

ADEQUACY OF REASONS REVISITED

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*The underlying difference between arbitration and court litigation should be borne in mind at all times... though courts and arbitration panels both resolve disputes, they represent fundamentally different mechanisms of doing so.*²

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Introduction

Section 29(1)(c) of the uniform Commercial Arbitration Act³ (**‘the CAA’**) requires that an arbitrator *shall include in the award a statement of the reasons for making the award*. A similar requirement is to be found in Article 31(2) of the UNCITRAL Model Law, which applies to international arbitrations seated in Australia and soon will apply to all domestic arbitrations seated in Australia.⁴

It is exceptional for an intermediate court of appeal in Australia not to follow the decision of another like court in relation to the interpretation of uniform legislation. Yet, the New South Wales Court of Appeal (**‘NSWCA’**) recently held in *Gordian Runoff Limited v Westport Insurance Corporation*⁵ (**‘Gordian’**) that to the extent that the Victorian Court of Appeal (**‘VCA’**) in *Oil Basins Limited v BHP Billiton Limited & Ors*⁶ (**‘Oil Basins’**) suggested that domestic arbitrators were required by section 29(1)(c) of the CAA to provide reasons of a judicial standard, that decision was plainly wrong and should not be followed.⁷

The result is to produce inconsistency in approach between appellate courts, which the NSWCA acknowledged was *regrettable*. It noted, however, that *the issue is of such importance as to require exposure*.⁸

Leave to appeal to the High Court of Australia was sought from the NSWCA decision in *Gordian*. On 3 September 2010, the High Court granted leave to appeal. The appeal was heard in early February 2011. Judgment is reserved.

It is hoped and expected that the inconsistency in approach by Australian intermediate courts to the requirement of domestic arbitrators to provide reasons for their arbitral awards will soon be resolved by the High Court.

Oil Basins

The VCA in *Oil Basins* decided that:

- (a) the standard of reasons required of an arbitral award depended on the circumstances of the case and in particular the nature of the dispute in question.⁹
- (b) the arbitrators’ reasons in the case before it *called for reasons of a judicial standard*.¹⁰

The trial judge (whose decision was affirmed on appeal) described the arbitration under consideration as *a large commercial arbitration involving many millions of dollars...attended with many of the formalities of legal proceedings, including the exchange of points of claim and defence and substantial*

*witness statements [with a] hearing [occupying] 15 sitting days [and in] addition to oral argument, substantial written submissions... The arbitrators were retired judges of superior courts. Both sides were represented by large commercial firms of solicitors and very experienced Queen's Counsel.*¹¹

The VCA observed that the adoption by parties to an arbitration of procedures adopted in complex commercial litigation and the selection of senior lawyers as arbitrators, may reflect the nature of the dispute and therefore the nature of the reasons required.¹²

The VCA found that in the case before it the arbitrators' reasons fell short of the required standard because they:

- (i) were inconsistent and ambiguous;
- (ii) failed to identify the evidence upon which findings of fact were based;
- (iii) failed to contain an intelligible explanation why some (expert) evidence was preferred over other competing (expert) evidence;
- (iv) failed to deal with substantial contentions and evidence.¹³

Gordian

The underlying arbitration in *Gordian* involved a relatively complex claim made by an insurer against a re-insurer. The arbitral panel consisted of three expert insurance lawyers. The panel concluded that it was reasonable for the re-insurers to be bound to indemnify the insurer under section 18B of the *Insurance Act 1901(NSW)*.

One of the issues on appeal to the NSWCA was whether the arbitrators had erred in law in failing to adequately express the reasons for this conclusion.

Whether or not section 18B applied to re-insurance involved a question of statutory interpretation. Whether or not the conditions contained in section 18B were satisfied, including whether in all the circumstances it was reasonable for the re-insurer to be bound to indemnify, involved questions of fact.

This gave the NSWCA the opportunity to consider the question of principle as to the required standard of an arbitrator's reasons and, in particular, whether arbitrators had an obligation to give reasons of a judicial standard.¹⁴

The Model Law context

As a starting point, the NSWCA treated section 29(1)(c) as being inspired by Article 31 of the Model Law.¹⁵ Thus, it considered section 29(1)(c) in a wider context, including the context of international arbitration practice.

The Model Law is of course a compromise between different nation states, including civil law and common law states. It would indeed be peculiar for Article 31 of the Model Law to be interpreted as requiring a standard of reasons equivalent to the reasons of a judge in a common law jurisdiction. The NSWCA noted that this had never been suggested.¹⁶

The fundamental difference between arbitration and litigation

Significantly, the NSWCA noted that:

*The underlying difference between arbitration and court litigation should be borne in mind at all times... Though courts and arbitration panels both resolve disputes, they represent fundamentally different mechanisms of doing so*¹⁷,

and

*That the language in s 29(1)(c) describes at one level what a judge does and is obliged to do does not as a matter of language or logic impose all the obligations upon judicial officers in this respect on to arbitrators.*¹⁸

In contrast, the VCA did not explore the difference between arbitration and litigation. Nor did it explore the objects of the CAA and interpret section 29(1)(c) against those objects. Rather, the VCA appeared to assume that if a complex matter was referred to arbitration, the parties expected that a judicial standard of reasons was required from the arbitrator.

Allsop P concluded:¹⁹

*... I am persuaded to the point of conviction that it is wrong to equate the obligations of judges and arbitrators to give reasons as part of the ascription of meaning to the CA Act, s 29 (1) (c). This is because of my view that so to equate the responsibilities of arbitrators and judges is not in accordance with the content of either s 29(1)(c) or the Model Law (being relevantly its source and inspiration) or with international arbitration practice as reflected by the cases and writing to which I have referred. **To the extent that the Court of Appeal in Oil Basins can be seen to have so decided** in relation to s 29(1)(c), I am of the respectful view that such view is plainly or clearly wrong and should not be followed... (emphasis added).*

The use of conditional language by Allsop P is explicable. At [54] of *Oil Basins* the VCA said “*The arbitrators’ decision in the present case called for reasons of a judicial standard*” (emphasis added), while at [55] the VCA expressed themselves in broader language. This has resulted in some uncertainty as to what, in the VCA’s view, are the circumstances in which the obligation of an arbitrator to provide reasons for an arbitral award are to be equated with the obligation of a judge to provide reasons for judgment.

The NSWCA stated that on its interpretation of *Oil Basins*, the VCA concluded that at least in the circumstances of a large important arbitration, section 29(1)(c) required reasons that a judge would be obliged to give in Australia.²⁰

Subjective factors

The NSWCA noted that the fact that parties may mimic court procedures in complex arbitrations should be seen as a failure of procedure in the arbitration rather than as reflecting any essential character of the arbitral process which would assist in the conclusion that arbitrators should be held to the standard of reasons required of judges.²¹

What is the standard of arbitral reasons?

The NSWCA adopted the relatively low standard of reasons articulated by Donaldson LJ in *Bremer’s* case²²

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. That is all that is meant by a “reasoned award”.

Gordian reinforces that the required reasons are the reasons for making the award - not a statement of reasons for not making the award.²³ Therefore, an arbitrator is not required to consider alternative arguments which are unnecessary for the purposes of reaching the arbitrator's conclusion.

Evidence and argument

The NSWCA disagreed with the VCA in terms of an arbitrator's obligations to set out the evidence upon which the arbitrator has made his findings of fact and to give reasons why some evidence is preferred over other evidence.²⁴ The NSWCA said:

*The Model Law Article 31(2) and the CAA section 29(1)(c) do not say that the arbitrator must deal with every substantial argument put forward by the contending parties. Nor do they state that the arbitrator should state the evidence from which he or she draws his or her findings of fact and give reasons for preferring some evidence over other evidence.*²⁵

The better view is that an arbitrator need not state the evidence from which he draws his findings of fact,²⁶ and need not (in general) give reasons for preferring some evidence over other evidence (although the position might be different in relation to expert evidence which involves something in the nature of an intellectual exchange).

But, with respect, I think it going too far to suggest that an arbitrator need not deal with every substantial argument put forward by the contending parties (especially if that argument may affect the conclusion reached by the arbitrator).

Thoroughvision

Not long after *Gordian*, Croft J in *Thoroughvision Pty Ltd v Sky Channel Pty Limited*²⁷ (*‘Thoroughvision’*) considered an attack on a domestic arbitral award (of a retired judge) on the basis of inadequate reasons. The arbitration concerned the proper interpretation of a commercial contract between sophisticated commercial parties.

At [54] Croft J emphasised the importance of proportionality with respect to the nature and extent of reasons required of an arbitrator:

... it is clear from the authorities that a principle of proportionality applies with respect to the nature and extent of reasons which an arbitrator is obliged to provide in an arbitration award. An example of a case in which very extensive and comprehensive reasons were required is Oil Basins...

His Honour then considered whether there was any relevant inconsistency between the decisions in *Oil Basins* and *Gordian*, concluding that there was no relevant inconsistency in the requirement of an arbitrator to provide reasons for his award.²⁸

With respect, once it is appreciated that the VCA in *Oil Basins* held that arbitrators may be required to provide reasons of a judicial standard (as indeed it held that the arbitrators in the case before it were so required), there is a necessary inconsistency between the two appellate decisions.

Practical guidance

The two appellate decisions lay down inconsistent approaches to important practical questions as to whether arbitrators are required (and if so, to what extent) to:

- (a) identify the evidence upon which their findings of fact are based;
- (b) explain why some evidence is preferred to other evidence;
- (c) deal with every substantial argument put by the parties.

What is clear, however, from both decisions is that an arbitral award in which the ultimate basis of the decision cannot be discerned because of ambiguity, inconsistency or incompleteness of reasoning or findings will not satisfy the required standard of reasons. This is consonant with the guiding principle that the award should make clear to the winning and (especially) the losing party exactly why they have won or lost.

Extra curial remarks

On 15 October 2010, the Chief Justice of the Federal Court of Australia weighed into the debate in delivering the Opening Address at the International Dispute Resolution Conference in Sydney, saying:

The decision of the [NSWCA] in [Gordian] can be said to recognise the theoretical and practical differences between judgments of a court and arbitral award.

Keane C.J. described the strict approach adopted by the VCA of equating the exercise of decision-making power conferred on an arbitrator by private contract to the exercise of the adjudicative power of the State exercised by the courts as *problematic, both as a matter of principle and practice*.²⁹

As a matter of theory, his Honour noted that:

- (a) the giving of a comprehensive statement of reasons explaining why the power of the State is to be exercised against the losing party (who does not necessarily consent to that exercise of power) is an essential requirement of the exercise of judicial power. On the other hand, the losing party has agreed to the exercise of power by the arbitrator;
- (b) judicial decisions, unlike arbitral decisions, affect not only the immediate parties to the dispute but other parties in like cases, given the precedential value of court judgments.

The above considerations readily explain why the reasons of a superior court judge need to be more elaborate than the reasons of an arbitrator.

At a practical level, his Honour noted that adoption of the *Oil Basins* strict approach will tend to slow the arbitral process and diminish the value of the parties' choice to resolve their dispute by arbitration.

Conclusion

Oil Basins lays down an unreasonably high standard. Arbitrators should not (unless the parties expressly agree) be required to give reasons of a judicial standard, even in a complex, high dollar value dispute.³⁰ To so require fails to appreciate the fundamental difference between arbitration and litigation (as explained by Keane CJ in his recent address). On the other hand, *Gordian* lays down a

minimum (low) standard but not the preferred standard to which arbitrators should aspire. In that regard, arbitrators should heed the advice of one learned and experienced commercial judge:

“*the prudent Arbitrator will not be tempted to stay close to this cliff edge.*”³¹

It does not necessarily follow that Article 31(2) of the Model Law should be interpreted in the same way as s 29(1)(c) of the CAA. That said, if the High Court were to confirm the strict VCA approach to reasons under the CAA, and there remained any lingering doubt that Australian courts may also interpret the Model Law as requiring reasons of a judicial standard, that would have a negative consequence. In particular, such an outcome has the serious potential to damage the aspiration of promoting Australia as a centre for international dispute resolution in the Asia Pacific Region.

Hence, the High Court decision in *Gordian* is awaited with keen interest.

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² *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57 (1 April 2010) at [216].

³ The Commercial Arbitration Act was enacted in about 1984 throughout Australia by the various States and Territories.

⁴ Following the enactment of the Model Commercial Arbitration Bill by the Parliaments of the various States and Territories. The Model Bill has already been enacted by the Parliament of NSW. See the *Commercial Arbitration Act 2010 (NSW)*.

⁵ See Note 2 above.

⁶ [2007] VSCA 255.

⁷ *Gordian* at [216].

⁸ *Gordian* at [224].

⁹ *Oil Basins* at [57].

¹⁰ *Oil Basins* at [54].

¹¹ [2006] VSC 402 at [23].

¹² *Oil Basins* at [55] and [58].

¹³ *Oil Basins* at [34], [35], [45], [48] and [55].

¹⁴ *Gordian* at [198] to [222].

¹⁵ This involves some stretch of the imagination as the CAA predated the Model Law, which was introduced in 1985. That said, Article 31(2) of the Model Law is substantially identical to Article 32(3) of the UNCITRAL Arbitration Rules, introduced in 1976.

¹⁶ *Gordian* at [218].

¹⁷ *Gordian* at [216].

¹⁸ *Gordian* at [220].

¹⁹ *Gordian* at [224].

²⁰ *Gordian* at [204].

²¹ *Gordian* at [217]. Contrast Note 11 above.

²² *Bremer Handelsgesellschaft mbH v Westzucker GmbH* (No. 2) [1981] 2 Lloyd’s Rep 130 at [25] per Donaldson LJ.

²³ *Gordian* at [220].

²⁴ *Gordian* at [205].

²⁵ *Gordian* at [219].

²⁶ Especially as there is no right of appeal from an arbitral award on questions of fact.

²⁷ [2010] VSC 139 (22 April 2010).

²⁸ *Thoroughvision* at [58]

²⁹ P.A. Keane, “Judicial support for arbitration in Australia”, Opening Address to the Financial Review International Dispute Resolution conference, Sydney, 15 October 2010, at p.4.

³⁰ Unless expressly agreed in the arbitration agreement

³¹ *Peter Schwarz (Overseas) Pty Ltd v Morton* [2003] VSC 144 at [33] per Byrne J.