Apply to set aside, or appeal against an award?

When to apply s34 or s34A of the *Commercial Arbitration Act 2013* (Qld)

When should you apply to set aside an arbitral award, or just appeal against it? **Russell Thirgood** and **Erika Williams** look at a recent Court of Appeal case which provides some guidance.

Mango Boulevard Pty Ltd v Mio Art Pty Ltd[1] (the original judgment) is an example of a case in which a party sought to set aside an arbitral award under section 34 of the *Commercial Arbitration Act 2013* (Qld) (the Act).

This decision was then appealed in *Mango Boulevard Pty Ltd v Mio Art Pty Ltd*[2] on the basis that the primary judge erred in not setting aside the award for the arbitrator's failure to afford procedural fairness.

Ultimately, the court found that the primary judge's findings were accurate, and that it was not possible to conclude any real unfair or practical prejudice because Mango Boulevard had been afforded a reasonable opportunity to present its case at arbitration.

Circumstances in which a court will set aside an arbitral award are extremely limited. Another avenue to challenge an arbitral award is by applying to appeal the award on a question of law. However, since the introduction of the Act in 2013, an application to appeal may only be made if the parties have agreed. In this article, we consider when and how this agreement should be reached.

Case background

The dispute between the parties originated from a joint venture for the development of land, specifically that the parties were unable to determine the share price pursuant to clause 4.1 in the share sale agreement (SSA).

At arbitration, it was stipulated that the arbitrator, in reaching his decision, "must adopt the same methodology as provided in clause 4.4".[3] This required the arbitrator to make assumptions agreed by the parties, particularly that the project would achieve a profit on cost percentage return of 25%.

In determining the subject property's market value under the SSA, the arbitrator was required to consider the "real life market considerations" and "commercial reality" of the project. In rejecting Mango Boulevard's expert evidence, the arbitrator concluded that a "competent", "prudent" or "rational" developer would not purchase the subject property unless they reasonably believed they could return a profit of 30% to 45%.[4]

Judgment and appeal

It is on this point that Mango Boulevard sought to set aside the arbitrator's decision on two grounds – firstly, that the methodology used by the arbitrator to determine the share price departed from the requirements of the SSA and was beyond the scope of the submission to the arbitration, and secondly, that the arbitrator failed to accord procedural fairness or acted in breach of the rules of natural justice by rejecting Mango Boulevards' expert witness, which meant it was unable to present its case and that the award was in conflict with the public policy.

Mango Boulevard first sought to set aside the arbitral award in the Supreme Court of Queensland under sections 34(2)(a)(ii) or 34(2)(b)(ii) of the Act, which provide that the court may only set aside an arbitral award under the Act in the circumstance whereby:

(a) the party making the application furnishes proof that it was otherwise unable to present the party's case, or

(b) the court finds that the award was in conflict with the public policy of the State.

The primary judge concluded that the arbitrator had appropriate reasons to reject the evidence of Mango Boulevard's expert witness, and that his error to not put this to the witness or counsel for Mango Boulevard did not amount to or cause a real practical injustice such as to set aside the award under section 34 of the Act.[5]

Mango Boulevard appealed the original judgment in the Queensland Court of Appeal, on the basis that:

(a) the primary judge erred in not finding that the arbitrator had conducted or resolved the arbitration in a manner that caused real unfairness or real practical injustice to the appellant, and

(b) on the basis of the error in paragraph (a), the primary judge erred in not finding that the arbitral awards delivered by the arbitrator should be set aside pursuant to sections 34(2)(a)(ii) or 34(2)(b)(ii) of the Act.[6]

Ultimately, the court held that, contrary to Mango Boulevard's contentions, it was not possible to conclude that there had been a real unfairness or real practical prejudice in this case. Mango Boulevard had been provided with ample opportunity to present its case. This was evidenced by the arbitrator's willingness for Mango Boulevard to recall its witness to give further evidence.

However, Mango Boulevard failed to do so on multiple occasions, choosing to present its case in the way it determined was appropriate. In conclusion, his Honour found that s34 of the Act was not intended to "protect a party from its own failure or poor strategic choices".[7] To set aside the award would effectively "bail out parties who have made choices that they might come to regret".[8]

Accordingly, the court dismissed the appeal.

Difference between s34 and s34A

In the original judgment, Justice Jackson referred to the judgment of *Cameron Australasia Pty Ltd v AED Oil Ltd*[9] (*Cameron*) to provide an explanation as to the difference when seeking to set aside under s34 or appealing against an award under s34A of the Act.

Cameron held that the provisions of s34A allow for "an appeal on a question of law arising out of an arbitral award, but only in limited circumstances, and only on an 'opt-in' basis."[10] In other words, a party can only appeal an arbitral award in circumstances whereby the parties to the arbitration agree that an appeal may be made on a question of law.

It is understandable that reaching an agreement once an award has been delivered is likely to be rather difficult, especially when agreement must be reached before the expiration of the appeal period (three months).[11] To counteract this potential stalemate, it is possible to agree to a right of appeal on a question of law in the arbitration agreement itself, or at the preliminary conference once an arbitration has been commenced.

If it is in your client's interest to maintain a right of appeal on a question of law, the best time to 'opt-in' to include this right is when drafting the arbitration agreement in the contract. An example arbitration clause from the Resolution Institute is:

"Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, Resolution Institute Arbitration Rules.

"Unless the parties agree upon an arbitrator, either party may request a nomination from the Chair of Resolution Institute."

If your client would like the right to appeal an arbitral award on a question of law, you should consider adding the following:

"The parties agree that an appeal lies to the Court in the relevant jurisdiction on a question of law arising out of an award, subject to the leave of the Court."

As is reflected in the above drafting, parties must also remember that, even if they have agreed on a right to appeal, they must also seek leave of the court.[12]

In contrast, a party can only seek to set aside an arbitral award under s34 of the Act in circumstances including (but not limited to) when:

(a) a party believes that the arbitrator has made an award outside the scope of the submissions to the arbitration
(b) the arbitrator has failed to accord procedural fairness or act in accordance with the rules of natural justice, or
(c) the award is in conflict with the public policy of the State.

Cameron identifies that section 34 of the Act provides for limited court intervention and nothing in the nature of an appeal on a question of law.

When should you apply under s34 or s34A

When making an application to either set aside or appeal an arbitral award, it is necessary to identify and apply the correct section of the Act. But which section best applies to your client's situation?

In the circumstance that you believe that an arbitrator has failed to accurately apply or interpret relevant legal principles to your client's matter, it would be necessary to appeal the award under s34A of the Act. However, as mentioned above, this would require not only the parties to agree to the appeal, but also leave from the court to do so.

Alternatively, in the circumstance you believe an arbitrator has:

(a) dealt with a dispute not contemplated by the submissions of the arbitration
(b) dealt with matters outside the scope of the submissions of the arbitration, or
(c) failed to provide your client with procedure fairness or accord with the laws of natural justice,

any of which results in the arbitral award being in conflict with the public policy of that state, then an application should be made under section 34 of the Act.

back to contents

Important notes

For anyone looking to challenge an arbitral award, it is important to note that there are strictly limited circumstances in which the court will set aside an arbitral award under s34 or allow an appeal of an award under s34A of the Act. Australian courts have demonstrated that they will use their best endeavours to uphold arbitral awards. Parties bringing set aside applications or appeals should also consider the manner in which they present their applications to the court, bearing in mind that bringing a frivolous application or presenting an application in an oppressive manner could result in an indemnity costs order.[13]

Finally, since s34A of the Act came into effect, due to the requirement for parties to agree to a right to appeal on a question of law, you should consider whether it is in your client's interest to agree to maintain this right.

For example, if your client would like the benefit of a quick, efficient and confidential arbitration but the dispute is in relation to a high-value claim or your client has a strong case in law, it may serve your client to maintain a right of appeal on a question of law. In this case, you should consider drafting such an agreement into the arbitration clause.

On the contrary, if your client would be best served by maintaining the final and binding nature of an arbitration award, you should be wary of any arbitration clause or agreement which includes an agreement to a right of appeal on a question of law.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee. Russell Thirgood is a partner and Head of Arbitration at McCullough Robertson Lawyers. Erika Williams is a senior associate at McCullough Robertson Lawyers and a member of the committee. The authors would like to thank Tom Hannah, a graduate at McCullough Robertson Lawyers, for his assistance in the preparation of this article.

Notes

1 [2017] QSC 87.
2 [2018] QCA 39.
3 *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [8].
4 Ibid, [10].
5 Ibid, [19].
6 Ibid, [5].
7 Ibid, [83].
8 Ibid, [85].
9 [2015] VSC 163.
10 [2015] VSC 163, 16.
11 *Commercial Arbitration Act 2013* (Qld) s34A(1)(a).
12 *Commercial Arbitration Act 2013* (Qld) s34A(1)(b).
13 *John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd (No.2)* [2018] QSC 48.