

# THE HIGH COURT RULES ON APPEALS FROM ARBITRAL AWARDS AND EXTENT OF ACCOMPANYING REASONS: *WESTPORT INSURANCE CORP V GORDIAN RUNOFF LTD* [2011] HCA 37

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Maritime contractual disputes often contain arbitration clauses whereby parties agree for disputes to be resolved by an arbitrator or a panel of arbitrators. In his Dethridge Memorial Address to the Maritime Law Association of Australia and New Zealand Conference in October 2010, Christopher Lau SC noted that parties are increasingly electing to resolve disputes by arbitration in the Asia-Pacific region.<sup>1</sup> He points, among others, to the 2010 opening in Sydney of the International Dispute Resolution Centre, which houses the Australian Maritime and Transport Arbitration Commission (AMTAC), and the relatively nascent *International Arbitration Amendment Act 2010* (Cth) as reflective of this growth.<sup>2</sup>

Commercial arbitration in Australia, including maritime and transport arbitration, is subject to the state-based uniform Commercial Arbitration Acts and the federal *International Arbitration Act 1974* (Cth), as amended by the *International Arbitration Amendment Act 2010* (Cth). The legislation seeks to achieve an effective balance between the utility of arbitration and party autonomy on the one hand, and justice through judicial reviewability on the other.<sup>3</sup> As Professor Martin Davies reiterated in his 2009 address to AMTAC, '[f]inding the right balance between autonomy and reviewability is an important but difficult task for a country that seeks to establish itself as being hospitable to arbitration.'<sup>4</sup>

The decision of the High Court of Australia on 5 October 2011 in *Westport Insurance Corporation v Gordian Runoff Ltd* ('*Westport*')<sup>5</sup> thus provides critical insight into the delineation between arbitral autonomy and judicial intervention in Australia. It clarifies the 'manifest error' ground of appeal from arbitral decisions, and resolves the apparent inconsistency existing between state courts' views on the extent of reasoning required of arbitrators under the Commercial Arbitration Acts.

## Facts

Directors of FAI Insurances Ltd bought Directors' and Officers' Liability (D&O) cover in 1998. It protected them from possible claims arising out of their conduct in the takeover of FAI by HIH Winterthur International Holdings Ltd. Gordian underwrote part of the policy, which afforded the FAI directors protection for claims made and notified to insurers within the next seven years. At all material times, Gordian was reinsured. The reinsurance treaty at issue partially covered Gordian for liability arising out of any underlying D&O policies that were not longer than three years in duration. Gordian failed to inform reinsurers about the FAI policy.

In 2001, FAI directors notified Gordian of likely claims under the D&O policy. Gordian informed their reinsurers, who refused to pay. For reinsurers, the reason was simple. The treaty covered underlying policies that were not longer than three years. The FAI policy's term was seven years. This excluded it from the scope of the reinsurance treaty. Gordian claimed that by virtue of s 18B of the *Insurance Act 1902* (NSW) ('*Insurance Act*'), the FAI claim was covered since it was made and notified within a three-year period.

The reinsurers and cedant commenced arbitration in 2004. The arbitration was subject to the *Commercial Arbitration Act 1984* (NSW) ('*CAA*'). Arbitrators agreed that the FAI policy was not subject to the reinsurance treaty. However, they applied s 18B of the *Insurance Act* and found that the statutory provision placed the FAI policy within the scope of reinsurance.

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<sup>1</sup> Christopher Lau, 'Opportunities in multiparty maritime arbitration' (2011) 25 *A&NZ Maritime Law Journal* 108, 108.

<sup>2</sup> *Ibid.*

<sup>3</sup> Vicki Donnenberg, 'Judicial review of arbitration awards under the Commercial Arbitration Acts' (2008) 30 *Australian Bar Review* 177, 177-8.

<sup>4</sup> Martin Davies, 'More lawyers but less law: Maritime arbitration in the 21<sup>st</sup> century' (2010) 24 *A&NZ Maritime Law Journal* 13, 13.

<sup>5</sup> [2011] HCA 37 ('*Westport*').

## The Appeals

Reinsurers appealed. At first instance,<sup>6</sup> Einstein J allowed the appeal and overturned the arbitrators' decision. His Honour identified the arbitrators' finding that s 18B of the *Insurance Act* rendered reinsurers liable to indemnify Gordian for the FAI claim as a 'primary error of law'. Section s 18B goes to exclusions or limitations and the primary judge found that the scope of cover in the reinsurance treaty extending to claims made and notified within three years was not such an exclusion or limitation. Therefore, reinsurers were successful in getting the award set aside.

Gordian appealed to the Court of Appeal.<sup>7</sup> The Court of Appeal set aside the primary judge's orders as it found no manifest error of law on the face of the award,<sup>8</sup> or strong evidence of such error,<sup>9</sup> that necessitated leave to appeal. It also rejected the Victorian Court of Appeal's approach to sufficiency of reasons of an award in *Oil Basins Ltd v BHP Billiton Ltd*<sup>10</sup> which reinsurers contended set the extent of reasons at a judicial standard.<sup>11</sup>

The reinsurers appealed to the High Court. They obtained leave to appeal the adequacy of the reasons the arbitrators gave for their award. In grounds 5 and 6 of their Notice of Appeal, they also sought leave to appeal the arbitrators' construction of the treaty in light of s 18B of the *Insurance Act*.

## High Court decision

There were three judgments delivered. French CJ, Gummow, Crennan and Bell JJ delivered a joint judgment allowing the appeal.<sup>12</sup> For convenience, I will refer to this as the 'majority decision'. Kiefel J delivered another decision allowing the appeal.<sup>13</sup> Heydon J was the lone dissenter and did not allow the appeal.<sup>14</sup> His Honour did not grant special leave to appeal grounds 5 and 6 either.

### *Insurance Act s 18*

Crucial to the decisions of the arbitrators and the courts was the construction of s 18B of the *Insurance Act*. As a matter of fact, the arbitrators had accepted that the reinsurance treaty did not cover the FAI policy.<sup>15</sup> However, Gordian claimed that the reinsurance was subject to s 18B of the *Insurance Act*. Under s 18B, an exclusion or limitation clause in a contract for insurance, which is based on the existence of particular circumstances, cannot be relied upon by the insurer to refuse to indemnify the insured if the loss is not caused by those circumstances.

Section 18B was inspired by s 138 of the *Consumer Credit Act 1983* (NSW) and was designed, where reasonable, to prevent insurers from relying on exclusion or limitation clauses in situations where the loss against which indemnity is sought is not caused by the occurrence of the events or circumstances to which the exclusion or limitation clauses are directed.<sup>16</sup> Although reinsurance contracts are now expressly excluded from the operation of s 18B,<sup>17</sup> at the material time, there was authority to support the view that reinsurance was included in its scope.<sup>18</sup>

The arbitrators accepted that reinsurance treaties were subject to the *Insurance Act*, and that the scope of the treaty in question constituted a limitation such as to attract s 18B. On this basis, they found that because the claims were made and notified to Gordian during the three-year period from the inception of the policy, and that duration of the

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<sup>6</sup> *Westport Insurance Corporation v Gordian Runoff Ltd* [2009] NSWSC 245 ('Primary decision').

<sup>7</sup> *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57 (Spigelman CJ, Allsop P and Macfarlan JA) ('Court of Appeal decision').

<sup>8</sup> *Ibid* [116].

<sup>9</sup> *Ibid* [172].

<sup>10</sup> [2007] VSCA 255.

<sup>11</sup> Court of Appeal decision, [199]-[207].

<sup>12</sup> *Westport*, [1]-[72].

<sup>13</sup> *Ibid* [113]-[171].

<sup>14</sup> *Ibid* [73]-[112].

<sup>15</sup> *Ibid* [7].

<sup>16</sup> *Ibid* [129] (Kiefel J) referring to the NSW Law Reform Commission, *Community Law Reform Program: First Report – Insurance Contracts: Non-Disclosure and Misrepresentation*, Report No 34 (1983) 31 and 53.

<sup>17</sup> *Insurance Regulations 2009* (NSW) cl 4(b).

<sup>18</sup> *Westport*, [131].

underlying policy was not causative of the loss against which indemnity was sought, the FAI fell within the scope of the reinsurance cover.<sup>19</sup> This instigated Allsop P of the NSW Court of Appeal to query whether s 18B:

... can operate to extend beyond its effect on so-called exclusion and limitation clauses leaving the so-called true scope of cover to operate and to have an effect on clauses that truly reflect the so-called scope of cover, thereby extending the intended substantive reach of the policy.<sup>20</sup>

Kiefel J shared this sentiment. Her Honour noted that the arbitrators' construction of the treaty was such that it 'extend[ed] the risk which the reinsurers assumed.'<sup>21</sup>

The majority judges agreed with reinsurers that the treaty did not trigger the application of s 18B from the outset.<sup>22</sup> This was because the statutory provision goes towards limitations or exclusions, which are distinct from the actual scope of cover provided for in the contract.

In any case, in the Court of Appeal, Allsop P (with whom Spigelman CJ and Macfarlan JA agreed) concluded that arbitrators may have erred in their reasoning regarding the cause of the loss for the purposes of s 18B. However, he opined that such an error was not a question of law, or if it was, it was not of the character to attract the operation of the appeal provisions in s 38 of the CAA.<sup>23</sup>

Kiefel J, endorsing the approach of her majority colleagues, disagreed with this conclusion. She said that the application of s 18B concerned construction of its provisions together with the reinsurance treaty. This:

concerned questions of law, regardless of whether the sub-section involved an inquiry as to the circumstance giving rise to a limitation or exclusion upon the indemnity under the treaty and the connection of the circumstance to the indemnity for loss.<sup>24</sup>

With respect to the law governing the grounds of appeal from an arbitration award, and the extent of reasoning required by the statute of arbitrators, Her Honour agreed with her colleagues who delivered the majority decision.

### *Appeal on error of law*

A court generally has no jurisdiction to intervene to set aside an arbitral award.<sup>25</sup> However, with consent of the parties or with leave of the court, s 38(4) allows for an appeal to the Supreme Court on a question of law arising out of an award. An exclusion agreement within the contract may prevent either party from applying for leave to appeal.<sup>26</sup> The legislation is designed to prevent curial incursions into questions of fact as decided by arbitrators.<sup>27</sup> It is also aimed at maintaining a balance between competing interests of relative informality, finality and confidentiality of arbitral proceedings on the one hand, and the development and certainty of commercial law on the other.<sup>28</sup>

Section 38(5) prescribes the criteria which must be satisfied before leave can be granted. It states:

The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that:

- (a) having regard to all 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
- (b) there is:

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<sup>19</sup> Ibid [14]-[15].

<sup>20</sup> Court of Appeal decision, [160].

<sup>21</sup> *Westport*, [160].

<sup>22</sup> Ibid [62].

<sup>23</sup> Court of Appeal decision, [182].

<sup>24</sup> *Westport*, [162].

<sup>25</sup> *Commercial Arbitration Act 1984* (NSW) s 38(1) ('CAA').

<sup>26</sup> CAA s 40.

<sup>27</sup> *Westport*, [27].

<sup>28</sup> Ibid [31]-[33]. In *Pioneer Shipping Ltd v BTP Tioxide Ltd* ('*The Nema*') [1982] AC 724, Lord Diplock pointed out that although the two sets of interests are divergent, they are mutually interdependent: at 741.

- (i) a manifest error of law on the face of the award, or
- (ii) strong evidence that the arbitrator or umpire 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.

Upon the satisfaction of the criteria, the courts retain a discretion to grant or withhold leave according to the circumstances of the case at hand.<sup>29</sup>

French CJ, Gummow, Crennan and Bell JJ describe the provision ‘manifest error of law on the face of the award’ under s 38(5)(b)(i) as requiring ‘the existence of error be manifest on the face of the award, including the reasons given by the arbitrator, in the sense of apparent to that understanding to the reader of the award.’<sup>30</sup> In doing so, they reject the interpretation of the same provision by the NSW Court of Appeal in *Natoli v Walker*.<sup>31</sup>

They interpreted the *Natoli* construction of ‘manifest error’ as restricting the circumstances out of which a manifest error arises to situations where there is an ‘egregious error apparent on the face of the award.’<sup>32</sup> In the majority *Westport* decision, the judges opined that the *Natoli* interpretation would exclude questions relating to interpretation of complex law such as s 18B of the Insurance Act.<sup>33</sup> This would also defeat the purpose of judicial intervention in commercial arbitration as identified by Lord Diplock in *The Nema*,<sup>34</sup> and endorsed by the High Court in *Westport*: the development and certainty of commercial law.

In the matter in question, the Court of Appeal followed *Natoli* and consequently held that a possible error in the construction of s 18B did not constitute a manifest error of law for the purposes of s 38(5) CAA.<sup>35</sup> Following the High Court’s rejection of *Natoli*, the Court of Appeal’s decision in this regard was overturned.

The majority judges went further and stated that an error concerning the construction of s 18B would touch upon both limbs of s 38(5)(b) and support a claim of ‘strong evidence’ of error of law as the correct construction of s 18B would ‘add substantially to the certainty of commercial law.’<sup>36</sup> The majority judges held that such error would have to be evident on the face of the award, including the reasons.<sup>37</sup>

Heydon J appears to favour a more restrictive approach. In his dissenting judgment, His Honour distinguished between an appeal against an award, and a complaint against the reasoning employed to arrive at the award. According to Heydon J, the CAA only entertains the former, and keeping with the restriction of curial intervention in arbitration, does not allow for ‘complaints’ against the reasoning which led to the award.<sup>38</sup> He admitted that appeals against the award itself may raise questions about the reasoning which led to the award, but was clear in maintaining the difference between the award – i.e. the order made by arbitrators – and the accompanying reasons.<sup>39</sup>

### *Extent of reasoning*

The appellant reinsurers were granted leave to appeal on the adequacy of the arbitrators’ reasons for their award.<sup>40</sup> Section 29(1) of the CAA requires arbitrators to:

- (a) make the award in writing,
- (b) sign the award, and
- (c) include in the award a statement of the reasons for making the award.

The issue in question centered on the required comprehensiveness of the reasons in s 29(1)(c). In the Court of Appeal, reinsurers relied upon the arbitrators’ alleged lack of adequate reasons as an error of law for the purposes of

<sup>29</sup> *Westport*, [29] following *Qantas Airways Ltd v Joseland & Gilling* (1986) NSWLR 327, 333 (McHugh, Glass and Priestley JJA).

<sup>30</sup> *Ibid* [42]. Kiefel J agreed at [163].

<sup>31</sup> (1994) 217 ALR 201.

<sup>32</sup> *Westport*, [45].

<sup>33</sup> *Ibid* [45].

<sup>34</sup> *Pioneer Shipping Ltd v BTP Tioxide Ltd ('The Nema')* [1982] AC 724, 741; *Westport*, [33].

<sup>35</sup> *Westport*, [46]. Court of Appeal decision, [116].

<sup>36</sup> *Westport*, [48].

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* [77].

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid* [143].

s 38(5). In doing so, they relied upon the Victorian Court of Appeal decision in *Oil Basins Ltd v BHP Billiton Ltd*.<sup>41</sup> In *Oil Basins*, the Victorian Court of Appeal addressed the question of the standard of reasoning required of arbitrators under the Victorian equivalent of s 29(1)(c). It decided that arbitrators are 'under a duty to give reasons of a standard which was equivalent to the reasons to be expected from a judge deciding a commercial case.'<sup>42</sup>

The Court of Appeal rejected this proposition as it found no basis for it in the legislative history of s 29(1) of the CAA or in international authorities on the equivalent of s 29(1) in art 31(2) of the UNCITRAL Model Law. In doing so, the court rejected the outcome in *Oil Basins* as authority in Australia on the issue.<sup>43</sup>

The High Court agreed with the Court of Appeal. It effectively held that the reinsurers' claimed principle in *Oil Basins* was actually the *application* of the general principle. It lamented that references such as 'judicial standard' 'placed an unfortunate gloss' on the terms of s 29(1)(c).<sup>44</sup> The general principle was:

.. what is required to satisfy [the provision on reasons] will depend upon the nature of the dispute and the particular circumstances of the case.<sup>45</sup>

Because the matter in *Oil Basins* was a complex one, it necessitated a comprehensive set of reasons.<sup>46</sup> The High Court decided to accept that the correct principle was the one enunciated by Donaldson LJ in *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Ll Rep 130, 132-3:<sup>47</sup>

All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a 'reasoned award'.

The majority judges agreed with the reinsurers in their application of the relevant law. They characterised s 18B as a complex statutory provision that required comprehensive reasons for its application in the matter in question. This is further supported by the fact that the week-long arbitration itself was highly complex.<sup>48</sup>

Further, the reinsurance treaty itself had allowed the arbitrators, in conjunction with s 22(2) of the CAA, to determine the dispute 'by reference to considerations of general justice and fairness.'<sup>49</sup> The majority judges opined that despite mentioning that they were satisfied that their final decision had so complied, the arbitrators had not adequately explained how they arrived at this conclusion.<sup>50</sup>

## Dissenting judgment

In dissent, Heydon J departed from his colleagues and focused on the construction of the treaty in question. According to Heydon J, the construction of the treaty was a question of law 'in the ... sense that the interpretation of a written agreement between private parties is a question of law.'<sup>51</sup> His Honour opined that the arbitrators had erred in law by applying a subjective instead of objective test to determine the intention of the parties. He also stated that the arbitrators were wrong to have utilised post-contractual events to aid the interpretation of the reinsurance treaty.<sup>52</sup>

Reinsurers had contended that the parties had agreed, pursuant to s 22(2) of the CAA for arbitrators to 'determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.'<sup>53</sup> As a result, they submitted that the arbitrators were not required to

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<sup>41</sup> [2007] VSCA 255.

<sup>42</sup> *Ibid* [27].

<sup>43</sup> Court of Appeal decision, [199]-[122].

<sup>44</sup> *Westport*, [53].

<sup>45</sup> *Westport*, [53].

<sup>46</sup> *Ibid* [53].

<sup>47</sup> *Ibid* [54], [169]-[170].

<sup>48</sup> *Ibid* [5].

<sup>49</sup> *Ibid* [16].

<sup>50</sup> *Ibid* [55]-[56].

<sup>51</sup> *Ibid* [82].

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid* [84], [16].

follow the strict legal rules of contractual interpretation.<sup>54</sup> Heydon J examined the authorities offered by reinsurers for this dual proposition and found that there was no basis for agreeing with them.<sup>55</sup>

His Honour then went on to examine the formation and wording of the treaty in question.<sup>56</sup> He disagreed with the arbitrators and concluded that the reinsurance treaties covered the FAI policy, and thus questions concerning s 18B were moot.<sup>57</sup> As a result, he disallowed the appeal.<sup>58</sup>

Interestingly, despite the acceptance by the majority judges that questions of fact already determined by arbitrators would generally not be tampered with by the courts,<sup>59</sup> this is exactly what Heydon J appears to have done in arriving at his conclusion.

## Comment

*Westport* clarifies the extent of reasoning expected of arbitrators. The integrity of the arbitral process will be compromised if inadequate reasons support awards made, particularly in more complex matters such as the present one. Complexity may exist either in the factual background of the matter – as was the case in *Oil Basins* – or in the relevant law – as *Westport* demonstrates. The High Court’s decision relieves arbitrators of an unnecessary burden which may adversely affect the efficacy of arbitration and the speed of final resolution. This appears in line with accepted academic opinion on the matter.<sup>60</sup>

However, the court’s decision on the scope of appeal from arbitral awards is controversial.

On one view, by following *Natoli*, the Court of Appeal decision strengthened notions of finality in arbitration by limiting the scope of judicial intervention into arbitral awards. Section 38 denies courts the previously held<sup>61</sup> inherent jurisdiction to set aside or remit an award on grounds of error of law or fact. Further, section 38(5) of the Commercial Arbitration Acts was progressively amended through the 90s to restrict the ability of courts to re-visit arbitral awards.<sup>62</sup> This narrowing of judicial power was based upon an underlying policy objective to hold parties to the finality of arbitral awards.<sup>63</sup> In *Natoli*, Kirby P recognised the legislative intent behind the provision and reiterated that s 38(5) of the CAA was designed to limit judicial involvement and to promote the finality of arbitration awards.<sup>64</sup> Commercially, this important factor contributes to the decision of parties to arbitrate in Australia.<sup>65</sup>

On another view, by closing the door on appeals on complex points of law, the decision was arguably detrimental to the development and certainty of commercial law. With *Westport*, the High Court has expanded the *Natoli* test for manifest error and gone beyond just ‘egregious’ errors on the face of the award. The majority decision specifically noted that an arbitration award goes beyond the mere exercise of a private contract between parties and it consequently rests upon a statutory framework. The judges pointed out that:

... it is going too far to conclude that performance of an 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.<sup>66</sup>

The High Court has certainly pulled private arbitration away from party autonomy, and towards the public realm where judicial intervention looms large in rendering uncertain arbitral awards. One of the attractions of arbitration is

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<sup>54</sup> *Ibid* [83].

<sup>55</sup> *Ibid* [91].

<sup>56</sup> *Ibid* [92]-[106].

<sup>57</sup> *Ibid* [110].

<sup>58</sup> *Ibid* [112].

<sup>59</sup> *Ibid* [27].

<sup>60</sup> Donnenberg, above n 3, 186; Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 2453-4.

<sup>61</sup> See for example, *Westport*, [31]-[33].

<sup>62</sup> Donnenberg, above n 3, 181.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Natoli v Walker* (1994) 217 ALR 201, 213.

<sup>65</sup> Richard Garnett, ‘International commercial arbitration in Australia: Legal framework and problems’ (2008) 19 *Australasian Dispute Resolution Journal* 249, 253.

<sup>66</sup> *Westport*, [20].

speed and efficacy of dispute resolution. As Heydon J wryly noted, the matter in question began in arbitration in 2004 and after succumbing to the labyrinthine processes and delays inherent in appellate proceedings, it was only resolved some seven years later.<sup>67</sup> As *Westport* shows, with the involvement of the courts in the process, sometimes arbitration is rendered less cost-effective and expeditious than if parties had sought to resolve their dispute at the outset in court.

However, the ‘exercise of public authority’ should be seen in context. There is ‘a legislative concern that the jurisdiction of the courts to develop commercial law not be restricted by the complete insulation of private commercial arbitration.’<sup>68</sup> This contributes to the comprehensiveness and certainty of commercial law as a whole. Section 38(5)(b)(ii) recognises the importance of this objective. In turn, as Lord Diplock highlighted, this makes the commercial law ‘a favoured choice as the ‘proper law’ of contracts ... and ... arbitration as the favoured curial law for the resolution of disputes arising under them.’<sup>69</sup> As a result, a ‘dispute resolution mechanism without any recourse to the judicial system whatsoever would be unlikely to attract large commercial disputants.’<sup>70</sup>

Hence, the argument is that the development and certainty of the commercial law within which commercial arbitration takes place is concomitantly critical to the confidence of parties seeking to resolve disputes by arbitration as is the finality and insularity of the arbitral process. Writing extra-judicially, Justice Rares explains that this contention is supported by the view that courts have ‘an important role to play which is complementary to arbitration’ because they ‘systemise and explain the legal principles applicable in particular, as well as frequently occurring, situations faced by those involved in commerce’.<sup>71</sup> In this light, the decision of the High Court appears sensible.

The federal *International Arbitration Act 1974* (Cth) applies to international arbitration.<sup>72</sup> The Commonwealth Attorney-General, as amicus curiae, had made submissions relating to the provisions of the federal act concerning reasons for awards. However, the court did not deal with them in any significant manner. Thus, the decision does not shed light on the relationship between the state Commercial Arbitration Acts and the federal act. Nor does it directly affect the interpretation of provisions of the latter act.

The CAA has now been replaced by the new *Commercial Arbitration Act 2010* (NSW). Similarly, other states have either passed or are in the process of passing legislation to replace the old Commercial Arbitration Acts with new legislation that significantly draws from the UNCITRAL Model Law.<sup>73</sup> Section 34A(3) of the new *Commercial Arbitration Act 2010* (NSW) now states:

The Court must not grant leave unless it is satisfied:

- (a) that the determination of the question will substantially affect the rights of one or more of the parties, and
- (b) that the question is one which the arbitral tribunal was asked to determine, and
- (c) that, on the basis of the findings of fact in the award:
  - (i) the decision of the tribunal on the question is obviously wrong, or
  - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

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<sup>67</sup> Ibid [111].

<sup>68</sup> Ibid [19].

<sup>69</sup> *Pioneer Shipping Ltd v BTP Tioxide Ltd* (‘*The Nema*’) [1982] AC 724, 741. Quoted in *Westport*, [33].

<sup>70</sup> Victoria Bell, ‘Judicial Review Awards Under the Commercial Arbitrations Act’ (2008) 123 *Australian Construction Law Newsletter* 6, 8.

<sup>71</sup> Steven Rares, ‘Australia’s Sea Change: Towards Developing a Comprehensive System of Admiralty and Maritime Dispute Resolution for Twenty-First Century Trade in the Asia-Pacific Region’ (2008) 30(3) *Australian Bar Review* 242, 249.

<sup>72</sup> *International Arbitration Act 1974* (Cth) s 2D.

<sup>73</sup> See for example Federal Attorney-General, Robert McClelland and New South Wales Attorney-General, John Hatzistergos ‘Agreement on New Model Commercial Arbitration Bill’ (Joint Media Release, 7 May 2010)

<[http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2010\\_SecondQuarter\\_7May2010-AgreementonNewModelCommercialArbitrationBill](http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_7May2010-AgreementonNewModelCommercialArbitrationBill)>.

Tasmania, South Australia and the Northern Territory have passed new legislation. Western Australia and Victoria are still in the process of doing so.

It remains to be seen if the approach taken by the High Court in *Westport* in relation to ‘manifest error’ would be the same when determining an error which is ‘obviously wrong’. This latter provision certainly appears to be closer to the *Natoli* formulation of error, but in *Westport*, the majority judges stated that there is either an error, or there is no error. There is ‘no twilight zone between the two possibilities.’<sup>74</sup> It would certainly be interesting to see if the new legislation acts to restrict judicial intervention and reverse the forward steps taken in *Westport* towards developing comprehensive and consistent commercial law.

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<sup>74</sup> *Westport*, [42].