SEEKING UNIFORMITY IN THE COMMERCIAL ARBITRATION ACTS

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SUMMARY

Appeals from awards in domestic arbitrations are restricted, under the respective *Commercial Arbitration Acts* (CAAs) of the Australian states and territories, to appeals on points of law. Leave of the Supreme Court is also necessary if an appeal is to proceed.

Until recently, there was some doubt about whether a decision refusing leave to appeal against an award could itself be appealed to an appellate court. In Western Australia, there seemed to be no such right of appeal, contrary to the position in other states whose courts had considered the issue.

However, in *Lamac Developments Pty Ltd v Devaugh Pty Ltd (Lamac)*,[1] a five-judge bench of the Full Court of the Supreme Court of WA overturned its previous decision in *Aintree Holdings Pty Ltd (t/as Beaumonde Homes) v George Corderoy and Marilyn Corderoy (Aintree)*[2] and held that an appeal lies from the refusal of leave to appeal an arbitral award on a question of law.

As a result, WA is now in line with the other Australian states whose courts have considered this matter.

BACKGROUND

While international arbitrations in Australia are generally governed by the UNCITRAL Model Law (applicable by virtue of the Commonwealth *International Arbitration Act* 1974), the procedural law applicable to domestic arbitrations will usually be the CAA of the relevant state or territory in which the place of arbitration is located.

The CAAs of the states and territories are commonly referred to as the Uniform CAAs, as they are the product of a legislative scheme intended to create a uniform platform for arbitration in Australia.

A notable feature of arbitration under the Uniform CAAs is the limited right of appeal against an arbitral award on a point of law, found in section 38 of the CAAs. The appeal is to the Supreme Court of the state or territory of the place of arbitration. An appeal may be brought either with the consent of all parties to the arbitration agreement, or with the leave of the court. Before it will grant leave, the court must be satisfied that:

- having regard to all of the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and
- there is:
  - a manifest error of law on the face of the record; or
  - strong evidence that the arbitrator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

However, one point on which almost all the CAAs are 'silent' is whether a party can appeal against a court's decision to grant or refuse leave to appeal against an arbitral award. The one exception is the CAA of Tasmania, which expressly provides for such an appeal, with the leave of the court.

So what is the position in the other states and territories of Australia?

Until recently, the authorities on the point were split, with the unsatisfactory result that whether or not one could appeal against a refusal of leave might hinge on where in Australia the place of arbitration was located.

This inconsistency appears to have been laid to rest by the decision of the Full Court of the WA Supreme Court in *Lamac*.

THE FACTS IN LAMAC

Various disputes arose between a building contractor, Devaugh, and

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its plumbing sub-contactor, Lamac, over plumbing and hydraulic works subcontracted in relation to the construction of a hospital. The disputes were submitted to an arbitrator, who decided that certain sums previously paid by Devaugh to Lamac (including interest) had been overpaid, and ordered Lamac to repay Devaugh, with compound interest at a high rate (including interest on the interest that had been paid to Lamac).

Lamac applied to the Supreme Court of WA for leave to appeal against the award. At first instance, leave was refused. Lamac then appealed to the Full Court of the WA Supreme Court against the first-instance decision, assuming that an appeal was a right.

DECISION IN LAMAC

A five-judge bench of the Full Court overturned its previous decision in *Aintree* and held that an appeal lies from the refusal of leave to appeal an arbitral award on a question of law. It was also held that an appeal is not a right; leave to appeal is required.

None of this helped Lamac. It was refused leave to appeal against the first-instance decision, and the arbitral award remained in place.

REASONING BEHIND DECISION IN LAMAC

In *Aintree*, the Full Court held unanimously that an appeal does not lie from a first-instance decision refusing leave to appeal against an arbitral award. The court had noted that the Western Australian *Commercial Arbitration Act 1985* (the CAA(WA)) does not expressly provide for such an appeal.

Further, Justice Rowland noted in *Aintree* that section 38(6) CAA(WA) then provided that where an award is varied on appeal, the award as varied shall have effect as if it were the award of the arbitrator.[3] He also noted that section 28 provided that, subject to the CAA(WA), an award is final and binding on the parties to the arbitration agreement. Reading these two provisions in conjunction with each other, Justice Rowland considered that any further right of appeal was rejected.[4]. The Full Court in *Lamac* did not agree with this reasoning.[5]

In *Aintree*, Justice Steytler (with whom Justice Wallwork agreed) also disagreed with Justice Rowland's reasoning, but concluded that the decision of a single judge of the Supreme Court on the question of leave to appeal against an award was intended to be final.[6] He expressed the view that an appeal from the decision would be:

'a thoroughly undesirable (and unintended) addition to legal remedies in the context of an Act [the CAA] which ... is designed to provide speedy, informal and comparatively inexpensive relief to litigants and which ... is designed to minimise interference by the Supreme Court.[7]

In *Lamac* Acting Justice Mathews noted that jurisdiction to review the decision of a single judge had been assumed to exist—albeit without argument on the matter—in New South Wales[8] and South Australia.[9]

Furthermore, since *Aintree* had been decided, the same point had come under scrutiny by the Full Court of the Supreme Court of South Australia and the Court of Appeal of Victoria. Both of those Courts had decided that an appeal does lie from a refusal of leave to appeal against an arbitral award.

The judgments of the WA Full Court highlighted the desirability of national uniformity in this area of the law, given that the CAA(WA) is part of a national legislative scheme involving all the states and territories of Australia. Acting Justice Mathews noted that WA was out of step with other jurisdictions and that this alone would provide

sufficient ground for overruling *Aintree.*

However, the Full Court also held, unanimously, that *Aintree* had been decided incorrectly.

It was noted that section 38 CAA(WA) does not expressly prevent an appeal from a decision refusing leave to appeal against an arbitral award, and the Court held that such an appeal therefore existed in accordance with the WA *Supreme Court Act* and Rules.

It was also noted that there is no doubt that an appeal lies to the appellate court from a first-instance decision on the appeal from the award (as opposed to the question of leave to appeal). That is, if the first-instance judge decides to grant leave to appeal and then proceeds to determine the appeal, there is plainly an appeal against that determination. The Full Court held that there is no reason to draw a distinction between a decision refusing or granting leave from an award, and a decision on the appeal itself.

COMMENT

As a result of *Lamac,* it is now generally accepted that there is a right to appeal a decision refusing leave to appeal against an arbitral award in all Australian jurisdictions. It is no doubt positive that an inconsistency in what is intended to be a uniform national scheme for commercial arbitration has been resolved.

But not everyone will be happy with this result. The decision will have the effect of allowing more, rather than less, intervention in arbitration by the courts, adding to the risk of arbitrations becoming longer and more expensive than they already are. Many would argue that this is contrary to the spirit and intention of arbitration, and would agree with the comments of Justice Steytler in *Aintree* cited above.

Certainly in international arbitration, such involvement by the courts is frowned upon and generally rare. It is more common in domestic arbitration, but is just as unpopular among arbitration commentators and practitioners (and ultimately, among most users of arbitration).

In any event, *Lamac* does not mean that all differences between the states and territories with respect to appeals against awards under the CAAs have been ironed out. There are many differences between the procedures applicable in the various Supreme Courts across Australia. For example, those wishing to appeal against an award face different time-limits for bringing the leave application according to the jurisdiction.[10]

Furthermore, the question of whether an appeal lies from a court's decision to grant (as opposed to refuse) leave to appeal an award, may still be decided differently across the Australian jurisdictions. While the Tasmanian CAA specifically couches the appeal from the decision of a single judge as encompassing both its grant and refusal,[11] the other CAAs are completely silent on the issue. Recently, in *Angela Kinnane v Zee Homes Pty Ltd,*[12] the Full Court of the South Australian Supreme Court heard an appeal by leave against a decision granting leave to appeal from a decision of an arbitrator. Justice Debelle considered that 'although a party to an award may appeal against an order refusing leave to appeal, different issues arise when leave to appeal has been granted'. As neither party raised any objection, it was unnecessary to fully examine the matter.

Some will be interested to see whether the courts adopt a uniform approach to these further issues in the absence of legislative intervention, given the legislative variations in each jurisdiction.

Others might find it more interesting if the appellate procedure under the CAAs was removed altogether and the position in domestic arbitrations in Australia was aligned with that in international arbitrations in Australia under the UNCITRAL Model Law, which provides no right of appeal against an arbitral award and far less scope for intervention (some would say interference) by the courts in the arbitral process, generally.

REFERENCES

1. [2002] WASCA 245.

2. (1996) 16 WAR 416.

3. This provision is now found in s 38(7) CAA(WA).

4. (1996) 16 WAR 416 at 419.

5. [2002] WASCA 245 at para 22 per Malcolm CJ.

6. Ibid at 426.

7. Ibid at 425–26.

8. *Promenade Investments Pty Ltd v New South Wales* (1992) 26 NSWLR 203.

9. *Leighton Contractors Pty Ltd v South Australian Superannuation Fund Investment Trust* (1995) 12 BCL 38.

10. For example, in New South Wales it is 28 days (see Supreme Court Rules 1970 (NSW) Part 72A rule 5(3)) whereas in WA it is 21 days (see Rules of the Supreme Court 1971 (WA) Order 81D rule 5(2)(a)) from either the date the parties are notified of the award or the date reasons are delivered.

11. s 38(8) CAA(Tas).

12. [2003] SASC 187.

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