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WHEN EVEN FRAUD IS NOT NEARLY ENOUGH

RECOURSE AGAINST ARBITRAL AWARDS AND PUBLIC POLICY CONSIDERATIONS: AN ANGLO-AUSTRALIAN PERSPECTIVE

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The new regime for domestic commercial arbitration reflects how far Australia has come in creating a substantively distinct jurisdiction for commercial dispute resolution as an alternative to the courts. An avowed desire to avoid the replication of processes through the courts motivated the authors of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).[1] Their aim was to restrict drastically the scope for curial intervention in order to achieve speedy, cost-effective, fair and final resolution of disputes. The Model Law has now been adopted into Australian state law for domestic commercial arbitrations,[2] following its earlier reception into Australian federal law for international arbitration.[3] It is a moot point whether this makes Australia a more attractive jurisdiction for those contemplating arbitration. Perhaps the point to be made is that the new legislation should make domestic arbitration in Australia more time and cost effective than before.

1. Statutory ethos: England and Wales versus Australia

The English[4] and Australian legislatures have each taken different approaches to drafting their legislation to allow recourse against awards. The objectives of both regimes are generally the same, but their methods of reaching those objectives are significantly different. While England and Wales take a restrictive approach, which reflects the special public policy considerations underpinning the English legislation, the Australian approach is a more general reflection of the Model Law, as adopted into the Australian legislation: the uniform Commercial Arbitration Acts (State Acts) and the International Arbitration Act 1974 (Cth) (IAA 1974), respectively. The differences between these textual approaches are significant, but as regards the practical implementation of those provisions, the distinctions are perhaps not all that great. In England and Wales, only the most exceptionally serious of cases will be set aside, even where serious procedural irregularities occur.

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By contrast, in Australia, following the literal text of the legislation, any breach of natural justice in connection with the making of an award may arguably be contrary to or in conflict with Australian public policy, triggering the possibility of recourse, including setting aside.[5]

Severe restriction of curial intervention has been a fundamental element of English arbitration for a long time. By enacting the Arbitration Act 1996 (the English Arbitration Act), the UK parliament adopted the Model Law, but went much further, by severely restricting the possibility of setting aside in particular. The English courts have interpreted rights of recourse against an award under the English Arbitration Act, as confining setting aside to only the most egregious and reprehensible of cases. The House of Lords explained the radical nature of the 1996 changes to English arbitration law in *Lesotho Highlands Development Authority v Impregilo SpA*, by reference to the pre-existing law.[6] Lord Steyn explained that the major purpose of the changes was *"to reduce drastically the extent of intervention of courts in the arbitral process"*.[7]

On the face of it, that strongly articulated expression of curial exclusion (save for the worst cases, where there is no practical alternative) contributes to the UK being a desirable seat for arbitration. This is borne out by indications from the business community, demanding speed and finality, with cost effectiveness as the additional bonus.[8]

The enactment of arbitration legislation in Australia and the UK was the culmination of the historical evolution of the common law. The High Court of Australia recently observed that historically both Australia and England have approached relationships between (i) the parties and (ii) the parties and the arbitrators in terms of private law.[9]

On the face of it, that strongly articulated expression of curial exclusion (save for the worst cases, where there is no practical alternative) contributes to the UK being a desirable seat for arbitration. This is borne out by indications from the business community, demanding speed and finality–with cost effectiveness as the additional bonus.

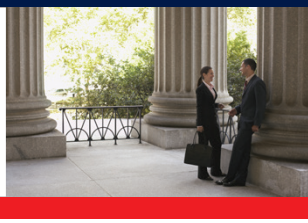
Notably, in view of the public policy considerations explicit in the current arbitration regime, the High Court of Australia has relevantly observed that performance of the arbitral function is not purely a private matter of contract, in which the parties have given up their rights to engage judicial power; nor is it *"wholly divorced from the exercise of public authority"*.[10] It was the Court's view that the development of commercial law should not be restricted by *"the complete insulation of private commercial arbitration"*.[11] The High Court's conclusion from its analysis of the interaction between the statutory regimes relevant to commercial arbitration, was that they involved the exercise of public authority, whether by the arbitral tribunal or by the court.[12]

Perhaps counter intuitively, the narrower scope for the English courts to intervene may be one of the attractions for companies that choose that seat for their arbitrations,[13] in preference to jurisdictions like Australia, arguably perceived to be more liberal or untested than the UK. Australia has not yet had a case testing the extent of curial intervention to set aside an award under the State Acts. One must turn to the ordinary principles of statutory construction laid down by the High Court of Australia, as well as precedents in the international arbitration context.

There are no explicit insights into the ethos of the State Acts to explain restricted curial intervention and the public policy which the legislation is meant to reflect, other than general considerations arising from the Model Law (and international arbitration), embodied in the new legislation as "paramount objectives". Although there is a relationship between the Model Law and the English Arbitration Act, the expression of purpose and policy from the UNCITRAL draftsmen seems a far cry from the explicit comments made by the sponsors of the English Arbitration Act in the House of Lords.

The question, at least in Australia, is identifying where, on the spectrum of gravity of public policy breaches, one would find the justification for setting aside an award altogether, in contrast to mere remittal to the arbitrators. What is the test for remittal rather than setting aside? An important statutory trigger for such recourse is the public policy ground. How this trigger operates in England and Wales is clear. When this trigger will operate is an academic consideration, because it is such an exceptional remedy. Its likely operation in Australia (on the domestic front) will be an interesting comparative (and meanwhile, speculative) exercise, until the first decision is handed down. Any decision will have profound relevance to Australia's perception of itself as an attractive jurisdiction for domestic arbitral dispute resolution.





2. England and Wales

An expression of public policy

The notion that a judgment can always be set aside if impugned by fraud[14] is not the norm in commercial arbitration, unlike in litigation in general. The recent English decision in *Chantiers de l'Atlantique*,[15] where the arbitration was tainted by fraud, illustrates this point. The English High Court held that even though the critical expert evidence (given at the arbitration hearing) was fraudulent, the award should not be set aside. In coming to this decision, the Court's view was that the result would probably not have been any different even if truthful evidence had been given.

This result will by no means have startled those familiar with English commercial arbitration law. It was merely one of the latest in a consistent line of English authority, articulating how recourse against awards is to be achieved. There is a mandatory statutory regime, with strict recourse provisions. The key to *Chantiers de l'Atlantique* is an understanding of the English Arbitration Act, the underlying public policy considerations, as well as the law governing the arbitration in question.

The decision is of interest in Australia, since it coincides (more or less) with the introduction of the new Model Law based State Acts. The common Model Law provenance of the English and Australian legislation provides limited guidance on how the State Acts are likely to be interpreted and applied in Australia. The English Arbitration Act goes much further than any Australian legislation by explicitly radically restricting curial intervention

Like the Commonwealth, with respect to international arbitration, Australian States and Territories have adopted the Model Law for domestic arbitration. The relevant provisions allow the setting aside of an award on the application of an aggrieved party on a generally expressed public policy ground. It differs markedly from the language of the English Arbitration Act which codifies a list of particularised grounds, including the rolled-up fraud and public policy ground.

These two approaches to statutory drafting do not of themselves reveal a great deal about differing approaches to their interpretation in England and Australia. The key to the English approach is the public policy considerations on which the English Arbitration Act is explicitly based and their implementation by the courts.

A feature of the English case law is the explicit reflection of the policy considerations at the heart of the statutory remedy. This invites the questions whether those considerations are relevant in Australian domestic arbitration law and how the new State Acts will be interpreted by the relevant Australian courts. That will involve an analysis of the English and Australian legislation, the Model Law and any explanatory material, as well as relevant case law. Accordingly, *Chantiers de l'Atlantique* merits further scrutiny.

Chantiers de l'Atlantique v Gaztransport: a summary

This was an application under the English Arbitration Act to set aside an arbitration award on the grounds that it was obtained by fraud on the part of the respondent, Gaztransport (GTT). The arbitration was held in Paris in the French language pursuant to the Procedural Rules of the International Commercial Court (ICC), which are essentially akin to the procedure in civil law jurisdictions including France, as regards matters such as disclosure. The arbitrators were French (albeit the President of the Tribunal was Belgian), and the parties and their lawyers were French. The agreement between the parties out of which the arbitration had arisen was subject to French law.

Despite that, the application to set aside was made to the High Court of Justice of England and Wales because the underlying agreement stipulated that the place of arbitration was to be London. It followed that the High Court was the supervisory court to which the application to set aside had to be made.

The claimant in the arbitration (and the applicant in the application to set aside) was a major French shipbuilding company that specialised in building Liquefied Natural Gas (LNG) carriers designed to carry LNG held at extreme sub-zero temperatures (CAT). GTT was a company specialising in the design of containment systems technology for LNG carriers and land-based LNG storage systems. It was jointly owned by significant corporations, namely, Gaz De France, Total and Saipem.

The core of the dispute was whether there was poor workmanship in the shipyard in the adhesive bonding of the secondary insulation barrier of the containment. Subsequent tests of the LNG vessels suggested that there was indeed a serious fault which needed to be rectified before the vessels could enter service. It was agreed that GTT would carry out a test programme in a laboratory. This was done. Unfortunately, the results of the tests were totally unsatisfactory, causing a reaction of some consternation within GTT. Yet GTT did not tell CAT about these results, which were deliberately concealed–as was the consternation for that matter.

CAT made an application under the English Arbitration Act s.68(2)(g) for the award to be set aside on the grounds that it was obtained by fraud on the part of the respondent.[16] The court articulated the issue before it in the subsequent application to set aside the arbitral award for fraud as follows:

"[W]hat matters ultimately is whether the allegations now relied upon … establish to the requisite standard that the Award was obtained by fraud".

This is a reference to the many allegations in the arbitration and the application to set aside. These involved criticisms not only of GTT's design, but also of GTT's failure to disclose the test results in question.

At the arbitration hearing in Paris, GTT called a witness who produced an expert's report disclosing certain test results, but not the results which caused the consternation. CAT's case, in the application to set aside, was that the witness intentionally concealed from the tribunal the existence of the tests and the test results, and made a number of deliberately misleading statements to the tribunal.

In the result the tribunal dismissed CAT's claims on various grounds, the most relevant of which was that CAT could not establish the necessary criterion as a matter of French law of "gross fault".

A few weeks after the award was published, CAT received a tip-off from a whistle-blower who was a disaffected employee of GTT. He suggested that CAT should look at the various test results and that CAT had been the victim of fraud. Subsequently, an anonymous whistle-blower provided CAT with a document in a plain brown envelope. It was the internal GTT email referring to the test results indicating unacceptable adhesive failures.

Lessons from *Chantiers de l'Atlantique*

The judgment in *Chantiers de l'Atlantique* demonstrates the extremely restrictive approach of English courts to the setting aside of arbitral awards. Flaux J. enunciated the following four principles in relation to the English Arbitration Act s.68.[17]

1. An arbitral award will only be set aside for fraud in extreme cases as s.68 is "designed as a longstop only available in extreme cases".

2. Fraud is dishonest, reprehensible or unconscionable conduct and it must be distinctly pleaded and proved, to a heightened burden of proof.[18]

3. The award itself must have been obtained by fraud. This will be where

   "the party which has deliberately concealed the document has, as a consequence of that concealment, obtained an award in its favour. The Party relying on section 68 (2) (g) must therefore also prove a causative link".[19]

   This means that there has to be fraud in the arbitration itself.

4. The evidence of fraud must not be of such a kind *"as could have been obtained or produced at the arbitration hearing with reasonable diligence"* and the evidence must be *"so material that its production [at trial] would probably have affected the result"*. It is not necessary to show that it *would* have affected the result, as this would be to usurp the function of the arbitrators in the event that it were to be remitted to them.

   It is also useful to note that Flaux J. emphasised that the arbitration had been conducted under the IBA Rules on the Taking of Evidence in International Arbitration, under which there was no duty to disclose relevant documents (as might have been required under English Civil Procedure Rules Pt 31).

The English Arbitration Act and its ethos

The English Arbitration Act allows a party to arbitral proceedings to apply to court challenging an award on the ground of serious irregularity affecting the tribunal, the proceedings or the award.[20]

A serious irregularity means an irregularity which the court considers has caused or will cause substantial injustice to the applicant. The codified list of grounds of irregularity which may trigger an application includes:

"the Award being obtained by fraud or the way in which it was procured being contrary to public policy".[21]

Once there is shown to be serious irregularity on one or more of the grounds, the court may remit the award to the tribunal, set it aside in whole or in part, or declare it to be of no effect, in whole or in part.[22] The critical requirement is that an irregularity will only be "serious" if it causes or will cause a substantial injustice to the applicant. It follows that even where fraud is proved, the court must still be satisfied that a substantial injustice to the applicant will result. "Injustice to the applicant", in contrast to general injustice, contrary to the values of the justice system, represents the radical pragmatism characterising the English Arbitration Act.

A court may only set aside an award, or declare it to be of no effect, if it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.[23] The thrust of this provision is that setting aside is the solution only where the impugned conduct is of such a kind that there is nothing else left that would be an appropriate form of relief. The effect is to reserve setting aside for the exceptional cases, where it is inappropriate to leave it to the tribunal to rectify its own mistakes, or any flaws in the procedure adopted in the arbitration.



The codified list of possible irregularities is exhaustive, leaving no room for the courts to develop new grounds of serious irregularity in a manner that might lead to a general supervisory jurisdiction.[24]

Specifying fraud as well as other conduct contrary to public policy as a single ground suggests the same treatment for both types of conduct. The English courts have, however, observed that where a party has procured the award in a way which is contrary to public policy, but short of fraud, it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct has contributed in a substantial way to obtaining an award in that party's favour. But it is also said that a court should not be quick to interfere under this provision. It should only be used in extreme or serious cases.[25]

The difficulty is in understanding the nature of behaviour so serious, yet not warranting the ultimate remedy of setting aside. The best way of illustrating where the line has been drawn is by referring to actual examples.

In *Miller's Timber Trust v Plywood Factory Julius Potempa*, the plaintiff applied to have the awards set aside and the umpire removed.[26] The court was not persuaded that this was the correct remedy where the umpire had acted honestly and in good faith, despite making awards which contravened the prevailing legal requirements.

It was said that if the evidence had been that the umpire was disposed to favour one or other of the parties, the court would not have regarded remittal as the appropriate solution. These observations are obsolete in the context of post-1996 English arbitration law, where a specific approach to curial intervention is recognised and applied by the courts. They do, however, show that setting aside is reserved for only the worst and most exceptional cases, involving dishonesty and bad faith on the part of the tribunal.

Pacol Ltd v Joint Stock Co Rossakhar[27] is a more recent example of setting aside, having been decided under the 1996 Act. Colman J. described it as *"the paradigm of a case where the award ought to be set aside"*. The arbitrators made their award without giving the parties prior notice of their intention to reopen the question of liability. Remittal was held to be inappropriate because the arbitration would have to be re-opened and re-pleaded. What is more, it was held that it would be *"quite wrong to allow the arbitrators to build anything on the structure of the award"*, by granting a remittal.

Setting aside may be either an inappropriate or an appropriate remedy, depending on the circumstances. It is inappropriate where arbitrators make a genuine mistake, but appropriate where they make a serious and irrevocable error of justice, affecting the integrity of the entire arbitration.

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The House of Lords has spoken of *"the radical changes brought about by the Act"* to explain its "ethos".[28] In the parliamentary debate on the occasion of the reading of the Arbitration Bill in the House of Lords in 1996, the relationship between arbitration and court proceedings was put in these words:

"I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law … . That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude …

Other countries adopt a different attitude and so does the UNCITRAL model law. The difference …is … quite a substantial deterrent to people to sending arbitrations … [to England and Wales] …

…[The Arbitration Bill] … has given the court only those essential powers which I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors".[29]

There was no need for the drafters of the Arbitration Act to set out the circumstances in which setting aside would be appropriate because the case law already sufficiently set the parameters.

One of the fundamental purposes of the English Arbitration Act was to reduce drastically the extent of court intervention in the arbitral process.[30] The rationale for refusing to set aside awards in cases short of fraud has been expressed as precluding what

would otherwise become the granting of a remittal or setting aside in virtually every case.[31] This proposition was accepted in *Chantiers de l'Atlantique*.[32] Even where the aggrieved party relied upon fraud, it was still necessary to prove not only that the new evidence was unavailable at the time of the arbitration, but that it would have had an important influence on the result.[33] This criterion is critical because of the language in the English Arbitration Act.

The words "obtained by fraud" in the English Arbitration Act have been held to mean the fraud of a party to the arbitration—or to which the party was privy—not fraud committed by anyone connected with the arbitral process. It has been observed that:

"this fits in with the general ethos of the Act, which is to give the courts as little chance to interfere with arbitrations as possible … If this wording referred to the fraud of anyone else … involved in the arbitral process … that would give unsuccessful parties carte blanche to apply to court to set aside or remit an award".[34]

The intention is to exclude cases where a witness for one or other party perjures him or herself.[35]

The House of Lords has remarked that the original conception of s.68 was in these terms:

"[it] … is really designed as a long stop only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".[36]

This was in the context of an appeal to resolve the issue of whether the arbitrators had exceeded their powers by making an award in a currency other than that stipulated in the contract. Lord Steyn observed that s.68 was not designed to achieve the "right" decision, but, rather, a fair arbitral hearing, leading to an impartial arbitral adjudication.

The case law reflects the view that applications to set aside will, more often than not, be unsuccessful.[37] It follows that a setting aside order would only be available in cases involving such reprehensible behaviour that no other remedy is appropriate. This would probably include the case where a tribunal itself has committed fraud. It is more difficult to imagine an example where a procedural irregularity committed in good faith would warrant setting aside.

3. Australia

Public policy and Australian domestic commercial arbitration

The State Acts allow an arbitral award to be set aside if the court finds that *"the award is in conflict with the public policy of … [the State]"*.[38] The reference to public policy should be understood in the context of the paramount object of the legislation, which is:

"to facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense".[39]

The public interest in achieving the paramount objective is explicitly recognised. It must be achieved:

"by enabling the parties to agree about how their commercial disputes are to be resolved (subject to … such safeguards as are necessary in the public interest)".[40]

There is no explicit language distinguishing between fraud and other conduct contrary to public policy, nor does there need to be.[41] Both fraud and failure to apply the safeguards of natural justice are paradigm examples of conduct in conflict with or contrary to public policy and the public interest. They are both at the heart of the administration of justice. Specifically, the legislation promotes the observation of good faith in the resolution of arbitral disputes.[42]

The State Acts provide that they must be interpreted with regard to the need to promote the application of the provisions of the Model Law, having regard also to documents relating to UNCITRAL itself and its working groups for the Model Law.[43]

The International Arbitration Act defines public policy in the context of both the enforcement of foreign awards and recourse against awards.[44] With respect to the latter the IAA provides:

"for the avoidance of any doubt … for the purposes of … [the Model Law art.34(2)(b)(ii)] … an award is in conflict with or contrary to, the public policy of Australia if:

(a) the making of the … award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the … award".[45]

Identical language is used in relation to identifying when the enforcement of foreign awards would be contrary

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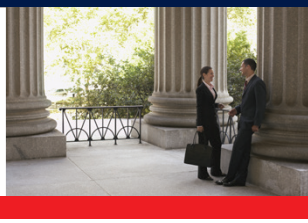

to public policy. It follows that "public policy" includes procedural as well as substantive questions.[46] On the face of it, any departure from the rules of natural justice in connection with the making of an award under the International Arbitration Act would offend fundamental notions of fairness and justice—in conflict with or contrary to public policy.[47]

This is also likely to be the interpretation under the State Acts, in the light of the common adoption of the Model Law at both state and federal levels. Unlike the IAA, the State Acts do not define the meaning of "public policy". They bundle up all impugned conduct generally, under the rubric of being in conflict with or contrary to public policy.

The language imported into the legislation from the Model Law contains guidance. The Model Law is said to contain an exhaustive list of the grounds on which an award can be set aside. *"Violation of public policy"*—one of the grounds for setting aside an award—is said *"to be understood as serious departures from fundamental notions of procedural justice"*.[48] The key adjective is "serious", indicating that the wide language of the State Act may encompass, but not be confined to, conduct of a *"most reprehensible"* or a *"most egregious"* kind. This suggests a range of impugned conduct, which must at least be serious.

Fraud is the obvious example of the most serious violation. But, importantly, it is also a serious departure from the principles of trust, honesty and integrity at the heart of the administration of justice. Fraud and corruption are the antithesis of the public interest. They are fundamentally in conflict with public policy objectives. It is no coincidence that the word "violation" is used in this context, to give adequate expression to the level of disapproval such reprehensible behaviour engenders. The language of the Explanatory Note to the Model Law, focusing on procedural rather than substantive justice, invites a question as to the degree of procedural irregularity contemplated. The answer must be "serious departures", including departures from principles of natural justice—like fraud, equally antithetical to procedural and to substantive justice.[49] This is consistent with the language of the English Arbitration Act, where the relevant ground for setting aside differentiates between conduct amounting to *"fraud or … contrary to public policy"*.[50]

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Restrictions on granting recourse against an award

In the rather Delphic language of the Model Law, the State Acts apply as follows:

"This Act does not affect any other Act by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Act".[51]

Stating the obvious, it follows that the State Acts do not apply to particular state laws which exclude submission to arbitration, or which allow submission under some other law. The logic is that the State Acts are an exclusive means of seeking relief, save where other laws exclude such relief altogether, or make specific provision for such relief.

The expression of exclusionary intent explicitly delimits the restricted extent of court intervention, namely:

"In matters governed by this Act, no court shall intervene except where so provided in this Act".[52]

Chapter VII of the Model Law (Recourse Against Award) makes it crystal clear that recourse to a court to set aside an award may only be made in conformity with the procedures and processes prescribed by the Law.[53]

To all intents and purposes, this is the last word on the exclusivity question.[54] Yet it has been suggested that this may amount to a denial of *"curial remedies in regard to excess of jurisdiction" which "may strike at the very heart of any such provision"*.[55] These remarks are now obsolete. They apparently stem from the line of authority regarding the operation of traditional privative clauses designed to protect decisions made under enactments applicable to jurisdictional error and judicial review.[56] They do not take into account the fundamental policy of pragmatism and flexibility at the heart of the legislation. The State Acts now allow much more flexibility in the choice of remedies, aiming to fix a problem, rather than provide retribution for the aggrieved party. The court may suspend the setting aside application to allow the arbitration to continue, or allow the arbitrators to take other steps to obviate setting aside the award.[57]

Seen in this light, two things become apparent. First, even where there is a complaint of fraud or of similarly seriously reprehensible conduct, the court has the flexibility to allow arbitrators to deal pragmatically with the source of the complaint. Secondly, the courts are expected and obliged

to grant pragmatic relief, consistent with the paramount object of the State Acts. Even where setting aside is deemed appropriate, the decision will be based on pragmatic grounds consistent with the objectives of the legislation.

Likely developments in Australia

Australia has not yet had a domestic arbitration case explaining how the judicial discretion to set aside a domestic arbitral award is, or is likely to be, applied. No Australian case explicitly confines the remedy of setting aside an award to only the most extreme cases. Fortunately, guidance is available from cases on the nearly identical regime for international arbitration.

A question for Australian lawyers remains: how to identify when setting aside is appropriate in a domestic arbitration. What is the trigger for setting aside instead of remittal? In England and Wales it is explicitly limited to the very worst of cases where the integrity of the administration of justice leaves no alternative. Is the position practically any different in Australia, despite the differences in the statutory language used?

In England and Wales, even where serious procedural irregularities have occurred, setting aside is not there for the asking. In Australia, the level of generality of the statutory language prompts the question of where the line should be drawn to justify setting aside. It has been observed that the ordinary grammatical meaning of the text is that any breach of natural justice in connection with the making of an award could justify setting aside.[58] Does this mean—by stating it so broadly—that even the most trivial breach would be actionable?

This issue has attracted some judicial commentary in Australia with respect to international arbitration. It is suggested that the setting aside power will be used only in the most serious cases despite the generality of the statutory language.[59] What is more, despite the differences between the language of the English and Australian legislation, the Australian courts will not deny the enforcement of an international award where an English court has previously refused to set aside that award.[60]

A question for Australian lawyers remains: how to identify when setting aside is appropriate in a domestic arbitration. What is the trigger for setting aside instead of remittal? In England and Wales it is explicitly limited to the very worst of cases where the integrity of the administration of justice leaves no alternative. Is the position practically any different in Australia, despite the differences in the statutory language used?

The Federal Court has questioned the view that less seriously impugned conduct may qualify for relief, as well as the reprehensible and unconscionable sort of conduct in the English Arbitration Act.[61] The first point is that a breach unlikely to affect the outcome of an arbitration should not result in the award being treated as being in conflict with public policy. Secondly, it is said that the inclusion of less serious breaches would be inconsistent with the paramount objective of the State Acts. The final point is that the inclusion of lesser breaches would be inconsistent with the pro-enforcement bias of the arbitration legislation.[62] All three of these points not only have considerable force in their own right, but they all seem entirely consistent with the aim of creating a seamless uniform arbitral system across jurisdictions.

4. A shared ethos?

In view of the expressed objectives of the Australian domestic arbitration regime and the public policy considerations on which it is based, it is unlikely that Australian courts would take a different approach to the English courts. There are, consistently with notions of comity and uniformity between jurisdictions, strong indications that Australian courts will find the English case law persuasive, in relation to both domestic and international arbitration.

Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd is a case in point.[63] In the aftermath of an English court refusing to set aside the award,[64] the litigation moved to Australia. Coeclerici successfully obtained judgment from the Federal Court of Australia for amounts owing, the appointment of receivers and ancillary relief. In the Australian proceeding Gujarat NRE's defence relied upon provisions of the IAA empowering a court to refuse the enforcement of a foreign award, if it would be contrary to public policy to do so, on the ground of a breach of natural justice.[65]

The Federal Court of Australia discussed in detail the reasons for the judgment delivered in the English proceedings.[66] Despite the English decision that their case was devoid



of merit, the respondents persisted in arguing that the alleged failure by the arbitrators to grant them natural justice entitled them to escape the consequences of enforcement of the award in Australia. But the Federal Court held that one of the relevant circumstances to be considered in the Australian proceedings was that the dispute was being dealt with by way of arbitration, in particular, under the English Act.[67] The Court held that not only had they received ample opportunity to be heard, but the English court had actually ruled against them on that very issue.[68] Extending that point, the Federal Court observed that *"it would generally be inappropriate for … [it] … to reach a different conclusion on the same question as that reached by the court of the seat of the arbitration"*.[69]

Gujarat NRE subsequently made an unsuccessful appeal to the Full Court of the Federal Court of Australia[70], confirming Australia as a pro-enforcement jurisdiction and demonstrating that the Australian courts will tend to give weight to decision of the court of seat of the arbitration.

5. Conclusions: where next?

The State Acts must be interpreted so as to promote uniformity between the application of the legislation to *domestic* commercial arbitrations and the application of the Model Law to *international* commercial arbitrations.[71] The court must not exercise its power to set aside an award unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal.[72] This is despite the plain words of the State Acts saying simply, without elaboration, that recourse is available whenever public policy is breached. The element of propriety was presumably added to give effect to the paramount objective of the State Acts.

It follows that remittal is the default position, setting aside being reserved only for inappropriate cases. These are the rare cases where remittal would be inadequate to redress breaches so serious as to bring the administration of justice into question, for example, securing an award by corrupt means.

It has been suggested that the discretion to set aside an award will only be exercised *"when fundamental notions of fairness or justice are offended"*.[73] This broad general approach is consistent with the meaning of the legislation.

It allows setting aside when appropriate, that is to say, where conduct seriously offends public policy. Equally, it finds pragmatic solutions short of setting aside in most cases, where radical surgery is not the solution.

The new arbitration regime is designed to keep intervention by the courts to a minimum, apparently even where egregious conduct occurs. The signs are that Australian courts are following this approach guided by universal public policy considerations inherent in the Model Law.

In the most serious cases, the court may set aside an award. However, this will take place only on the rarest of occasions. Instead, remittal is likely to become the default recourse in the majority of cases.

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The Federal Court of Australia discussed in detail the reasons for the judgment delivered in the English proceedings. Despite the English decision that their case was devoid of merit, the respondents persisted in arguing that the alleged failure by the arbitrators to grant them natural justice entitled them to escape the consequences of enforcement of the award in Australia.

Footnotes

1 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

2 The uniform Commercial Arbitration Acts (CAA) have come into force in all Australian States and Territories except for the Australian Capital Territory. The Acts are as follows: Commercial Arbitration Act 2012 (WA), Commercial Arbitration Act 2010 (NSW), Commercial Arbitration Act 2011 (Vic), Commercial Arbitration Act 2011 (SA), Commercial Arbitration Act 2011 (Tas), Commercial Arbitration Act 2013 (Qld).

3 The relevant act is the International Arbitration Act 1974 (Cth) which applies in all Australian States and Territories.

4 England and Wales constitute a single jurisdiction. Scotland and Northern Ireland are distinct jurisdictions. When we refer to England or the UK, this refers to the jurisdiction of England and Wales.

5 Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No.2) [2012] FCA 1214 at [19].

6 Lesotho Highlands Development Authority v Impregilio SpA [2005] 3 All E.R. 789; (2006) 1 AC 221 at [26] and [27]; [2005] 2 Lloyd's Reports 310; [2005] UKHL 43.

7 Lesotho Highlands Development Authority v Impregilo SpA [2005] 3 All E.R. 789 ;(2006) 1 AC 221 at [26]; [2005] 2 Lloyd's Reports 310; [2005] UKHL 43 .

8 Queen Mary, University of London and PWC, International Arbitration Survey 2013: Corporate Choices in International Arbitration: Industry Perspectives, available online at http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf [Accessed 28 January 2014].

9 TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia [2013] HCA 5 at [9].

10 Westport Insurance Corp v Gordian Runoff Ltd [2011] HCA 37; 244 CLR 239, 261–262 at [20].

11 Westport Insurance Corp v Gordian Runoff Ltd [2011] HCA 37; 244 CLR 239, 261–262 at [19].

12 Westport Insurance Corp v Gordian Runoff Ltd [2011] HCA 37; 244 CLR 239, 261–262 at [19].

13 There are many reasons for which commercial entities may choose English arbitration, not least the renowned expertise and breadth of experience available.

14 Robert Merkin and Louis Flannery, "Arbitration Act 1996", 4th edn. (London: Routledge, 2008), note commenting on the English Arbitration Act, s.68, pp 155 – 163.

15 Chantiers de l'Atlantique S.A. v Gaztransport & Technigaz S.A.S. [2011] EWHC 3383.

16 The relevant section provides as follows:

"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant:

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy."

17 Chantiers de l'Atlantique S.A. v Gaztransport & Technigaz S.A.S. [2011] EWHC 3383 at [54] –[61].

18 The burden of proof is set out in Hornal v Neuberger Products Ltd [1954] 1 QB 247 and Re H (Minors) [1996] AC 563.

19 Flaux J. was relying on the decision in Elektrim v Vivendi Universal SA [2007] 1 Lloyd's Rep 693; [2007] EWHC 11 (Comm) at [82].

20 English Arbitration Act s.68(1).

21 English Arbitration Act s.68(2)(g).

22 English Arbitration Act s.68(3).

23 English Arbitration Act s.68(3).

24 Robert Merkin and Louis Flannery, Arbitration Act 1996, 4th edn (London: Routledge, 2008), note commenting on the English Arbitration Act, s.68, pp 155 – 163.

25 Profilati Italia SRL v PaineWebber Inc & another [2001] 1 All E.R. (Comm)1065 , 1071 at [17].

26 Miller's Timber Trust v Plywood Factory Julius Potempa 63 Ll.L. Rep. (1939), 184.

27 Pacol Ltd v Joint Stock Co. Rossakhar [2000] 1 Lloyd's Rep. 109.

28 Lesotho Highlands Development Authority v Impregilo SpA [2005] 3 All E.R. 789; (2006) 1 AC 221 at [17]; [2005] 2 Lloyd's Rep. 310; [2005] UKHL 43.

29 Lord Wilberforce, Hansard, col.778, January 18, 1996, as cited in Lesotho Highlands Development Authority v Impregilo SpA [2005] 3 All E.R. 789; (2006) 1 AC 221 at [18]; [2005] 2 Lloyd's Rep. 310; [2005] UKHL 43.

30 English Arbitration Act s.1(c).

31 Profilati Italia SRL v PaineWebber Inc & another [2001] 1 All E.R. (Comm) 1065 1072 at [20].

32 Chantiers de l'Atlantique S.A. v Gaztransport & Technigaz S.A.S. [2011] EWHC 3383 at [53].

33 Elektrim v Vivendi Universal SA [2007] 1 Lloyd's Rep 693; [2007] EWHC 11 (Comm) at [82].

34 Elektrim SA v Vivendi Universal SA and others [2007] EWHC 11(Comm) at [80].

35 Elektrim SA v Vivendi Universal SA[2007] EWHC 11(Comm) at [79].

36 Lesotho Highlands Development Authority v Impregilo SpA [2005] 3 All E.R. 789; (2006) 1 AC 221 at [27]; [2005] 2 Lloyd's Rep. 310; [2005] UKHL 43, citing the Report of the Departmental Advisory Committee of Arbitration Law on the then Arbitration Bill cl.68.

37 Elektrim v Vivendi Universal SA [2007] 1 Lloyd's Rep 693; [2007] EWHC 11 (Comm); Cuflet Chartering v Carousel Shipping Co Ltd [2001] 1 All E.R. (Comm) 398; Thyssen Canada Ltd v Mariana Maritime SA [2005] EWHC 219 (Comm).

38 CAA s.34(2)(b)(ii) all state legislation.

39 CAA s.1C(1) (WA), (NSW), (SA) and (Tas); s.1AC(1) (Qld); s. 1AA(a) (Vic). The dual objectives of the case management system found in the superior courts are reducing delay and achieving cost effectiveness.

40 CAA s.1C(2)(a) (WA), (NSW), (SA) and (Tas); s.1AC(2)(a) (Vic) and (Qld).

41 Cf. CAA s.34 all state legislation.

42 CAA s.2A(1) all state legislation.


43 CAA s.2A(3) (WA); (NSW); (Vic); (Tas); (Qld); s. 2A(2) (SA). Cf. TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia [2013] HCA 5 at [6].

44 IAA s.8(7A) and s.19(1)(b) respectively.

45 IAA s.19.

46 Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No. 2) [2012] FCA 1214, at [19]. An appeal to the High Court of Australia was successful, but on different grounds.

47 Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No. 2) [2012] FCA 1214 at [50].

48 Explanatory Note by the UNCITRAL Secretariat to the 1985 Model Law on International Commercial Arbitration as amended in 2006, para.46.

49 Assistant Commissioner Condon v Pompano Pty Ltd [2013] HCA 7.

50 Above, n16 and English Arbitration Act s.68(2)(g).

51 CAA s.1(5), as incorporated into the all State Acts.

52 CAA s.5 of all State Acts.

53 CAA s.34(1).

54 Bishop v Chung Bros (1907) 4 C.L.R. 1262, 1273.

55 Marcus S. Jacobs Q.C., Commercial Arbitration Law and Practice (Sydney: Law Book Company), at.560, remarking on the possible effect of Kirk v Industrial Court of NSW (2010) 239 C.L.R. 531.

56 Cf. Houssein v Department of Industrial Relations and Technology NSW (1982) 148 C.L.R. 88.

57 CAA s.34(4) of all State Acts.

58 Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No. 2) [2012] FCA 1214 at.[19].

59 Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No. 2) [2012] FCA 1214.

60 Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd [2013] FCA 882.

61 Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No.2) [2012] FCA 1214 at [30].

62 CAA ss.35–36 of all State Acts.

63 Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd [2013] FCA 882.

64 NRE Coke Ltd & Anor v Coeclerici Asia (Pte) Ltd [2013] EWHC 1987 (Comm).

65 IAA s.8(7)(b); Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd [2013] FCA 882 at [26].

66 Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd [2013] FCA 882 at [86]–[91].

67 Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd [2013] FCA 882 at.[92].

68 Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd [2013] FCA 882 at [102].

69 Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd [2013] FCA 882 at [103].

70 Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd [2013] FCAFC 109.

71 CAA s.2A(1) of all State Acts.

72 CAA s.34A(8) of all State Acts.

73 Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No. 2) [2012] FCA 1214 at [33].

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