have altered Westport's rights of appeal.
- Whether it was reasonable for Westport to be bound to indemnify Gordian was an evaluative question of fact. The arbitrators' reasons revealed a comprehensive appreciation of the underlying factual material.
- The adequacy of reasoning should be considered in light of the way the arbitration was conducted and in particular, the submissions made by the parties. The matters contained within the submissions were known to both parties, and the reasons given by the arbitrators were not impenetrable if read in light of those matters.
- The requirement under s.18B(1) to consider 'all the circumstances' did not mandate an enquiry at large.

ACICA was granted leave to appear amicus curiae and argued that:

- There is no requirement under s.29(1)(c) of the *Commercial Arbitration Act* that a statement of reasons adhere to a particular standard, be adequate, or even be factually or legally correct. Only in circumstances where the statement of reasons given is so illogical, irrational, or brief that it could not possibly be a statement of reasons, should an appeal be available.
- The facilitation of rights of appeal through an expansive requirement for reasons is inconsistent with the parties' agreement to arbitrate their dispute, rather than submit it to the judicial process. It is also at odds with the legislative intention of the Act to promote the finality of arbitral awards and ensure that arbitration remains a freely negotiated contract based process, characterised by autonomy, flexibility and privacy.
- s.29(1)(c) is not necessary to facilitate rights of appeal under s.38 of the *Commercial Arbitration Act*, because it allows the parties to agree that no statement of reasons will be given in an arbitration award. Parliament has thus created a legislative scheme that severs any nexus between sufficiency of reasons and rights of appeal.
- Adjusting the standards of reasoning to reflect the formality of the arbitration process would introduce a degree of variability into the requirement for reasons not intended nor contemplated by parliament.

The Commonwealth Attorney-General was also given leave to appear amicus curiae and argued that:

- An arbitrator is only required to give his/her actual bona fide reasons for a decision in terms sufficient to disclose whether or not they have given actual consideration to the dispute referred to them.
- It is not the function of statements of reasons to satisfy the public interest. They have a very limited role to play in the development of the law.
- The aims of arbitration, being a speedy and final determination, are no less when the dispute is complex, a retired judicial officer is an arbitrator or where experienced counsel is retained.
- The requirement to provide reasons of a judicial standard is unsupported in the history of an

arbitrator's obligation to give reasons in both common law and civil law jurisdictions.

- Under article 34 of the UNCITRAL Model Law, error of law or fact is not a ground of appeal. The one exception is found in article 34(2)(b)(ii), where the award is in conflict with the public policy of the state. In this instance, there was no conflict with public policy.

Implications for arbitration in Australia

Arbitration plays an important role in facilitating international trade and commerce.

It does not take a massive leap of logic to realise that Australia's attractiveness as an arbitration jurisdiction within a booming international commercial dispute resolution market depends on maintaining arbitral best practice.

This is an essential element in securing a competitive advantage against prominent arbitration jurisdictions such as Hong Kong and Singapore.

The efficacy of arbitration as an enforceable, cost-efficient and timely method of dispute resolution hinges on the finality of arbitral awards and the availability of grounds of appeal.

While standards for judicial reasoning would arguably increase transparency, more onerous obligations on arbitrators than those contemplated by the UNCITRAL Model Law would also invite appeals against arbitrator's awards.

SPENCER FLAY

Partner
Construction
Tel +61 8 9460 1738
Mob 0415 048 270
Spencer.Flay@corrs.com.au

A Partner in the Construction Practice in Perth, Spencer is experienced in dispute resolution across the construction and energy and resources industries, including disputes in large civil and mining construction projects. Spencer has represented clients in mediation, adjudication, arbitration and litigation in Australia, the United Kingdom, Hong Kong and Jordan.

Spencer is also experienced in front and back end construction work, advising principals, contractors, engineers and architects in drafting and negotiating construction contracts. His recent experience includes advising clients such as BGC (Australia), Fleetwood Corporation, Macmahon, Thiess, Woodside, Probuild, Clough and MCC Mining.