Comment

Atco appears to have taken the view that its chances of success in the Court of Appeal were sufficient for it to reject the second offer. Against this position were, it appears, at least two factors. First, Atco appeared not to take into account the concession by Mr Stewart that he would accept $55,000 in settlement of any costs order made by Davies J. Although the quantum of that costs was unknown, it seems to be accepted that this was a considerable concession. Secondly, the second offer also brought with it the certainty, if accepted, that the litigation would be at an end and neither party would be at any greater exposure to costs.

The High Court's decision suggests that practitioners need to be careful about relying solely upon their views as to prospects of success in advising their clients to reject a *Calderbank* offer particularly in areas where the law is well-established and success would require that well-established law to be distinguished.

Endnotes

1. Crennan, Kiefel, Bell, Gageler and Keane JJ.
2. (1933) 48 CLR 171.
3. At [6].

NCAT is a 'court' from which arbitration is referred

Stephen Tully reports on *Subway Systems v Ireland* [2014] VSCA 142.

The Victorian Civil and Administrative Tribunal (VCAT) has been held to be a 'court' such that when an action is brought before it concerning a matter subject to an arbitration agreement, VCAT shall, upon request, refer the parties to arbitration. This was the conclusion made by a majority of the Court of Appeal of the Victorian Supreme Court in *Subway Systems v Ireland* [2014] VSCA 142 (*Subway*). The reasoning is likely to apply to the New South Wales Civil and Administrative Tribunal (NCAT) and to commercial arbitration acts across Australia.

The facts and reasoning in *Subway*

Article 8(1) of the Model Law on International Commercial Arbitration (the 'Model Law') relevantly provides that a 'court' before which an action is brought in a matter subject to an arbitration agreement shall, upon request, refer the parties to arbitration.[1] This is replicated in s 8(1) of the *Commercial Arbitration Act* 2011 (Vic), which was the provision considered in *Subway*, as well as in s 8(1) of the *Commercial Arbitration Act 2010* (NSW).

Subway is a sandwich bar well-known to suburban shopping centres. Subway Systems argued that matters in dispute under the franchise agreement between the parties fell within the scope of an arbitration clause in the agreement. The issue was whether VCAT was a 'court' for the purposes of s 8(1).

Under Article 2(c) of the Model Law, a 'court' means 'a body or organ of the judicial system of a State'. However, that term is not defined in s 2 of the Victorian (or NSW) legislation. The Victorian Act defined 'the Court' (with capitalisation) as the Supreme Court and referred to the Supreme, County and Magistrates' courts as providing arbitration assistance and supervision functions (ss 2, 6).

At first instance VCAT was found not to be a 'court' for the purposes of s 8(1). This was on the basis that the Victorian Act referred specifically to the Supreme, County and Magistrates' courts and, following a comparison with the Model Law provisions, it was held to have been open to parliament to refer expressly to VCAT if that had been intended.[2]

Upon appeal Maxwell P and Beach JA concluded, by different routes, that the word 'court' included VCAT.

Maxwell P considered the ordinary meaning of the word 'judicial' and the substantive character of the functions VCAT performed. Maxwell P was satisfied that VCAT had a recognised adjudicative jurisdiction.[3] Although VCAT is not referred to as a court and its adjudicators are not called judges, it exercised judicial functions with the authority to determine the rights and liabilities of parties to commercial disputes. In Maxwell P's view, the drafters of the Model Law would have 'undoubtedly' intended Article 8(1) to apply to VCAT, and if the Victorian Parliament had deliberately wanted to depart from the Model Law, then this would have been expressly adverted to in the legislation.[4]

Beach JA reviewed the provisions of the Victorian Act, its object and purpose, extrinsic materials and the Model Law. Beach JA considered that the overall objective was to promote low cost, speedy arbitrations over longer, more expensive court trials and, in the interests of a uniform interpretation of the Model Law, hold those parties who chose arbitration to their bargains.[5] Further, Beach JA was satisfied that VCAT possessed all of the features of a court identified under the common law.[6]

In contrast, Kyrou AJA also applied ordinary rules of statutory interpretation to the same materials reviewed by Beach JA but concluded that VCAT was not a court.[7] This was because VCAT did not meet the common law criteria for a court. It was not bound by the rules of evidence, could not enforce its own decisions, some of its members are not legally qualified, it can be required to apply government policy, can offer advisory opinions and, indeed, was established to be an inexpensive, informal and speedy alternative to a court.[8] Furthermore, the definition of 'court' in Article 2 of the Model Law was the only definition which had been entirely omitted from s 2(1) of the Victorian Act. This had significance, because it could not be inferred that the definition was intended to apply to the legislation.[9] The parliament could have easily legislated that VCAT was a court, and the Model Law could have easily said that 'court' was intended to include statutory tribunals which had compulsory dispute resolution functions.[10]

Contrasting interpretative methodologies

Subway is also noteworthy for the contrasting interpretative methodologies employed by the three judges. Although reaching different conclusions, Beach JA and Kyrou AJA adopted orthodox but slightly different approaches as to statutory construction. For Beach JA, the task of statutory construction began and concluded with the legislative text.[11] For Kyrou AJA, the process of statutory construction began with an examination of context.[12] Section 8(1) could not be considered in isolation but had to be read in light of the provisions and purposes of the legislation.[13]

Maxwell P took a different approach altogether. For Maxwell P, distinctive interpretative rules were engaged. The Victorian legislation had a special character because it embodied and gave effect to an international agreement. This meant that certainty and uniformity of interpretation and application between states were paramount. The rules applicable to treaty interpretation had to be applied, unconstrained by technical rules of statutory interpretation.[14] This meant that the working documents of the international body which had formulated the Model Law – for example, an explanatory note from the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) - could be considered.[15] This approach is relatively unremarkable. Indeed, s 2A(3) of the Victorian Act expressly provides that reference may be made to such documents. The High Court has also had occasion to interpret the Model Law by reference to documents from UNCITRAL working groups.[16]

Kyrou AJA, by contrast considered that if the Act had intended that explanatory documents relating to the Model Law were to govern its interpretation, then the parliament would have mandated that they be taken into account.[17]

Conclusions

In proceedings concerning arbitration, Australian courts seek to strike a balance between the exercise of supervisory jurisdiction and party autonomy. An arbitral award will not be set aside as contrary to public policy unless, for example, fundamental norms of justice or fairness have been breached.[18] Now tribunals must equally support disputants resorting to arbitration. The conclusion in *Subway* is likely to be applicable to all other states and territories whose commercial arbitration acts contain materially identical provisions. For NSW, it is likely that any matter brought before NCAT which involves an arbitration agreement can be referred to arbitration upon request.

Endnotes

1. United Nations (UN) Commission on International Trade Law, Model Law on International Commercial Arbitration, UN Doc A/40117, Annex I (1994).
2. *Subway Systems Australia v Ireland* [2013] VSC 550 at [30], [41].
3. *Subway Systems v Ireland* [2014] VSCA 142 at [41]–[42] per Maxwell P.
4. Ibid., at [44], [45], [47] per Maxwell P.
5. Ibid., at [90] per Beach JA.
6. Ibid., at [86] per Beach JA. For the common law criteria, see *Shell Oil Co of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275 at 297 per Lord Sankey LC.
7. *Subway Systems v Ireland* [2014] VSCA 142 at [115] per Kyrou AJA.
8. Ibid., at [96] per Kyrou AJA.
9. Ibid., at [108] per Kyrou AJA.
10. Ibid., at [99], [110] per Kyrou AJA.
11. *Thiess v Collector of Customs & Ors* (2014) 88 ALJR 514 at 518 per French CJ, Hayne, Kiefel, Gageler and Keane JJ.
12. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, 384.
13. *Subway Systems v Ireland* [2014] VSCA 142 at [102] per Kyrou AJA.
14. See Articles 31 and 32, Vienna Convention on the Law of Treaties [1974] ATS 2.
15. *Subway Systems v Ireland* [2014] VSCA 142 at [29] per Maxwell P.
16. Facilitated by s 17, *International Arbitration Act 1974* (Cth); see *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5 at [11], [14], [20] per French CJ and Gageler J.
17. *Subway Systems v Ireland* [2014] VSCA 142 at [109] per Kyrou AJA.
18. *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 at [55], [111] per Allsop CJ, Middleton and Foster JJ.