Wallace v Buttar – Review of Arbitral Awards: Manifest Disregard of Evidence and Manifest Disregard of the Law

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In a judgment which may surprise lawyers (and perhaps some judges) in Australia, the Second Circuit of the Federal Court in the United States, in effect, reaffirmed the Court's long held deference to arbitrators. Such deference cannot be said to be commonly reflected in Australia in the attitude of both lawyers engaged in arbitration or necessarily of courts conducting a review of an arbitral award.

In *Wallace v Buttar ('Wallace')*,[2] the Court addressed the circumstances in which an arbitral award might be vacated if there is clear evidence of 'manifest disregard of the law' and 'manifest disregard of evidence'.

Although such grounds are not provided in the governing *Federal Arbitration Act of 1925* ('FAA'), the grounds existed under the precedence of the Second Circuit's own judgments.

The judgement in *Wallace* clarified and, to some extent, defined the very narrow scope of review of Arbitral Awards by the Federal Court.

Manifest Disregard of the Law

The Court established the starting point for review as the presumption that an arbitrator is without knowledge of the law. As, under the FAA, an arbitrator has no duty to ascertain the law and in practise the arbitrator's consideration and application of the law, in effect, is to be limited to the authorities put before the arbitrator by the parties.

This presumption is entirely consistent with the common law traditional view of commercial arbitration being a process of finally deciding commercial disputes arising between commercial disputants by reference to a commercial man.

In these circumstances of presumed lack of knowledge of the law, whether or not an arbitrator's decision on the law is manifestly wrong, was held to be irrelevant.

The Australian Position

It should be noted that it is unlikely that such rationale would or could be applied by Australian Courts.

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2. 376 F.3d 182 (2nd Circuit 2004).

Although it is the expressed position of many lay arbitrators in Australia that they are limited only to consider the law as submitted to them by the parties thus somewhat consistent with the enunciated position of the Federal Court in *Wallace*, the *Uniform Commercial Arbitration Acts*[3] provide, at s 22(1), as follows:

> *Unless otherwise agreed in writing by the parties to the arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.*

Such a categorical provision is not limiting and, in effect, requires that the arbitrator correctly applies the law. That the parties might fail to make any submission on the law, or incorrectly submit on the law, will not excuse the arbitrator from the obligation of ascertaining the applicable law and correctly applying it even if this means that the arbitrator is required to conduct independent research.

In *Wallace*, the Court held that 'a federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law'.[4] The Court went on to state:

> *If a party fails to identify governing law to an arbitrator, we will infer knowledge and intentionality on the part of the arbitrator only if we find an error that is so obvious that it would be instantly perceived as such by the average person qualified to serve as an arbitrator.*[5]

However, having restrictively circumscribed the scope of legal reviews, the Court held that it must:

> *[R]eview an arbitral panel's decision to assure that it rests upon a barely colourable justification for the outcome reached.*[6]

By this judgment, the Court left open whether or not:

- the reviewing court enquiry into 'a barely colourable justification' is to be strictly confined to that which the parties put before a presumably ignorant arbitrator;
- the reviewing court can or must take into account substantial legal knowledge the arbitrator actually has, whether by legal training or otherwise; that is, the presumption of ignorance is not soundly based.

Manifest Disregard of the Evidence

In respect of manifest disregard of the evidence, the Court held that:

> *[T]he Second Circuit does not recognise manifest disregard of the evidence as a proper ground for vacating an arbitrator's award.*[7]

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3. *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (NSW); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1986* (WA); *Commercial Arbitration Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1986* (ACT).
4. *Uniform Commercial Arbitration Acts*, s 22 (1), 190.
5. Ibid. 195.
6. Ibid. 196.
7. Ibid. 193.

The Court departed from prior precedent in holding:

> *[T]o the extent that a federal court may look upon the evidentiary record of an arbitration proceeding at all it may only do so for the purpose of discerning whether a colourable basis exists for the panel's award so as to assure that the award cannot be said to be the result of the panel's manifest disregard of the law.*[8]

Thus, a reviewing court cannot reassess the evidence other than to establish if the factual record when applied to the law, as presented to the arbitral panel by the parties (if at all), does not support a basis for the award.

The conclusions that can be drawn from *Wallace* are that under the Federal law of the USA, manifest disregard of the law is almost never a ground for vacating an arbitrator's award, and manifest disregard of the evidence is never a ground.

The Australian Acts of themselves provide variously for curial intervention in arbitrations and for review of awards.[9] Section 38(1) *prima facie* would appear to exclude the jurisdiction of a Court to review awards and be somewhat consistent with the USA view. Section 38(1) reads as follows:

Without prejudice to the right of appeal conferred by sub-section (2), the Court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

The Australian Position

This view of limitation was expressed by Cole J (as he then was) in an article published in the *Australian Construction Law Newsletter*[10] in which his Honour stated:

> *There is no power conferred by the Act to review an award. It is simply incorrect to speak of judicial review of awards for the court does not have any statutory or any other power to conduct such a review even if it desired to do so.*

However, the provisions of s 38(1) are tempered by s 38(2) in the following terms:

> *Subject to sub-section (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.*

and s 38(4) as follows:

> *An appeal under sub-section (2) may be brought by any of the parties to an arbitration agreement—*
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> *(a) with the consent of all the other parties to the arbitration agreement; or*
>
> *(b) subject to section 40, with the leave of the Supreme Court.*

Section 38(5) provides:

> *The Supreme Court shall not grant leave under sub-section (4)(b) unless it considers that—*
>
> *(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and*

8. Ibid. 194.
9. Relevantly under s 38 and s 42 of the *Uniform Commercial Arbitration Acts*.
10. Cole J 'Awards under the *Uniform Commercial Arbitration Act 1984* (1990)' ACLN 25-29.

(b) there is—

(i) a manifest error of law on the face of the award; or

(ii) 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.

Thus, the court, other than in the unlikely circumstances that the determination of the question of law does not 'substantially affect the rights of one or more parties to the arbitration agreement', has the jurisdiction to do that which s 38(1) would appear to preclude.

A further consideration is the Act's prohibition upon 'breach of the rules of natural justice'.[11] Whilst the definition of misconduct is not limiting, misconduct is a ground permitting the court to set aside an award.[12]

Arguably, manifest disregard of the evidence or manifest error of law could constitute misconduct. This was a view held by Rolf J in *Doran Consructions Pty Ltd v Administration Corp of NSW*.[13]

Australian case law also supports the view that Australian courts can and should intervene to set aside an award where there has been manifest error of law on the face of the award.[14]

Conclusion

It would be most unusual if Australian courts could or would apply the same or like rationale as that applied by the US Federal Court in review on an arbitral award where allegations of manifest disregard of the law or manifest disregard of the evidence have been made against an arbitrator.

11. Section 4(1) *Uniform Commercial Arbitration Acts.*
12. Ibid. s 42(1)(a).
13. (Unreported 2nd Sept 1994 NSW Supreme Court).
14. For example, *Friend & Brooker Pty Ltd v Eurobodella Shire Council* (unreported 24th Nov 1995 NSW Supreme Court CA); *Hooper Constructions Pty Ltd v Giab Nominees Pty Ltd* (unreported 2nd Nov 1988 Victorian Supreme Court Marks J).