

SUFFICIENCY OF REASONS IN ARBITRATION AWARDS

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Introduction

The advantages of arbitration are well known. The parties to arbitration are entitled to expect their dispute to be resolved quickly, cheaply and privately. They want an ‘answer’ (preferably final) from the arbitrator/s. The existence of efficient, reliable and enforceable dispute resolution mechanisms is fundamental to the development and promotion of international and domestic trade.

Arbitration has long been an alternative to domestic court-based litigation. Indeed, arbitration may be preferable to litigation so far as it concerns international commercial disputes, given the *New York Convention*¹ facilitates the international enforcement of arbitration awards above judgments in many jurisdictions. But there is a conflict at the heart of arbitration; to what extent should the parties be free to make their own arbitration ‘bargain’, even if it is a bad one, and to what extent should domestic courts have a supervisory jurisdiction? At the extreme of the former lies the risk of inconsistent and capricious decision making; of the latter the prospect of protracted and costly procedures and layers of appeals.

Australian policy makers appear to favour the former, ‘laissez faire’, position; at a policy level it makes sense to encourage commercial parties to resolve disputes on a true ‘user pays’ basis, outside the taxpayer-subsidised court systems, according to a mechanism of their own design (or at least mutually adopted). Commercial Darwinism will weed-out incompetent arbitrators. Courts then have a significant role in enforcing that policy by holding parties to their bargain.

Some courts however have trouble ‘letting go’, and focus on the natural justice and fairness consideration that ‘those charged with making a binding decision affecting the rights and obligation of others should explain the reasons for making that decision’² with little if any distinction between the function of judges and arbitrators. Another policy consideration favouring intervention is the question of whether the jurisdiction of the courts to develop commercial law should be restricted by the ‘complete insulation’ of commercial arbitration.

In circumstances therefore where the parties to a commercial agreement have expressly chosen to take disputes away from the jurisdiction of national courts, when should those same national courts have supervisory jurisdiction over the conduct of the arbitration? An essential product of the arbitration is the award itself. But what is required of an award and specifically how detailed need the reasons be? This question is central to the arbitration process, directly affecting qualifications required of the arbitrator; the time and costs associated with the arbitration, and possibly even the enforceability of the award itself.

This paper will consider recent judgments which have considered the adequacy of reasons disclosed in arbitration awards, and what impact they might have on the conduct of commercial arbitration, both domestic and international.

The Legislation

The Australian legislative regime applying to arbitration is changing. For Constitutional reasons, international arbitration has long been regulated at the Federal level, while domestic arbitration has been the domain of the States.

While both domestic and international arbitration is now largely based on the *UNCITRAL Model Law on International Commercial Arbitration 2006* (see for example the *Commercial Arbitration Act 2010* (NSW), and the *International Arbitration Act 1974* (Cth)) prior to 2010 domestic arbitration in particular

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¹ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 24 June 1975).

² *Oil Basins Ltd v BHP Billiton Ltd & Ors* [2007] VSCA 255, 51 (‘Oil Basins’).

was modelled on a scheme similar to the UK's 1979 and 1996 *Arbitration Acts* (see the *Commercial Arbitration Act 1984* (NSW) for example). Extracts from the relevant legislation are annexed.

The Litigation

The Australian High Court has recently given judgment in *Westport Insurance Corporation v Gordian Runoff Ltd*.³ In that case, the High Court heard an appeal against a judgment of the New South Wales Court of Appeal, which itself was hearing an appeal from a first instance judgment of Justice Einstein in the Commercial Division of the NSW Supreme Court, who was himself hearing an application for leave to appeal and an appeal from a panel of arbitrators.⁴ The arbitration at the heart of the matter concerned a reinsurance dispute.

The panel consisted of specialist arbitrators, selected for their expertise in insurance. The dispute itself concerned the construction of a provision in the *Insurance Act 1902* (NSW). The arbitration was governed by the *Commercial Arbitration Act 1984* (NSW), 'CAA', which is now repealed.⁵

The Dispute

It is necessary to say something of the nature of the underlying dispute. Gordian was an insurer. It wrote PI and D&O policies for another insurer, FAI. Those policies covered claims made within seven years. Gordian had reinsurance with a syndicate of reinsurers, lead by Westport. The relevant reinsurance treaty was limited to claims made within three years (though there was a construction argument about whether the reinsurance treaty was so limited).

Claims were made under the FAI policy, all but one of which were made within three years. Gordian's claims under the reinsurance treaty were rejected on the basis that the treaty reinsurance only applied to three year policies, not seven year policies such as Gordian had written. Gordian replied that s 18B of the *Insurance Act 1902* (NSW) applied to extend (for want of a better word) cover.

That section of the Act provided:

18B Limitation on exclusion clauses

- (1) *Where by or under the provisions of a contract of insurance entered into, reinstated or renewed after the commencement of this section:*
 - (a) *the circumstances in which the insurer is bound to indemnify the insured are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of particular events or on the existence of particular circumstances, and*
 - (b) *the liability of the insurer has been so defined because the happening of those events or the existence of those circumstances was in the view of the insurer likely to increase the risk of loss occurring, the insured shall not be disentitled to be indemnified by the insurer by reason only of those provisions of the contract of insurance if, on the balance of probability, the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of those events or the existence of those circumstances, **unless in all the circumstances it is not reasonable for the insurer to be bound to indemnify the insured.***
- (2) *The onus of proving for the purposes of subsection (1) that, on the balance of probability, loss in respect of which an insured seeks to be indemnified was not caused or contributed to by the happening of particular events or the existence of particular circumstances is on the insured.*(Emphasis added).

It is also relevant that the reinsurance treaty specifically incorporated reference to s 22 of the CAA.

That section of the Act provided:

³ *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37.

⁴ The arbitration hearing took place between 14 July - 22 July 2008; the award was published on 10 October 2008; the judgment of the High Court was handed down on 5 October 2011.

22 Determination to be made according to law or as amiable compositeur or ex aequo et bono (See UNCITRAL Arbitration Rules Article 33, paragraph 2)

- (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.
- (2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.

The arbitrators allowed Gordian's claims, holding that s 18B applied.

There is probably little doubt that the arbitrators erred in law in reaching that conclusion. There is also probably little doubt that the arbitrators' published reasoning (to put it neutrally) was deficient in a number of respects, not least because they failed to address Westport's submission in relation to the proviso in s 18B (Westport had submitted that s 18B would not apply because it was not reasonable for the insurer to be bound to indemnify the insured).

Westport applied to the Supreme Court of NSW for leave to appeal the award. Under the provisions of the CAA, an appellant must first seek leave to appeal. If leave is granted, then the court will deal with the appeal, usually at a separate hearing. It was a matter of controversy in this matter that the court dealt with the leave application and appeal simultaneously and both granted leave, and allowed the appeal, dismissing Gordian's claim in the arbitration.

Gordian appealed to the Court of Appeal.

The Court of Appeal was faced with three main issues:

1. The appellant procedure, namely whether the Court should have dealt with the leave application and appeal simultaneously.
2. The substance of the appeal itself, as a matter of construction of the *Insurance Act 1902*.
3. Whether as a further ground for challenging the award, the arbitrators failed to give sufficient reasons.

It is the third ground on which this paper will focus.

Sufficiency of Reasons

It is a requirement of s 29 of the CAA that the arbitrators make an award 'in writing' and 'include in the award a statement of the reasons for making the award.'⁶ The policy behind this is that it is a generally accepted ground for an appeal that there is a 'manifest error of law on the face of the record.' Courts must accordingly be able to examine the award and reasons to establish whether such a manifest error exists. The frustration of this process by a failure to provide adequate reasons amounts to a manifest error.

Prior to the decision of the NSW Court of Appeal, the most recent significant decision had been the judgment of the Victorian Court of Appeal in *Oil Basins*. That case had concerned a panel of three senior lawyers (including two retired judges) dealing with the meaning of 'overriding royalty' in a commercial agreement. The losing party appealed to the Supreme Court who allowed the appeal. There was then a further appeal to the Court of Appeal, who dismissed the appeal.

The Court of Appeal agreed that 'the present case called for reasons of a judicial standard', and 'the extent to which an arbitrator needs to go into explaining his or her decision depends on the nature of the

⁶ This obligation may be compared with Art 31(2) of the *UNCITRAL Model Law on International Commercial Arbitration* which requires that an award 'shall state the reasons upon which it is based.'

decision.’⁷ For example, ‘where there is a conflict [of evidence] of a significant nature, to provide reasons for choosing one side over the other.’⁸

In fact the Court of Appeal relied in large part on earlier decisions dealing with the adequacy of reasons given by judges, and said:

And in point of principle, there is not a great deal of difference between that idea and the imperative that those who make binding decisions affecting the rights and obligations of others should explain their reasons. Each derives from the fundamental conception of fairness that a party should not be bound by a determination without being apprised of the basis on which it was made. So in arbitration, the requirement is that parties not be left in doubt as to the basis on which an award has been given. To that extent, the scope of an arbitrator's obligation to give reasons is logically the same as that of a judge.⁹

The Court of Appeal did however go on to carve-out a proviso in relation to ‘trade’, or ‘look-sniff’ arbitrations where the:

arbitrator has been chosen for his or her expertise in the trade or calling with which the dispute is concerned in which case a court might well not expect anything more than rudimentary identification of the issues, evidence and reasoning from the evidence to the facts and the facts to the conclusion.¹⁰

That would only apply, however, if the ‘dispute turns on a single short issue of fact.’¹¹

Gordian - The Court of Appeal

The judgment of the NSW Court of Appeal was delivered by Allsop P, with whom Spigelman CJ and Macfarlan JA agreed. The Court allowed the appeal and restored the award, also dismissing the reinsurers application for leave to appeal, and in reaching that conclusion had to consider the judgment of the Victorian Court of Appeal in *Oil Basins*. To that end, the NSW Court of Appeal was bound to follow *Oil Basins*, unless it reached the view that that decision was plainly or clearly wrong.¹²

The appellant's submission to the Court of Appeal focused on the assertion by the Victorian Court that an arbitrator's reasons must be to a judicial standard. Allsop P questioned whether this was in fact the basis for the decision by the Victorian Court and focused instead on the more subtle question of whether an evaluative conclusion was itself sufficient, or whether a statement of reasons for reaching that conclusion was required.

To attempt to give a practical example, is it sufficient for an arbitrator to say:

Having considered the evidence and submissions made by both parties in relation to the requirement for notice of acceptance of a repudiatory act as a basis for termination of contract, I find that I agree with the Claimant and that appropriate notice was given in this case.

Or does the arbitrator need to state the reasons for preferring one party's submissions on law and evidence? Put slightly differently, does the arbitrator need to state his or her reasoning, or are reasons enough?¹³ Or put slightly differently again, does the arbitrator need to give both his or her reasons for reaching a decision, plus his or her reasons for not reaching a different conclusion?

In deciding that an evaluative conclusion was sufficient, the Court of Appeal looked carefully at the policy considerations¹⁴ behind the encouragement of arbitration generally and the need for reasons in particular, and came to the clear conclusion that reasons (or reasoning) of a judicial standard are not required.

⁷ *Oil Basins Ltd v BHP Billiton Ltd & Ors* [2007] VSCA 255, 54.

⁸ *Ibid* 55.

⁹ *Ibid* 56.

¹⁰ *Ibid* 57.

¹¹ *Ibid* 57.

¹² *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57, 201.

¹³ *Ibid* 210.

¹⁴ *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57, 207. Specifically ‘the compromise embodied in the Model law and against the background of international commercial arbitration.’

In the judgment of the NSW Court of Appeal:

Though courts and arbitration panels both resolve disputes, they represent fundamentally different mechanisms for doing so. The court is an arm of the state; its judgment is an act of state authority, subject generally in a common law context to the right of appeal available to parties. The arbitration award is the result of a private consensual mechanism intended to be shorn of the costs, complexities and technicalities often cited (rightly or wrongly, it matters not) as the indicia and disadvantages of curial decision making.

That some difficult and complex arbitrations tend to mimic the procedures and complexities of court litigation may be a feature of some modern arbitration, but that can be seen perhaps more as a failing of procedure and approach rather than as reflecting any essential character of the arbitral process that would assist in the conclusion (erroneous in principle) that arbitrations should be equated with court process and so arbitrators should be held to the standard of reasons of judges.¹⁵

In summary, the NSW Court of Appeal found that under both the NSW CAA, as well as the *Model Law*, an award required:

a statement of factual findings and legal or other reasons which led the arbitrators to conclude as they did. These provisions do not in terms require the arbitrators to resolve the other issues or deal with other matters not necessary to explain why they have come to the view that they have. What is required in a particular case may be a question open to debate.¹⁶

As mentioned in *Oil Basins*, formal or detailed reasons have not always been a requirement in arbitration, particularly in trade or ‘look-sniff’ arbitrations which often came down to a ‘judgment call’ by the arbitrator (who had presumably been selected precisely for his or her ability to make sound judgment calls). To that extent, arbitration was intended to be (as the word suggests) arbitrary, or summary, presumably to minimise both the cost of the process and disruption to normal business.

While both the CAA and the *Model Law* require that an arbitrator give reasons, there is a distinction to be drawn between the two. Under the CAA, any right of appeal was predicated on the existence of a ‘manifest error of law’, such that the absence of adequate reasons from which such an assessment could be drawn was itself an error of law. It should be noted however that under the CAA the parties could agree to exclude that statutory right of appeal.

The *Model Law* contains no right of appeal, as such, but does grant rights of ‘recourse’, including a right of recourse where the award ‘is in conflict with the public policy of this State.’¹⁷ Does the giving of adequate reasons form part of the public policy of the New South Wales (whether in the guise of natural justice, or otherwise)?

The High Court

Three judgments were delivered by the High Court. The majority (French CJ, Gummow, Crennan and Bell JJ) allowed the appeal. Keifel J published a separate judgment also allowing the appeal, and Heydon J dismissed the appeal, but for reasons not directly concerning the provisions of the *Commercial Arbitration Act 1984* (NSW) or *Model Law*.¹⁸

At least in so far as the ‘prior’ legislation was concerned, the High Court has resolutely affirmed the continuing role of the courts in the supervision of commercial arbitration.¹⁹ The High Court also considered that any suggestion that arbitration was an exercise of freedom of contract went ‘too far’.²⁰ The High Court was also concerned to preserve the jurisdiction of the Court to develop commercial law, a jurisdiction affirmed by the terms of the CAA, and inconsistent with the ‘complete insulation’ of commercial arbitration.²¹

¹⁵ Ibid 216-217.

¹⁶ Ibid 218.

¹⁷ *UNCITRAL Model Law on International Commercial Arbitration*, article 34(2)(b)(i).

¹⁸ *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37, 111. His Honour did have something to say about arbitration generally in this source.

¹⁹ Ibid 19.

²⁰ Ibid 20.

²¹ Ibid 19.

Sufficiency of Reasons in Arbitration Awards

While some may have hoped that the High Court would give some guidance as to how these concerns may also play-out under the *Model Law*, the High Court chose (with respect, correctly) to firmly separate consideration of s 19 of the *CAA* from the *Model Law*. Curiously this was one area where both the Victorian and NSW Courts of Appeal seemed to agree.

The Commonwealth Solicitor-General had appeared as *amicus curae* before the High Court to explain that:

Article 31(2) of the Model Law requires that an award 'shall state the reasons upon which it is based.' However, the Solicitor-General submitted that this appears in a context where Art 5 provides that 'no court shall intervene except where so provided by this Law', and there is no provision for appeal on a question of law. An award may be set aside only under Art 34 and relevantly only on the ground of a breach of the rules of natural justice. The Solicitor-General contended that here these rules require no more than a statement of reasons to demonstrate whether the arbitrators have addressed the dispute referred for determination. *Whether this is the proper construction of the federal Act and the Model Law may be left for determination on another occasion* (emphasis added).²²

In considering the issue of the sufficiency of reasons, the Majority traced the development of the law. Key to their decision in relation to the adequacy of reasons appeared not to be the general public policy on decision makers, but the power of the Court to review errors of law in awards, with the commensurate obligation to provide a sufficient statement of reasons to allow such a review to take place.²³

The Majority also focused on the policy of the legislature disclosed by s 38(5)(b)(ii), namely:

not to leave entirely to the operation of the arbitration agreement questions of law the determination of which may be likely to add to the certainty of commercial law. In an age when much commercial activity is regulated by statute, such questions are likely to be matters of statutory interpretation. It would be incongruous to favour judicial determination merely of egregious error apparent on the face of the award.²⁴

To this end, the Majority approved the following passage from the judgment of Lord Diplock in *The Nema*:

[T]his, in the case of a dispute that parties have agreed to submit to arbitration, involves deciding between the rival merits of assured finality on the one hand and upon the other the resolution of doubts as to the accuracy of the legal reasoning followed by the arbitrator in the course of arriving at his award, having regard in that assessment to the nature and circumstances of the particular dispute.²⁵

Of *Oil Basins*, the Majority observed that the reference to reasons of a 'judicial standard' placed an 'unfortunate gloss'²⁶ on the operation of s 29(1)(c) of the *CAA*, but otherwise approved the observations of the Victorian Court of Appeal 'to the effect that what is required to satisfy that provision will generally depend upon the nature of the dispute and particular circumstances of the case.'²⁷

The Majority went on to hold that;

1. the reasons given by the arbitrators were inadequate;
2. the arbitrators erred in law in their application of section 18B of the *Insurance Act 1902*; and
3. the appeal should be allowed and that the orders of the primary judge dismissing Gordian's case in arbitration should be restored.

Conclusions

The High Court observed that both parties to the proceeding, as well as Allsop P agreed with statement of Donaldson LJ in *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)*²⁸ that:

²² Ibid 23.

²³ Ibid 36.

²⁴ Ibid 45.

²⁵ *Pioneer Shipping v BTP Tioxide* [1982] AC 724, 739 ('*The Nema*').

²⁶ *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37, 53.

²⁷ Ibid 53.

²⁸ *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130.

Sufficiency of Reasons in Arbitration Awards

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 what is meant by a reasoned award [in s 1(6) of the 1979 UK Act].²⁹

The Majority did not however say whether they approved of this construction.³⁰

To the extent that the Victorian Court of Appeal appeared to elide the formalistic requirements of curial judgments with arbitration awards, that arbitrators reasons be of a judicial standard, that is wrong. However, that does not mean that reasoning of a judicial standard will never be appropriate. Precisely when it will be appropriate will be a matter for conjecture; for example, is an arbitrator required to address and answer all of the submissions made?

While the decision of the High Court addresses the issues arising under the CAA, it has expressly carved out considerations of the *Model Law*. Given the emphasis of the majority on the policy disclosed under the CAA for judicial intervention and supervision, a scope which is arguably less obvious under the *Model Law*, it is no means certain that similar reasoning should apply to future considerations of adequacy of reasoning under the *Model Law*.

Finally, it needs to be borne in mind that both *Oil Basins* and *Gordian* were slightly unusual cases. In *Oil Basins*, an obvious course for the Court would have been to remit the award to the Tribunal for the provision of a further award. The Court was unable to take that course however as one of the arbitrators had died. In *Gordian*, the High Court's conclusions on sufficiency of reasons were probably obiter dicta, given that ultimately the remedy given by the Court was the setting aside of the original award, not due to inadequacy of reasons, but due to obvious error of law.

Practical Implications

- The decision does not clarify the uncertainty surrounding the extent to which arbitrators are to provide reasons for their award.
- Arbitrators will need to provide reasons, probably detailed reasons for complex matters. The requirement for reasons in more complicated matters is beneficial as it assists in avoiding the denial of natural justice and enhances confidence in the arbitration process, albeit creating potential delays in preparing the award.
- It is unlikely that arbitrators will have to provide 'adequate reasons' for relatively straightforward matters such as trade arbitrations. As stated in *Oil Basins* and as referred to in *Gordian* by the High Court:

If a dispute turns on a single short issue of fact, and it is apparent that the arbitrator has been chosen for his or her expertise in the trade or calling with which the dispute is concerned, a court might well not expect anything more than rudimentary identification of the issues, evidence and reasoning from the evidence to the facts and from the facts to the conclusion.³¹

- The unlikelihood of being required to provide detailed reasons for straightforward matters fosters the speedy resolution of disputes- one of the hallmarks of arbitration.
- The fact that there is no mention of a specific criteria to apply to determine when more detailed reasons would be required might confuse arbitrators. Therefore arbitrators and parties should agree on the detail of reasoning required at the beginning of the arbitration process.
- The case only applies to domestic arbitral awards. It is yet to be seen if it applies to international arbitral awards. Note: *Commercial Arbitration Act 2010* (NSW) only applies to domestic commercial arbitrations (s 1) i.e. one where, for instance, the *Model Law* does not apply (s 1c).
- The case does not apply to the *UNCITRAL Model Law on International Commercial Arbitration* (2006) and the new uniform *State Commercial Arbitration Acts*.

²⁹ Ibid 132-133.

³⁰ Cf *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38, 26 (French CJ, Crennan and Kiefel JJ).

³¹ *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37, 53.

- The case related to the old Act - *Commercial Arbitration Act 1984* (NSW). Under that Act, a party could appeal on the grounds that the decision of the arbitrators on a question of law is a 'manifest error' and in light of *Gordian*, manifest error could include inadequate reasons for an award. Under the new Act, *Commercial Arbitration Act 2010* (NSW) rights of appeal are significantly curtailed. Reference to manifest error has been replaced by 'obviously wrong'. We have yet to see if the courts perceive them as having the same meaning. However if they are deemed to have the same meaning, then inadequate reasons can be used as a basis of appealing under ss 34A of the new Act. Therefore, for parties that are concerned about the lack of finality in their arbitration or the possibility of an unsuccessful party appealing, the concerned party might consider the following:
 - o Try to reach agreement with the other parties at the beginning of arbitration that the arbitral tribunal is not required to provide any reasons. This will reduce the possibility of controversy about the extent of reasons later on;
 - o Try to reach an agreement with the other parties at the beginning of the arbitration or before the end of the appeal period i.e. within 3 months after receiving the award that there will be no appeal. This will enhance finality of the arbitration. Parties should bear in mind that under the new Act, appeals on a question of law must be consensual (s 34A(1)(a));
 - o If the other parties are not willing to agree to the arbitrator not having to provide reasons, then within 30 days following the receipt of the award, the concerned party may request an interpretation of a specific point/part of the award or seek an additional award as to claims presented in the arbitral proceedings but omitted from the award (s 33). This will clarify certain, possibly contentious, points and discourage the losing party from appealing;
 - o Even if an aggrieved party were to make application for setting aside under Art 34, the Court would most likely remit the award to the Tribunal for further consideration under Art 34(4).

Appendix

Commercial Arbitration Act 1984 (NSW)

[Now repealed.]

29 Form of award

- (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator or umpire shall:
 - (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.
- (2) Where an arbitrator or umpire makes an award otherwise than in writing, the arbitrator or umpire shall, upon request by a party within 7 days after the making of the award, give to the party a statement in writing signed by the arbitrator or umpire of the date, the terms of the award and the reasons for making the award.

38 Judicial review of awards

- (1) Without prejudice to the right of appeal conferred by subsection (2), the Court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.
- (2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.
- (3) On the determination of an appeal under subsection (2) the Supreme Court may by order:
 - (a) confirm, vary or set aside the award, or
 - (b) remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration, and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make the award within 3 months after the date of the order.
- (4) An appeal under subsection (2) may be brought by any of the parties to an arbitration agreement:
 - (a) with the consent of all the other parties to the arbitration agreement, or
 - (b) subject to section 40, with the leave of the Supreme Court.
- (5) 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:
 - (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.
- (6) The Supreme Court may make any leave which it grants under subsection (4) (b) subject to the applicant complying with any conditions it considers appropriate.
- (7) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.

Commercial Arbitration Act 2010 (NSW)

(cf International Arbitration Act 1974 (Cth))

31 Form and contents of award

(cf Model Law Art 31)

- (1) The award must be made in writing and must be signed by the arbitrator or arbitrators.
- (2) In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal suffices, provided that the reason for any omitted signature is stated.
- (3) The award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 30.
- (4) The award must state its date and the place of arbitration as determined in accordance with section 20.

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- (5) The award is taken to have been made at the place stated in the award in accordance with subsection (4).
- (6) After the award is made, a copy signed by the arbitrators in accordance with subsection (1) must be delivered to each party.

33 Correction and interpretation of award; additional award

(cf Model Law Art 33)

- (1) Within 30 days of receipt of the award, unless another period of time has been agreed on by the parties:
 - (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature, and
 - (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
- (2) If the arbitral tribunal considers a request under subsection (1) to be justified, it must make the correction or give the interpretation within 30 days of receipt of the request.
- (3) The interpretation forms part of the award.
- (4) The arbitral tribunal may correct any error of the type referred to in subsection (1)(a) on its own initiative within 30 days of the date of the award.
- (5) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
- (6) If the arbitral tribunal considers the request to be justified, it must make the additional award within 60 days.
- (7) The arbitral tribunal may extend, if necessary, the period of time within which it may make a correction, interpretation or an additional award under subsection (2) or (5).
- (8) Section 31 applies to a correction or interpretation of the award or to an additional award.

34 Application for setting aside as exclusive recourse against arbitral award

(cf Model Law Art 34)

- (1) Recourse to the Court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3) or by an appeal under section 34A.
Note. The Model Law does not provide for appeals as under section 34A.
- (2) An arbitral award may be set aside by the Court only if:
 - (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in section 7 was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of this State, or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitral tribunal or of the arbitral proceedings or was otherwise unable to present the party's case, or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside, or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act, or
 - (b) the Court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State, or
 - (ii) the award is in conflict with the public policy of this State.
- (3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal.

Sufficiency of Reasons in Arbitration Awards

- (4) The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside of proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

34A Appeals against awards

- (1) An appeal lies to the Court on a question of law arising out of an award if:
- (a) the parties agree, before the end of the appeal period referred to in subsection (6), that an appeal may be made under this section, and
 - (b) the Court grants leave.
- (2) An appeal under this section may be brought by any of the parties to an arbitration agreement.
- (3) 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.
- (4) An application for leave to appeal must identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
- (5) The Court is to determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required.
- (6) An appeal may not be made under this section after 3 months have elapsed from the date on which the party making the appeal received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal (in this section referred to as the "appeal period").
- (7) On the determination of an appeal under this section the Court may by order:
- (a) confirm the award, or
 - (b) vary the award, or
 - (c) remit the award, together with the Court's opinion on the question of law which was the subject of the appeal, to the arbitrator for reconsideration or, where a new arbitrator has been appointed, to that arbitrator for consideration, or
 - (d) set aside the award in whole or in part.
- (8) The Court must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.
- (9) Where the award is remitted under subsection (7) (c) the arbitrator must, unless the order otherwise directs, make the award within 3 months after the date of the order.
- (10) The Court may make any leave which it grants under subsection (3) (c) subject to the applicant complying with any conditions it considers appropriate.
- (11) Where the award of an arbitrator is varied on an appeal under this section, the award as varied has effect (except for the purposes of this section) as if it were the award of the arbitrator.

Note: There is no equivalent to this section in the *Model Law*.