

Arbitration & ADR Law

Case study by Albert Monichino



Chartered Institute of Arbitrators*

Oil Basins Ltd v BHP Billiton Limited - the Victorian Court of Appeal Decision

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The Victorian Court of Appeal (“the VCA”) decision in *Oil Basins Ltd v BHP Billiton Limited* [2007] VSCA 255 has important implications for commercial arbitration in Australia in terms of identifying the required standard of reasons of an arbitrator's award, certainly in domestic arbitrations. The VCA's decision is a decision of an intermediate court of appeal in relation to uniform legislation (ie the *Domestic Commercial Arbitration Acts* of the various States of Australia) and therefore will be followed by other Australian courts unless considered to be obviously wrong.

The VCA did not accept as self evident that the standard of reasons of an arbitrator's award were not as rigorous as the standard of reasons required of a superior court judge. It was not enamoured with the argument that section 29 of the *Commercial Arbitration Act* (“the Domestic Act”) requires a “statement of reasons” and not a “statement of reasoning”.

The VCA found that the requirement of an arbitrator to give reasons was founded upon notions of natural justice - that is, a person who imposes a decision upon parties is required to explain his reasons for decision. The VCA did not accept the argument that the requirement of an arbitrator to give reasons under section 29 was solely, or substantially, for the purpose of facilitating rights of appeal under s. 38 of the *Domestic Act*. By founding the requirement of an arbitrator to give reasons on broader notions of natural justice, the VCA broadened the requirement of an arbitrator to give reasons.

Disappointingly, the VCA did not acknowledge the policy objectives behind the domestic Act - namely, to promote the speed and cost effectiveness of arbitration as an alternative to litigation. Nor did the VCA acknowledge any major differences between a superior court's judgment and an arbitral panel's award. For example, unlike an award, a judgment has precedent value.

The VCA's judgment suggests that the standard of reasoning required of an arbitral award is variable-depending upon the nature of the dispute in each case.

The fact that the arbitrators are retired judges may be indirectly relevant as indicating the nature of the dispute. Hence, it may indicate (along with other factors) that the dispute is a complex one. In this regard the VCA upheld the trial judge's (Hargrave J) finding that in the instant case the majority arbitrators were required to provide reasons of a judicial standard.

It must be seriously doubted whether parties to a complex commercial dispute, in choosing arbitration, expect in all cases that the reasons of the award to be of the same standard of the reasons of a superior court judgment. But that is the premise from which the VCA's judgment proceeds.

What then are the implications of the VCA's decision for domestic commercial arbitration in Australia?

First, it signals increasing judicial interference in arbitral awards in Australia. Secondly, it undermines the finality of arbitral awards in Australia, or at least the perception of finality. Thirdly, it will lead to longer and more prolix arbitral awards, with consequent increased costs of arbitration. Fourthly, it will slow up the arbitral process as arbitrators will require more time to publish their arbitral awards. Overall, it reduces the competitive advantage of arbitration as compared with commercial litigation.

What then should be done about the VCA decision?

First, the question arises whether any reform is required of the domestic Act - in particular, in relation to either section 29 or s. 38. Reform of these sections does not appear to be on the agenda of the Expert Working Group ("the EWG") which is looking at the question of reform of the domestic Act. It is suggested that the EWG should re-consider this.

Secondly, parties and arbitrators should be alive to the possibility of expressly agreeing in their arbitration agreement the required standard of reasoning in any arbitral award. There is no impediment, in my view, to parties (exercising party autonomy) specifying the required content of the arbitrator's reasons under section 29, short of dispensing with the requirement to give reasons at all.

Thirdly, parties and arbitrators should bear in mind the possibility of entering into an exclusion agreement under section 40 of the domestic Act following the commencement of the arbitration. The effect of an exclusion agreement will be to exclude rights of appeal under s. 38. However, an exclusion agreement will not remove the possibility of interference with the award under s. 42 on the grounds of technical misconduct.

Finally, I would recommend that parties opt out of the *Domestic Act* regime in favour of the *International Arbitration Act 1974 (Cth)*/Model Law regime wherever any dispute involves an international element. That is, the parties should, wherever possible, expressly agree in their arbitration agreement that the subject matter of the agreement relates to more than one country, thereby rendering the arbitration an international arbitration for the purposes of the Model Law. In that way, the parties will be able to reduce the scope of judicial interference.