



## Précis Paper

### Commercial Arbitration : Setting aside arbitral awards

A discussion of the recent decision in *Mango Boulevard Pty Ltd v Mio Art Pty Ltd & Anor* [2018] QCA 39.

#### **Discussion Includes**

- Key issues at first instance
- Issues raised in Court of Appeal
- Decision of Court of Appeal
- Real practical injustice
- International implications
- Take homes for practitioners

## Précis Paper

### Commercial Arbitration: Setting aside arbitral awards

1. In this edition of BenchTV, Francis Douglas QC (Barrister, Tenth Floor Chambers, Sydney) and Alex Baykitch AM (Partner, King & Wood Mallesons, Sydney) discuss the recent decision in *Mango Boulevard Pty Ltd v Mio Pty Ltd & Anor* [2018] QCA 39.

#### Key issues at first instance

2. The matter was heard at first instance by Jackson J of the Supreme Court of Queensland and it was then determined by the Court of Appeal.
3. At first instance, the issues were those that arise under s 34 of the *Commercial Arbitration Act 2013* (Qld). That is;
  - i. Was the decision outside the bounds of that which was submitted to arbitration and
  - ii. Was there a lack of procedural fairness and was the award in conflict with the public policy of the State.
4. There were a number of issues which arose in the first instance decision before Jackson J which were not raised in the Court of Appeal.
5. One such issue was the applicant's argument that the dispute as determined by the arbitrator was not in the confines of that which was submitted to arbitration on the basis that the way in which he determined the valuation of the property, which was the subject of the arbitration, was contrary to the formula in the share sale agreement.
6. This issue was not a subject of appeal.
7. An important question which arose from Jackson J's judgment was the question of what happens if an arbitral law is set aside? Is it sent back with a view to having it re-determined to deal with a lack of procedural fairness, or is it set aside which means that another arbitration has to take place?
8. In regards to this question, Jackson J held that all the old authorities must be read subject to the legislation, therefore taking the view that when an arbitral award has been set aside, the arbitrator is functus, and as such it cannot be set aside and then sent back to the arbitrator for re-determination.

#### Issues raised in the Court of Appeal

9. At first instance, the application for setting aside the arbitral award was on the basis of, firstly, procedural fairness and that it was contrary to the public policy of the State, and, secondly, that that it was beyond the ambit of a dispute which had been submitted to arbitration.
10. The appeal however, was concerned solely with the first issue of procedural fairness and whether it was consistent with the public policy of the State, both questions which arise under s 34 of the Commercial Arbitration Act.
11. The particulars of the case which the applicant raised objection to were as follows:
  - i. the arbitrator was of the opinion that he should check the market value of the property, obtained by a formula contained in a shared sale agreement between the parties against the expectations of persons in the market at the relevant time;
  - ii. he thought that a way of doing that would be to have regard to the percentage outcomes which developers and others would expect in buying developmental land and then selling it;
  - iii. he elicited evidence from the experts to the effect that they would expect a profit margin of between 30-45%, whereas the shared sale agreement mandated 25%; and
  - iv. he chose to exclude comparable sales or have regard to any other measures of market valuation.
12. The applicant raised objection to this and said that it was effectively contrary to natural justice, and invited the Court of Appeal to set aside the award.

#### Decision of the Court of Appeal

13. Morrison J found that the matter had been raised with witnesses and with counsel for the applicant for leave to appeal during a hearing as well as in a directions hearing, and therefore the applicant had reasonable time to present its case.
14. On the other hand, Fraser and McMurdo JJ found that it hadn't been raised in the hearing, but that it had been raised later, before any award had been handed down, and well in time for the applicant to either call for further evidence or make further submissions.
15. The Justices were unanimous in taking the view that there was no denial of natural justice.

#### 'Real Practical Injustice'

16. The provisions of the *UNCITRAL Model Law on International Commercial Arbitration* precludes recourse against an award made under the provisions of the Convention or any Act in Australia which implements the provisions of the Convention.
17. It is important to uphold the provisions and not allow too readily questions of procedure or public policy come in the way of the enforceability of an award.
18. The Full Federal Court in *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 said that there has to be real practical injustice for an award to be set aside.
19. This test was also affirmed in Victoria in *Amaysa Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326.
20. *Mango Boulevard Pty Ltd v Mio Pty Ltd & Anor* [2018] QCA 39 (*Mango*) reaffirms the basic principles that arbitrators can determine their own procedure and they do not necessarily have to determine a matter in accordance with the way in which it has been laid out by the parties.
21. However, if they are going to take a different approach, they must tell the parties.
22. In *Mango*, it was found that both parties were well aware of the approach which the arbitrator intended to take, and therefore there couldn't be any real complaint about the issue not being in the pleadings. This was because the issue was one which was:
  - i. raised by the arbitrator;
  - ii. relevant to the way in which one approaches the question of valuation; and
  - iii. clearly foreshadowed by the arbitrator that he was thinking of taking into consideration the expectations of the developers.
23. In essence, *Mango* was able to present its case and there was no real unfairness or real practical prejudice in how the arbitration was conducted, nor was there any breach of public policy.

#### International implications

24. The adoption of these principles for the purposes of our domestic Commercial Arbitration Acts will have ramifications for our *International Arbitration Act 1974* (Cth), which is premised on the same grounds for setting aside arbitral laws.
25. So foreign parties looking at the possibility of an international arbitration in Australia will have regard to the fact that our law is sympathetic to the law which exists elsewhere in the world.

Commented [AM1]:

and therefore will be able to approach an Australian international arbitration with more confidence.

26. The reasoning of the Court in *Mango* and of the Full Federal Court in *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 is such that it will find support elsewhere in the world where questions of setting aside arbitral awards are discussed.

Take homes for Practitioners.

27. One cannot likely undertake a challenge to an arbitral award in Australia. It is going to be very difficult in the future.
28. This is because the courts have decided to support arbitration as a means of dispute resolution.
29. From this case, it is clear that the courts are going to act in accordance with the legislation and make it difficult for there to be an appeal from an arbitral award unless it has been pre-agreed in terms of the legislation.
30. The case of *Mango* confirms earlier decisions that a restrictive approach to setting aside awards should be adopted in accordance with s 34 of the *Commercial Arbitration Act* and the corresponding Art 34 of the *Model Law*.
31. Whilst there is provision in the legislation for appeals and setting aside on the basis of an area of law, most of these are based upon consent.
32. The case of *Mango* shows that courts are willing to continue to support and uphold arbitral awards even if the arbitrator may have been guilty of some procedural missteps, so long as it is done in keeping with the objectives of the *Commercial Arbitration Act*.
33. In the present case, there is a question as to whether there was indeed a misstep taken by the arbitrator, but if we assume that there was a misstep in the process of arbitration, it was one which the applicant was aware of in time to have it cured.
34. Whilst the case is domestic in nature, it has broad international relevance, and this is because the Commercial Arbitration Acts in Australia are based around the *UNCITRAL Model Law*.

## **BIOGRAPHY**

### Francis Douglas QC

Barrister – Tenth Floor Chambers, Sydney

Francis was called to the Bar in 1975 before taking silk in 1988. He has an extensive practice in commercial and public law. Francis is particularly interested in Arbitration and Mediation and has been appointed as counsel and arbitration in Australia and overseas. In 2017, Best Lawyers recognised Francis as a leader of the Australian Bar in Alternative Dispute Resolution.

### Alex Baykitch AM

Partner – King & Wood Mallesons, Sydney

Alex was admitted as a lawyer in 1989. He is consistently listed as a leading individual in legal directories for his expertise in cross border litigation and international arbitration. In 2017, he was appointed a Member of the Order of Australia. Alex is the President of the Australian Centre for International Commercial Arbitration (ACICA) and is a fellow of ACICA.

## **BIBLIOGRAPHY**

### Focus Case

*Mango Boulevard Pty Ltd v Mio Art Pty Ltd & Anor* [2018] QCA 39.

### Cases

*Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326  
*TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83

### Legislation

*Commercial Arbitration Act 2013* (Qld)

### Model Law

The UNCITRAL Model Law on International Commercial Arbitration, as adapted by the UN Commission on International Trade Law on 21 June 1985 and amended in 2006.