# NEW COMMERCIAL ARBITRATION ACT SURVIVES CONSTITUTIONAL CHALLENGE

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## COMMERCIAL ARBITRATION ACT ALIGNED WITH INTERNATIONAL PRACTICE

The Act is at the vanguard of reforms to domestic arbitration throughout Australia. Among its key features are:

(1) a commitment to cost efficiency and finality;

(2) convergence with international practice;

(3) a limitation on the involvement of the courts in review of arbitral decisions; and

(4) a limitation on the right of appeal from arbitral decisions.

## CHALLENGE TO ARBITRATION AWARD FOR CANCELLED WHEAT CONTRACTS

The limitations on review and the right of appeal in arbitrations were recently the focus of a challenge in the Supreme Court of NSW in *Ashjal Pty Limited v Alfred Toepfer International (Australia) Pty Ltd* [2012] NSWSC 1306.

Ashjal was seeking to disturb an arbitration award that it had wrongfully cancelled certain wheat contracts and was liable to pay the defendant purchaser $119,000 for non delivery of grain. Under the *Commercial Arbitration Act*, a party may only appeal to the court on a question of law if the parties agree and the court grants leave.

Ashjal had failed in its attempt to convince the court that there had been an agreement which would allow it to appeal. It then brought an application seeking a declaration that certain sections of the *Commercial Arbitration Act* were beyond the legislative power of the parliament of NSW.

Plaintiff argues that limitations on review and right of appeal invalid … In the case of *Ashjal v Alfred Toepfer*, the Supreme Court of NSW has recently rejected a challenge to the constitutionality of the recently enacted *Commercial Arbitration Act 2010* (NSW)

## CONSTITUTIONAL CHALLENGE TO COMMERCIAL ARBITRATION ACT

The constitutional attack had two limbs.

Ashjal argued that the limitations on review and/or appeal were invalid. It said that the power to review arbitral awards was 'constitutionally entrenched' and the NSW parliament did not have power to remove it.

This argument had succeeded in the High Court in a case about OH&S prosecutions in the Industrial Relations Commission, and in the Supreme Court in a case about security of payment adjudications.

Ashjal also argued that the power of the court to enforce an award required some judicial analysis of the content and correctness of the award. Thus to enforce an award that 'pretends to represent the parties' rights and obligations but in fact does not' was said to interfere with the decisional independence of the court, rendering it a mere agency of the executive and impairing its institutional integrity.

## COURT COMPARES CONSENSUAL ARBITRATION TO STATUTORY ADJUDICATION

In rejecting both propositions, the court relied on the primacy of the consensual nature of arbitration. It contrasted consensual arbitration with statutory adjudication under the security of payment legislation. Statutory adjudication has been described as a public or statutory dispute resolution process which was subject to the supervisory jurisdiction of the court. In adjudications, concepts of public law have a central role.

By contrast, the source of the arbitrator's power to determine a dispute between parties in a consensual arbitration arises from agreement between the parties. Justice Stevenson put it as follows:

*The parties in a consensual arbitration are not compelled to resolve their disputes by arbitration; they do so because that is their agreement. An Award binds the parties because they have agreed to abide the arbitrator's decision.*

*Their position is quite different from that of a citizen subject to the exercise of state, judicial, governmental or executive power; that citizen has no choice.*

*The arbitrator, acting under contract, is not exercising state, judicial governmental or executive power.*

## ARBITRATION AWARD IS THE PRODUCT OF AN AGREEMENT

The court also rejected the attack on the role of the court in enforcing awards. There was a significant difference between enforcing an award, and enforcing a determination of a minister of a government. The first is the product of an agreement. The second is an act of state, government or executive power.

Further, there was a role for the court, defined in the Act, in refusing enforcement if the dispute or decision was beyond the scope of the submission to arbitration.

Finally, the court held that its role in enforcing awards was similar to its role in enforcing settlements in litigation before it, or foreign judgments.

## CONSENSUAL SOURCE OF AUTHORITY AND THE EXERCISE OF STATE COMPULSION

Although unsuccessful, the case raises some very difficult philosophical questions about arbitration. It is clearly correct that consensual arbitration is a product of agreement.

The new act supplements that agreement with significant powers, enforceable by the court.

Those powers include the power to subpoena, preserve evidence and require specific performance of agreements. As these powers are exercised, a blurring of the line may occur between the 'consensual' source of authority and the exercise of state compulsion.

The decision of the court was handed down on 26 October 2012. It will be greeted with relief among dispute resolvers. It is not clear whether it is, or will be, the subject of an appeal.

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