

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

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INTERNATIONAL ARBITRATION ACT 1974 (CWTH) DOES PRIVACY OF CONTRACT APPLY?

By Jim Thomson

In *Altain Khuder LLC v IMC Mining Inc & Anor* [2011] VSC 1 the Victorian Commercial Court dismissed a challenge to an order made ex parte under the *International Arbitration Act 1974* ("IAA") (with liberty to the defendants to apply to set the order aside) to enforce a foreign award made in Mongolia. The IAA gives domestic effect to the 1958 *UN Convention on the Recognition and Enforcement of Foreign Awards* ("the New York Convention") and the *UNCITRAL Model Law* as last updated in 2006.

Croft J distinguished the rules governing disclosure standards applicable on applications for ex parte injunctions. The procedure was more analogous to an "order nisi" procedure.

The main challenge was that the "original arbitration agreement" produced for the purpose of complying with IAA s.9(1)(b) to obtain the order was not binding on, or enforceable against, the second defendant. Since the second defendant was not a party to the arbitration agreement between the plaintiff and the first defendant, the second defendant argued it was outside the scope of IAA relief to enforce the award against it. However, this seemingly straightforward privity of contract defence could not prevail.

Under the international jurisprudence surrounding the application of the New York Convention, the mere absence of the defendant as a party to the text of the "agreement in writing" under which the arbitration was instigated does not give rise to any problem with the Court making orders under the IAA to enforce the award. Further, the applicable law for determining the issue was the law of the 'Seat' of the Arbitration (here Mongolian Law) even though the law of the contract was Queensland.

Rather, the party resisting enforcement of the award had to satisfy the Court that enforcement of the award should be refused on one of the grounds listed in IAA s.8(5). This the second defendant was unable to do and the orders for enforcement were confirmed.

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LIMITATION OF ACTIONS - AMENDMENT OF PLEADINGS AFTER LIMITATION EXPIRY – CIVIL PROCEDURE ACT s 65 – *State of New South Wales v Steven Charles Radford* [2010] NSWCA 276

Mr Radford sued the State of New South Wales, alleging that police officers used excessive force whilst arresting him, thus amounting to an assault. He sought to amend his Statement of Claim, so as to add an allegation that the excessive force rendered his arrest unlawful, thereby causing him to be falsely imprisoned. In the District Court, Mr Radford was granted leave to file his Amended Statement of Claim.

The Court of Appeal reversed the decision below, finding that because the period of the alleged false imprisonment was not pleaded in the proposed Amended Statement of Claim, the critical question of whether the new cause of action arose out of substantially the same facts as the existing cause of action under s.65(2)(c) of the *Civil Procedure Act* could not be answered. The Court of Appeal also found, *obiter*, that the correct limitation period for a cause of action in intentional tort claiming damages for personal injury is 3 years pursuant to s 18A(2) of the *Limitation Act*.

By Jason Downing

AGENCY – APPARENT AUTHORITY: *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd (in liquidation)* [2010] HKCFA 63

A recent decision of the Hong Kong Court of Final Appeal has considered the law in relation to apparent authority—better known in Australia as ostensible authority. At issue was whether Akai Holdings Ltd was liable to repay a US\$30 million loan its CEO ('Mr Ting') had obtained without authorisation from Thai Farmers Bank.

In dismissing the Bank's appeal, Lord Neuberger of Abbotsbury NPJ (with whom Ma CJ, Bokhary, Chan and Ribeiro PJJ agreed) held that Mr Ting did not have apparent authority and that the Bank was irrational in its belief that Mr Ting had authority to commit Akai to the loan.

The decision contains a useful discussion on the principles of apparent authority by reference to the leading English and Australian cases. It is important to also remember that s 129 of the Corporations Act 2001 (Cth) identifies certain assumptions people dealing with companies are entitled to make.

By Benjamin Kasep

AUSTRALIAN CONSUMER LAW

On 1 January 2011, the *Trade Practices Act 1974* (Cth) changed its name to the *Competition and Consumer Act* and the *Australian Consumer Law* (Schedule 2 to the Act) came into effect. The *Australian Consumer Law* centralizes Commonwealth and state consumer protection and fair trading legislation including provisions about consumer guarantees, unfair contracts, unconscionable conduct misleading and deceptive conduct and product safety.

Tom Brennan has published an article on the new law on his page of the floor website <http://www.13wentworthselbornechambers.com.au/brennan.html>

Therese Catanzariti has published an article on how the consumer guarantee and unfair contracts provisions may affect standard form contracts. The contract is available on her page of the floor website <http://www.13wentworthselbornechambers.com.au/catanzariti.html>

By Therese Catanzariti

ANNOUNCEMENTS

Commercial Arbitration

Jennifer Beck and **Jim Thomson** recently completed the course work for the Diploma of International Commercial Arbitration in Penang, Malaysia in October 2010. This Course was organized by the Australian and Malaysian branches of the Chartered Institute of Arbitrators.

Publications

[Corporations Legislation 2011](#) with Key Section Annotations by **Edmund Finnane**, published by Thomson Reuters, is now in print.

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