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LAW BULLETIN

Gordian Runoff v Westport: limited grounds to challenge award

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The recent case of *Gordian Runoff Ltd v Westport Insurance Corp* (2010) 267 ALR 74; [2010] NSWCA 57; BC201001877 gives arbitration users more confidence as to the finality of arbitral awards by confirming that the grounds for challenging an award are very limited. It also recognises the importance of upholding arbitration's key attributes of providing a commercial resolution in an efficient and timely manner, by not imposing on arbitrators the same procedural formalities and technicalities applied to judges (such as the requirement for detailed judgments). In addition, the decision has given valuable guidance with respect to the scope of the application of s 18B of the Insurance Act 1902 (NSW).

Facts

In this case, an insurer and reinsurer disagreed over whether the reinsurance contracts responded to a certain claim and, in particular, the operation of s 18B of the Insurance Act. Their dispute was referred to arbitration before a panel of experienced insurance arbitrators, which found in favour of the insurer. The implications of the case from an insurance perspective are discussed further below.

Challenging the arbitral award

The reinsurer sought leave to appeal to the Supreme Court of New South Wales from the award, which was granted, and the appeal was successful. The insurer then appealed from that decision to the Court of Appeal.

Under s 38 of the Commercial Arbitration Act 1984 (NSW) (which has counterparts in each state), the grounds upon which a party can appeal from an arbitral award are limited to questions of law arising out of an award. However, unless both parties agree to the appeal, it can only be heard with the leave of the court, which can only be granted in the following circumstances:

- the determination of the question of law concerned could substantially affect the rights of one or more parties (s 38(5)(a)); and
- there is a manifest error of law on the face of the award, or 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 (s 38(5)(b)).

Courts in the past have had a tendency to give an expansive interpretation to these limited grounds and thereby grant leave to appeal, which is why this decision is so significant.

In this case, the Court of Appeal in overturning the primary judge's decision (which granted leave to appeal and found in favour of the appellant) has given clear guidance as to the strict criteria that must be satisfied when considering whether or not to grant leave to appeal. The court held as follows.

- **"Manifest error of law"** must be "more than arguable; it must be evident or obvious". The court found that the primary judge had erred in finding that there was a manifest error of law.
- **"Strong evidence of an error of law"** requires a strong prima facie case that the arbitrators were wrong in law. The court found that only if this was satisfied could it move on to the next consideration in s 38(5)(b) — ie, whether the determination may be likely to add substantially to the certainty of commercial law. In this case, it found that there was no such strong evidence.

No requirement for arbitrators to give detailed reasons

The reinsurer argued that another reason that the primary judge was justified in granting leave to appeal from the arbitral award was because the arbitral tribunal failed to give adequate reasons in its award, and that this also constituted a manifest error of law or strong evidence of an error of law.

In support of its argument, the reinsurer relied on the decision of the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346; [2007] VSCA 255; BC200709808. In that case, the court interpreted the requirement to "include in the award a statement of the reasons for making the award" (s 29(1) of the Commercial Arbitration Act 1984 (Vic), identical to that in New South Wales) as requiring reasons equivalent to those that a judge would be obliged to give in Australia.

After reviewing relevant arbitration instruments such as the Model Law, the history of the development of the Commercial Arbitration Act which drew inspiration from those instruments, and contemporary writings, the court in this case concluded that the decision in *Oil Basins* was wrong in requiring arbitrators to be held to the standard of reasons of judges and should not be followed.

In reaching this conclusion, the court emphasised that the underlying difference between arbitration and court litigation should be kept in mind at all times. It observed that whereas a court judgment is an act of state authority as the court is an arm of the state, the arbitration award is the outcome of a private consensual process that is meant to be "shorn of the costs, complexities and technicalities often cited ... as the indicia and disadvantages of curial decision making".

The recognition by the court of the important underlying differences between arbitration and litigation, along with its consequent decision not to follow the *Oil Basins* decision, is laudable, and gives renewed confidence in the Australian judiciary's support of arbitration as a straightforward, fast and cost-effective alternative to litigation.

Section 18B of the Insurance Act

A key issue in the arbitration was the effect of s 18B of the NSW Insurance Act. Section 18B provides a limitation on the application of exclusion clauses in a contract of insurance. The court found that the primary judge was wrong to conclude that there was strong evidence that the arbitrator misunderstood or misconstrued s 18B.

The Court of Appeal commented on the proper construction of s 18B. The context in which to interpret s 18B is "the existence of a mischief in the operation of exclusion clauses in insurance policies in a way that was unjust: the denial of cover when ... an exclusion clause operated by reference to a factor unrelated to the cause of the loss". With this in mind, the court found that the section should not depend on a distinction between an insurance contract's scope of cover or exclusion clauses.

The court chose not to comment on whether s 18B applies to reinsurance. On 1 September 2009, the Insurance Regulations 2009 (NSW) came into effect and exempted reinsurance contracts from s 18B and certain other sections of the Insurance Act. The Regulations are not expressed to have a retrospective application. Therefore, the application of s 18B now appears to depend on whether a reinsurance contract was entered into before or after 1 September 2009.

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