International arbitration in Australia: 2011/2012 in review

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This article updates readers on the most important developments in international arbitration in Australia in the past year. It surveys legislative, case law, policy and other developments in Australia since 1 September 2011.

INTRODUCTION

After historic changes in 2010,[1] Australia continues to see exciting developments in international arbitration. A growing body of case law is emerging which illustrates the strengths, and also the shortcomings, of the 2010 amendments to the *International Arbitration Act 1974* (Cth) (IAA). At the same time, investment arbitration has been in the headlines, with ongoing debate over government policy, the first investor-state arbitration award in favour of an Australian investor, and the commencement of the *Phillip Morris* arbitration. Moreover, part of the enforcement provisions of the IAA is facing constitutional challenge in the High Court of Australia.

This article surveys the most important developments over the past year. In turn, it considers: (a) legislative developments; (b) case law concerning both commercial and investment arbitration; and (c) other developments, including government policy on investment arbitration and the constitutional challenge to the IAA.

LEGISLATIVE DEVELOPMENTS

Commonwealth legislation

There have been no further amendments to the IAA since 2010. Some recent cases have exposed weaknesses in the drafting of the 2010 amendments. There is increasing support for a new round of legislative amendments to address these weaknesses.[2] The key problems are briefly outlined below.

Section 8(1): Evidentiary onus

As noted in the *Norden case* below, there is uncertainty in the enforcement of foreign awards where the award debtor is not named in the arbitration agreement. Specifically, there is conflicting authority on whether the award creditor has some onus to prove that the award debtor was a party to the arbitration agreement. Part of the problem lies in linguistic differences between s 8(1) of the IAA and its counterpart provisions in other jurisdictions, such as the United Kingdom, Singapore and Hong Kong, which are in subtly different terms. Section 8(1) states that foreign awards are binding "on the parties to the arbitration agreement in pursuance of which it was made". By contrast, equivalent legislative provisions in other jurisdictions provide that a foreign award is "binding upon the persons between whom it was made".[3]

This uncertainty has generated four different judicial views as to the proper interpretation of, and the nature of the onus (if any) cast by, s 8(1). There is no explanation in the Explanatory

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[1] See Monichino A, "International Arbitration in Australia – 2010/2011 in Review" (2011) 22 ADRJ 215.

[2] See, for example, Garnett R and Nottage L, "What Law (if any) Now Applies to International Commercial Arbitration in Australia?" UNSWLJ (forthcoming, 2012); Keane PA, *The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House Our Rules*, Paper presented at AMTAC Annual Address (Brisbane, 25 September 2012), http://www.fedcourt.gov.au/aboutct/judges_papers/Keane-CJ-20120925.rtf viewed 1 October 2012.

[3] See *Arbitration Act 1996* (UK), s 101(1); *International Arbitration Act* (Cap 143A) (SGP), s 29(2); *Arbitration Ordinance* (Cap 609) (HKG), s 87(2).

Memorandum in respect of the IAA as originally enacted[4] for Parliament's choice of language in s 8(1). It should, in the authors' view, be brought into line with the equivalent provision in other jurisdictions.

Competent court to enforce non-foreign awards and non-Convention awards

Most awards enforced in Australia are foreign awards to which the New York Convention[5] applies. Enforcement of such awards is covered by s 8 of the IAA, which expressly confers jurisdiction on the federal and State/Territory Supreme Courts. However, s 8 does not apply to foreign awards made in a non-Convention country where the award creditor is neither domiciled, nor ordinarily resident, in a Convention country or in Australia (non-Convention foreign awards).[6] Nor does s 8 apply to international arbitration awards made in Australia (non-foreign awards).

Instead, non-Convention foreign awards and non-foreign awards are enforceable under Arts 35-36 of the Model Law, which is given the force of law by s 16 of the IAA. These articles refer to enforcement by a "competent court". However, in a legislative oversight, there is no definition of "competent court" for the purpose of those articles. This led to some difficulty in the *Castel Electronics case* discussed below. The IAA should, in the authors' view, be amended to provide expressly that both the Federal Court and the State/Territory Supreme Courts are "competent courts" with jurisdiction to enforce awards under Arts 35-36 of the Model Law.

Temporal operation of s 21

The old s 21 of the IAA enabled parties to opt out of the Model Law and choose an alternative *lex arbitri*. The IAA amendments in July 2010 introduced a new s 21, which makes it clear that the Model Law "covers the field"; that is, if the Model Law applies to an arbitration, a State or Territory arbitral law does not apply. Thus, opting out of the Model Law is no longer permitted. The problem, as noted in the *Castel Electronics* and *Rizhao* cases below, is that the federal legislature did not indicate the temporal operation of the new s 21. Specifically, it is not clear whether it applies to arbitration agreements entered into before 6 July 2010. If the new s 21 has prospective effect, it does not invalidate parties' choice to opt out of the Model Law in international arbitration agreements entered into before 6 July 2010.

This could lead to a tricky problem. The Uniform Arbitration Acts of the States and Territories are currently being repealed and replaced with new Commercial Arbitration Acts (CAAs) based on the UNCITRAL Model Law. If an arbitration is commenced pursuant to a pre-6 July 2010 international arbitration agreement, *following* the repeal of the relevant CAA selected by the parties in their agreement, the arbitration will have *no* arbitral law because the *lex arbitri* chosen by the parties will have ceased to exist.[7] Moreover, if, on their proper interpretation, the savings and transitional provisions of the new CAAs are limited in their operation to domestic arbitration agreements (a view advanced by one of the authors), there is also a potential "black hole" in respect of arbitrations brought pursuant to a pre-6 July 2010 international arbitration agreement, *prior to* the repeal of the relevant CAA selected by the parties in their agreement. That is, in this situation, while there is a *lex arbitri* at the commencement of the arbitration, upon the repeal of the old CAA, the chosen *lex arbitri* ceases to exist.[8] The spectre of a legislative "black hole" is a significant weakness: without an arbitral law, there is no nominated court to assist or supervise the arbitration.

[4] Then known as the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth).

[5] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) (New York Convention).

[6] By virtue of s 8(4), s 8 applies to foreign awards made in a non-Convention country, provided the award creditor is domiciled or ordinarily resident in a Convention country or in Australia. A Convention country is one of the 146 countries that have acceded to the New York Convention.

[7] The possibility of this "black hole" was first identified by Professors Nottage and Garnett (before the decisions in *Castel* and *Rhizhao* discussed below). See Nottage L and Garnett R, "The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?" (2010) 7 Asian Int'l Arb J 29 at 49-51.

[8] Thus, the "black hole" may be bigger than first identified. See Monichino A, "The Temporal Operation of the New Section 21 – Beware of the Black Hole", *ACICA News* (forthcoming, December 2012).

State and Territory legislation

The new State/Territory model legislation, which regulates domestic arbitration, has now been passed by all parliaments except for Queensland and the Australian Capital Territory (ACT). Below is a summary of the progress of the legislation across the States and Territories.

Jurisdiction	Name of Act	Progress
NSW	Commercial Arbitration Act 2010	Commencement: 1 October 2010
VIC	Commercial Arbitration Act 2012	Commencement: 17 November 2011
SA	Commercial Arbitration Act 2011	Commencement: 1 January 2012
NT	Commercial Arbitration (National Uniform Legislation) Act 2011	Commencement: 1 August 2012
TAS	Commercial Arbitration Act 2011 Commercial Arbitration (Consequential Amendments) Act 2011	Royal Assent: 16 June 2011 Commencement date not yet proclaimed
WA	Commercial Arbitration Act 2012	Royal Assent: 29 August 2012 Commencement date not yet proclaimed
QLD	Commercial Arbitration Bill 2011	Introduced into Parliament, but lapsed with the dissolution of Parliament for elections.
ACT	N/A	Yet to be introduced into Parliament

As the new legislation comes into operation in Tasmania, Western Australia, Queensland and the ACT, the legislative black hole referred to above will become larger.[9]

CASE LAW DEVELOPMENTS

There were 36 arbitration-related judgments in Australia in the year from 1 September 2011 to 1 September 2012. Of these, 10 concerned international arbitration.[10] Six were from the Federal Court of Australia, two from the Supreme Court of New South Wales, and two from the Supreme Court of Western Australia. Of the remaining 26 judgments, five involved the new CAAs which, like the IAA, are based on the UNCITRAL Model Law.[11]

The international arbitration-related judgments covered a range of interesting issues under Australia's arbitration legislation, including freezing orders in support of arbitration[12] and the time limit for making jurisdictional objections.[13] This section will concentrate on four international commercial arbitration cases of particular importance which deal with, among other things, the jurisdiction of Australian superior courts to enforce international arbitration awards made in Australia (that is, non-foreign awards), the public policy ground for resisting enforcement, enforcement of foreign awards against parties not named in the arbitration agreement, and the temporal operation of the new s 21 of the IAA. It also looks at two investor-state arbitrations.

[9] Assuming the new s 21 has prospective effect only.

[10] They are: *Casaceli v Natuzzi SpA* [2012] FCA 691; *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696; *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining* [2012] WASC 228; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535; *Passlow v Butmac Pty Ltd* [2012] NSWSC 225; *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1; *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209; *Prime Property Investment Pty Ltd v Van der Velde* (2011) 199 FCR 34; *ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat"* (2011) 285 ALR 444; *teleMates (Previously Better Telecom) Pty Ltd v Standard SofTel Solutions Pvt Ltd* (2011) 257 FLR 75.

[11] They are: *Wyong Shire Council v Jenbuild Pty Ltd* [2012] NSWSC 720; *Ashjal Pty Ltd v Elders Toepfer Grain Pty Ltd* [2012] NSWSC 545; *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 1567; *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 1331; *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 285 ALR 207.

[12] *ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat"* [2011] FCA 1371.

[13] *teleMates (previously better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd* (2011) 257 FLR 75.

International commercial arbitration

Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)

Facts

The applicant, Traxys (a Luxembourgish company), had a contract with the respondent, Balaji (an Indian company), regarding the supply of metallurgical coke. The contract was governed by English law and provided for arbitration in London under the London Court of International Arbitration rules. A dispute arose and, following arbitration, an award was made in favour of the applicant.

The applicant sought to have the foreign award enforced in Australia because the respondent appeared to own shares in an Australian company. It also sought a freezing order in respect of those shares. Around the same time, the respondent obtained an injunction from the High Court of Kolkata in India, restraining the applicant from taking any steps to enforce the award. This order was made *ex parte* and the applicant only received notice of it one month later.

Parties' submissions

The respondent resisted enforcement on three broad grounds, without relying on any of the specific grounds set out in s 8(5) of the IAA.[14] The first was a technical argument. It asserted that the Federal Court had no power to make an order giving effect to the award, because the IAA "automatically" did this. Section 8(2) and (3) of the IAA, it said, provide a "statutory deeming" that foreign awards are judgments of the court. Consequently, it argued, there is no provision in the IAA which allows courts to make orders giving effect to the terms of an arbitral award.

Secondly, the respondent argued that Australian courts cannot enforce an award against a party unless the party has assets in Australia. It submitted that this requirement had not been established.

Thirdly, it relied on s 8(7)[15] of the IAA, arguing that it would be a breach of public policy to enforce the award, on the basis of the respondent's lack of assets in Australia and, further, the injunction granted in India.

Decision

Foster J ordered that the award be enforced, rejecting all of the respondent's arguments. On the first point, his Honour found that Australian courts have consistently enforced foreign awards by making an order which reflects the terms of the award, and that this approach had a solid foundation in the language of the IAA.[16]

On the second argument, Foster J held that there was nothing in the IAA indicating that the award debtor must be shown to have assets in Australia before an award will be enforced.

In relation to the respondent's public policy arguments, Foster J noted the pro-enforcement bias of the IAA. In a thorough and illuminating discussion of the meaning of public policy, his Honour stated that the ground "should not be made available too readily, lest it undermine the purpose of encouraging and facilitating the enforcement of foreign arbitration awards".[17] On the facts of this case, Foster J reiterated that nothing in the IAA, including the public policy ground, required proof that the award debtor had assets in Australia. His Honour further held that the Indian injunction did not prevent the award from being enforced in Australia because Indian courts had no power to set aside an award which was rendered in London.[18]

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[14] Which reflects Art V(1) of the New York Convention.

[15] Which reflects Art V(2) of the New York Convention.

[16] See *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2)* (2011) 277 ALR 441.

[17] *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535 at [90]. This echoes remarks by Foster J in earlier cases, such as *Uganda*.

[18] It is widely accepted that, pursuant to the New York Convention, a foreign award cannot be set aside other than by a court at the seat of the arbitration. The issue of Indian courts purporting to set aside foreign awards was also a problem in the *White Industries case*, discussed below. A recent decision by the Supreme Court of India has put a stop to this practice: *Bharat Aluminium Co v Kaiser Aluminium Technical Service, Inc* (unreported, Civil Appeal No 7019 of 2005, 6 September 2012).

Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd

Facts

This case concerned two arbitration awards made in London under the Rules of the London Maritime Arbitrators Association. The dispute arose out of a voyage charterparty, governed by English law, for the shipping of coal from Australia to China. The applicant, Norden (a Danish ship owner), sought to have the foreign awards recognised and enforced in Australia.

Parties' submissions

The respondent, Beach Building & Civil Group Pty Ltd (an Australian company), resisted enforcement on two bases. First, it submitted that it was never party to the arbitration agreement. Secondly, it submitted that the arbitration agreement was invalid because of s 11 of the *Carriage of Goods by Sea Act 1991* (Cth) (COGSA).

Its first argument was based on the discomformity between the name in the award and the name in the arbitration agreement. The award debtor named in the award was indeed the respondent, Beach Building & Civil Group Pty Ltd. However, the charterparty in which the arbitration clause was contained named only the applicant (that is, the award creditor) and "Beach Building and Construction Group (of which Bowen Basis Coal Group forms a part), Australia".

The respondent submitted that this meant the award could not be enforced against it for two reasons. First, the applicant had not produced to the enforcement court, as required by s 9 of the IAA, an "arbitration agreement" within the definition of the IAA. Section 3(1) of the IAA defines a foreign arbitral award as an arbitral award made "in pursuance of an arbitration agreement". The respondent argued that, as it was never named in the arbitration agreement, it was impossible for the award to have been made in pursuance of such an agreement. In the alternative, the respondent argued that the award should not be enforced on the ground set out in s 8(5)(b) of the IAA, which permits refusal of enforcement where the arbitration agreement is not valid under the law applicable to it. Specifically, the respondent argued that the arbitration agreement was *not binding upon it* because it was never a party to the agreement. The authorities suggest that the validity of the arbitration agreement for the purposes of Art V(1)(a) of the New York Convention extends to such situations.[19]

The respondent's second argument was that the arbitration clause was invalid due to the COGSA. Section 11 of the COGSA essentially states that an agreement in a "sea carriage document" which purports to limit or preclude the jurisdiction of an Australian court is invalid, unless it provides for arbitration in Australia. Here, the seat of arbitration was London, so the arbitration clause was said to be invalid.

Decision

Foster J rejected the respondent's arguments about the misdescription in the arbitration agreement, but accepted its argument based on the COGSA.

His Honour rejected the submission that an arbitration agreement somehow fails to meet the definition in the IAA simply because the award debtor is not named in it. That the award named the respondent, and mentioned no other arbitration clause other than that in the charterparty, "inevitably" led, in his view, to the *prima facie* conclusion that the respondent was a party to the arbitration agreement.[20] Moreover, the respondent had presented no evidence to suggest that it was not, properly considered, the party named in the arbitration agreement. It simply pointed to the name in the agreement and noted the difference with its own. His Honour held that this assertion, without more, was not enough to rebut the inference drawn from the respondent's name appearing in the award.[21]

[19] See, for example, *Dallah Real Estate v Ministry of Religious Affairs* [2011] 1 AC 763 at [77]; *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9 at [166], [171]-[172], [272] (Hansen JA and Kyrou AJA). See n 25 as to the different approach adopted by Warren CJ. See also Born G, *International Commercial Arbitration* (Kluwer Law International, 2009) pp 2778-2779.

[20] *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 at [74].

[21] *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 at [76].

On the second point, concerning the invalidity of the arbitration agreement as per s 8(5)(b) of the IAA, Foster J held that the evidence clearly established that the respondent was simply misdescribed in the arbitration clause. Using ordinary principles of contractual interpretation, his Honour held that the true party to the agreement was the respondent.[22]

It is worth pausing to consider Foster J's analysis on the onus and burden of proof when the award debtor is not named in the arbitration agreement. On this point, Foster J departed from the approach taken by the majority of the Victorian Court of Appeal (Hansen JA and Kyrou AJA) in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*.[23] In that case, the majority held that the award creditor, at the first stage of the enforcement process, bore an "evidentiary" onus of establishing, on a *prima facie basis*, that there was an arbitration agreement between the award debtor and the award creditor. In their view, where enforcement of a foreign award was sought against a non-signatory to the arbitration agreement, the mere production of the award and the arbitration agreement, pursuant to which the award was made, would not be enough to satisfy this evidential onus. The majority considered that the English cases supported such an approach.[24] The only justification for the departure in approach from the English cases is the existence of linguistic differences between ss 8 and 9 of the IAA – in particular s 8(1) – and the equivalent provision in the English Act. Warren CJ expressly relied on those linguistic differences as justifying a departure from the English cases.[25] On the other hand, the majority acknowledged the existence of linguistic differences but nevertheless purported to follow the English cases.[26]

Foster J held that the leading English cases did not support the approach adopted by the majority in *Altain Khuder*. Instead, those cases supported the view that once the award creditor produces to the enforcement court the award and arbitration, the burden shifts to the award debtor to show it was not a party to the agreement. His Honour concluded that this approach was preferable to that in *Altain Khuder*.[27]

With respect, the better view is that of Foster J, as it gives full effect to the intent of Art IV of the New York Convention. The IAA must be interpreted on the basis that it faithfully implements Australia's obligations under the New York Convention. This is supported by the new objects clause and interpretation clause as part of the 2010 amendments of the IAA.[28]

Despite this, the respondent was ultimately successful in resisting enforcement. This is because Foster J accepted the respondent's argument relating to the COGSA, which meant that the arbitration clause was null and void, stripping the arbitrator of jurisdiction to render the awards.

Whether or not a voyage charterparty amounts to a "sea carriage document" under the COGSA is debatable. It is true that the COGSA is not affected by the IAA,[29] but Foster J's decision runs contrary

[22] *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 at [96], [98]-[100]. In contrast, the arbitrator had found that the charterparty named the respondent as a party, using principles of rectification (as opposed to contractual interpretation).

[23] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9.

[24] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9 at [136]; see also *Dallah Real Estate v Ministry of Religious Affairs* [2010] UKSC 46; *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326.

[25] See *Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9 at [37], [42]. Warren CJ held that, pursuant to s 8(1), the question whether the award debtor was a party to the arbitration agreement was a threshold issue which the award creditor had the legal onus of proving on the balance of probabilities.

[26] *Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9 at [135]-[136], [184].

[27] *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 at [91]. Foster J's approach is consistent with that of the trial judge in *Altain Khuder*, Croft J, whose decision was reversed on appeal. See *Altain Khuder LLC v IMC Mining* (2011) 246 FLR 47.

[28] IAA, ss 2D, 39. See also Nell G, "Recent Developments in the Enforcement of Foreign Arbitral Awards in Australia" (2012) A&NZ Mar LJ 24 at 65-68.

[29] IAA, s 2C.

to an earlier decision by the South Australian Supreme Court.[30] Thus, the law in this area is now uncertain. The decision leads to the outcome that, for the purposes of Australian law, arbitration clauses in charterparty contracts are invalid unless the seat of arbitration is in Australia. Practitioners should be conscious of this case when considering dispute resolution clauses at the drafting stage.

Castel Electronics Pty Ltd v TCL Air Conditioner (Zhonshan) Co Ltd

Facts

In 2003, the applicant, an Australian company (Castel), entered into a distribution agreement with the respondent, a Chinese company (TCL). The agreement was governed by Victorian law and provided for arbitration in Victoria. A dispute arose and the matter was referred to arbitration in Melbourne in 2008. The applicant was successful and awarded AU$2.8 million in damages plus costs. When the respondent failed to pay, the applicant sought to enforce the award in the Federal Court of Australia under Ch VIII of the Model Law.

Parties' submissions

The respondent resisted enforcement, primarily on the basis that the Federal Court of Australia did not have jurisdiction to enforce an international arbitration award made in Australia (labelled by the court as a "non-foreign award"). The respondent also resisted enforcement on public policy grounds, but Murphy J postponed that argument to a later date following his determination of the jurisdictional question.

The proposition that the Federal Court has no power to enforce an international arbitration award made in Australia is surprising. That it was a plausible argument is due to an oddity in Australia's implementation of the Model Law. International arbitration awards may be enforced under the IAA.[31] Foreign awards (in particular, awards made outside of Australia in a Convention country) are enforceable under ss 8-9 of the IAA.[32] Section 8 expressly confers upon both the Federal Court and the State/Territory Supreme Courts' jurisdiction to enforce foreign awards. Alternatively, an international arbitration award may be made in Australia pursuant to an arbitration seated in Australia. Such awards are enforceable under Arts 35-36 of the Model Law.[33] These articles refer to enforcement by a "competent court". However, in a legislative oversight, there is no definition of "competent court" for the purpose of those articles.

The respondent argued that because the Federal Court was not expressly nominated as a "competent court" for the purposes of Arts 35-36 of the Model Law, it had no power to enforce the award.

Decision

Rejecting the respondent's argument, Murphy J held that the Federal Court does have jurisdiction to enforce international awards made in Australia. His Honour relied on s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), which gives the Federal Court broad supplementary jurisdiction over "any matter … arising under any laws made by the [Federal] Parliament". This was sufficient to dispose of the jurisdictional objection. Murphy J made no finding on whether State Supreme Courts also have such jurisdiction.[34]

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[30] See *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (2012) 112 SASR 297. See also Keane, n 2, p 7 who questioned whether, as a matter of policy, an expansive interpretation of "sea carriage document" under the COGSA to encompass a voyage charter party was warranted.

[31] On the other hand, domestic arbitration awards are enforceable under the State/Territory CAAs.

[32] Section 8(4) expands the application of s 8 to apply to foreign awards made in a non-Convention country, provided the award creditor is domiciled or ordinarily resident in a Convention country or in Australia.

[33] Indeed, Arts 35-36 (contained in Ch VIII) are not limited to the enforcement of non-foreign awards. However, s 20 of the IAA provides that those articles do not apply to the enforcement of foreign awards. By reason of that restriction, Arts 35-36 of the Model Law are limited in their operation to the enforcement of non-foreign awards.

[34] This issue arose in the Supreme Court of Western Australia in *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1, which is discussed below.

Murphy J's analysis was undoubtedly correct. However, it is unfortunate that his Honour had to rely on the *Judiciary Act* to reach his conclusions. As argued above, the IAA should expressly confer jurisdiction on the Federal Court to deal with international awards made in Australia. The authors agree with the extra-judicial remarks of Justice Rares, which were endorsed by Murphy J:

> Parties should not have to sift through a legislative morass and apply constitutional law principles to find a court in which to enforce an award.[35]

His Honour also took the opportunity to make some *obiter* comments about the temporal operation of the new s 21 of the IAA, discussed above. In the present case, the parties had entered into an arbitration agreement before the new s 21 came into effect (6 July 2010), but their arbitration proceedings did not commence until after the amendment. Nor had they purported to opt-out of the Model Law.

Murphy J acknowledged that there is a general presumption against retrospectivity and that the IAA amendments do not expressly rebut this.[36] This would appear to support the view that the amended s 21 does not apply to pre-6 July 2010 arbitration agreements.[37] However, two matters outweighed this presumption. First, his Honour characterised the s 21 amendment as a *procedural* rather than a *substantive* change. Relying on authority from the High Court of Australia, he held that the presumption against retrospectivity protects parties to an arbitration from changes to their substantive and vested rights, but does not otherwise prevent retrospective changes to procedural laws.[38] Murphy J found it difficult to see how any "vested rights" could be adversely affected by the retrospective operation of the new s 21, since it did not change the substantive law to be applied.[39] Secondly, his Honour considered that the Explanatory Memorandum and Second Reading Speech for the amendment made it clear that "Parliament was responding to an immediate and significant difficulty which required prompt rectification, rather than to be addressed over ensuing years as arbitration agreements were entered into in the future".[40] As will be seen in *Rizhao* below, this view (which has much to commend it) has not gained universal acceptance.

Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd

Facts

A few months after *Castel Electronics*, the Western Australia Court of Appeal had to address a similar issue. The facts were as follows. In 2007, the appellant (a company based in China) entered into contracts with the respondent (a group of Australian mining companies) for the purchase of iron ore. The contracts contained clauses stating that any dispute would be referred to arbitration "in accordance with the *Commercial Arbitration Act 1985* (WA)".[41] In late 2008, a dispute arose and the matter was referred to arbitration in Australia. It was common ground in the arbitration that the CAA was the relevant arbitral law, even though it was an international arbitration. In August 2010, just after the IAA was amended, awards were rendered in favour of the respondent, in the amount of US$114 million plus interest and costs. The respondent then sought to enforce the awards under the CAA. Simultaneously, the appellant sought leave to appeal the awards under s 38 of the CAA.

At first instance, the primary judge gave leave to the respondent to enforce the awards and dismissed the appellant's application for leave to appeal the awards.

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[35] Justice Rares, *The Federal Court of Australia's International Arbitration List*, Paper presented at Senior Counsel Arbitration Seminar of the New South Wales Bar Association (Sydney, 14 September 2011) at [29].

[36] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209 at [65]-[66].

[37] This is the view taken, although "with hesitation", by Professors Richard Garnett and Luke Nottage. See Garnett and Nottage, n 7 at 47-48.

[38] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209 at [66]-[71].

[39] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209 at [68]-[69].

[40] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209 at [75].

[41] By selecting the CAA (WA), the parties had purported to opt out of the Model Law in the instant case.

Parties' submissions

On appeal, the appellant submitted that the trial judge erred in enforcing the award under the CAA. Rather, it said, the court only had jurisdiction to enforce them under the IAA and the Model Law.

The appellant advanced two arguments to support this. Both are somewhat technical and need explanation. First, the appellant submitted that the old s 21 of the IAA never permitted parties to opt out of the Model Law provisions on enforcement and recognition. Its reasoning was based on the language of the old s 21, which stated that parties could opt to "settle" their dispute using a law other than the Model Law. The appellant submitted that a dispute is "settled" once the award is made. After this, at the setting aside and enforcement stage, s 21 left no scope for opting out of the Model Law. Thus, the trial judge was wrong to enforce the awards under the CAA.

Secondly, the appellant submitted that the amendment to s 21, which came into effect on 6 July 2010, prevented the parties from opting out of the Model Law. It argued the amendment had retrospective effect and thus applied to the parties' earlier agreement, with the result that the purported opting out was ineffective. Alternatively, it submitted that the new s 21 applied because the enforcement proceedings were brought after 6 July 2010. This was said to be a further reason for which the trial judge erred in applying the CAA. The court was thus faced with the same question as in *Castel*: does the new s 21 apply to pre-6 July 2010 arbitration agreements?

The respondent rejected these arguments and submitted that, in any case, the appellant should not be able to raise this new point on appeal.

Decision

The Court of Appeal held that the appellant could not raise this new point on appeal.[42] Although in exceptional circumstances new submissions can be made on appeal, the court held that this was not such a case. That was sufficient to dismiss the appeal. However, the Court went on to make three findings of general importance for arbitration in Australia.

First, it assumed that State Supreme Courts have jurisdiction to enforce international arbitration awards made in Australia (that is, non-foreign awards) under the IAA,[43] even though the IAA does not expressly nominate them as a "competent court" in Arts 35-36 of the Model Law. As noted above, Murphy J declined to rule on this in *Castel*. On the facts of this case, this finding meant that even if the trial judge was wrong to enforce the award under the CAA, that error was not fatal: the trial judge had another source of jurisdiction in the IAA. It was a matter of common ground on appeal that the Supreme Court had jurisdiction to enforce non-foreign awards under the IAA (and, in particular, under Arts 35-36 of the Model Law). Nevertheless, the judgment does not explain how the Supreme Court has such jurisdiction.[44]

Secondly, the Court rejected the appellant's submission that the old s 21 only allowed parties to opt out of the Model Law up to the issue of the award. The Court adopted a broad interpretation of the section, finding that a dispute was only "settled" upon "final satisfaction of the disputed claim".[45] It held that there may be numerous steps to take *after* the making of the award before the matter is truly settled, including setting aside and enforcement proceedings. By selecting the CAA, the parties had opted out of the Model Law, including its setting aside and enforcement provisions. Therefore, the trial judge was entitled to employ the enforcement provisions in the CAA to enforce the awards.

Thirdly, Martin CJ, with whom Buss JA agreed, rejected the appellant's submission that the amended s 21 had retrospective effect and thus applied to the parties' pre-6 July 2010 arbitration agreement. This is contrary to the finding of Murphy J in *Castel Electronics*. Martin CJ held that, at

[42] *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1 at [87] (Martin CJ with whom Buss and Murphy JJA agreed).

[43] *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1 at [66], [74] (Martin CJ).

[44] See *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1 at [66], [91] (Martin CJ). It has been suggested that such power exists under the *Judiciary Act 1903* (Cth), s 39(2). See Rares, n 35.

[45] *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1 at [111] (Martin CJ).

the time of their arbitration agreement, the parties had a vested *substantive* right to conduct any future arbitration according to the selected *lex arbitri*. Consequently, the general presumption against retrospectivity applied. His Honour noted that this view was strengthened when, as on the facts of this case, the parties had referred their dispute to arbitration before the amendment came into operation.[46] Martin CJ observed that "very real practical problems" could arise if the legal regime governing arbitral proceedings which are underway are fundamentally altered during the course of those proceedings.[47] Accordingly, Martin CJ considered that the parties' choice to opt out of the Model Law was not affected by the introduction of the new s 21, and that the trial judge correctly employed the CAA to enforce the awards. However, on the general question of s 21's retrospective effect, his Honour noted that it was not necessary to express a concluded view.

The third member of the Court, Murphy JA, generally agreed with Martin CJ's reasons. However, his Honour was more circumspect in relation to the situation where an arbitration agreement was concluded before 6 July 2010, but no dispute had been referred to arbitration by that date. In such a case, he said, "the arbitration agreement would be wholly executory, and the rights … would arguably not have vested".[48] Therefore, Murphy JA suggested that there was no relevant impediment in those circumstances to the retrospective application of the new s 21 to an arbitration agreement entered into before 6 July 2010.

Thus, all three members of the Court agreed that the amended s 21 did not have retrospective effect where the dispute had been referred to arbitration prior to 6 July 2010 pursuant to a pre-6 July 2010 arbitration agreement in which the parties had selected the CAA as their lex arbitri. In such a case, upon commencement of the arbitration, the contractual rights recognised by the old s 21 (that is, a right to opt out of the Model Law) were invoked, creating vested rights which were not affected by the new s 21. On the other hand, the court was divided as to whether the new s 21 applied to a pre-6 July 2010 arbitration agreement where arbitration proceedings had not been commenced prior to the introduction of the new s 21.

In the authors' view, Murphy JA's approach is to be preferred (to the view of the majority, and also to the view in *Castel*), from both a statutory interpretation and a policy perspective.

Investor-state arbitration

White Industries Australia Ltd v India

This case is probably the first in which an Australian investor has succeeded in an arbitration brought against a state under an investment treaty.[49] It is also the first reported investment treaty ruling against India.

The factual background is relatively straightforward. In 1989, White Industries Australia (White), an Australian company specialising in mining equipment, entered into a contract with a state-owned Indian mining company, Coal India, to supply equipment and develop a coal mine in Piparwar, India. The contract, governed by Indian law, provided for ICC arbitration in Paris. In 1999, a dispute arose and the matter was referred to arbitration. A majority award was rendered in favour of White for AU$ 4.08 million.

In September 2002, White sought to enforce the award in New Delhi. This is where the real trouble began. Coal India initiated separate proceedings seeking to have the award set aside in Calcutta (despite the fact that the arbitration was seated in Paris).[50] What followed was a muddled series of adjournments, extensions and appeals.[51] Nine years later, the matter was far from resolved.

[46] *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1 at [133].

[47] *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1 at [141].

[48] *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1 at [207] (Murphy JA).

[49] Boxsell A, "Award against India a First" *The Australian Financial Review* (16 March 2012) p 42.

[50] Ordinarily, an arbitral award can only be set aside at the seat of arbitration. The award debtor's only option in a jurisdiction other than the seat is to resist any application to enforce the award. See n 18.

[51] See *White Industries v Government of India*, Final Award (30 November 2011) at 19-25.

The enforcement proceedings had been stayed (pending determination of the setting aside proceedings) and the setting aside proceedings did not yet have a hearing date in the Indian Supreme Court.

White then changed its strategy. It initiated arbitration proceedings against the Indian government, alleging that the delays in the Indian courts amounted to breaches of four provisions of the Australia-India Bilateral Investment Treaty (Australia-India BIT),[52] namely:

- the requirement of fair and equal treatment of investors;
- the requirement of treatment on a basis no less favourable than that afforded to an investor from any third country (the most favoured nation clause or "MFN clause");
- the prohibition on expropriation of investments; and
- the requirement that all funds relating to an investment are able to be transferred freely.[53]

Decision

The Tribunal rejected White Industries' claim on the fair and equitable treatment, expropriation and free transfer of funds grounds. Notably, it found that the delay in the Indian court system did not reach the level of a "denial of justice", which would constitute a breach of the fair and equal treatment provision.[54] However, the Tribunal found held that India was liable for breach of the MFN clause and awarded White the amount due under the original ICC award.[55]

The rationale of MFN clauses is to prevent discrimination between investors based on nationality. The Tribunal held that the judicial delay was a breach of India's obligation to provide White with "effective means" of asserting claims and enforcing rights. The "effective means" protection exists in many BITs,[56] but it does not appear in the Australia-India BIT. The Tribunal found that because such an obligation exists in the Kuwait-India BIT, India owed the same obligation to White under, and by reason of, the MFN clause.[57] That is, a failure by India to provide an effective means to enforce White's rights under the ICC award meant that White was being accorded less favourable treatment than that to which an investor from a third country (that is, Kuwait) was entitled at law. In this way, White was able to use the MFN clause to "piggy-back" off the Kuwait-India BIT and import the effective means obligation into the Australia-India BIT.

Once it had imported the obligation, the Tribunal had to decide whether that obligation had been breached. In relation to White's enforcement proceedings, which had been stayed after three and a half years, it found no breach had occurred. This was because White had decided not to appeal the stay granted in respect of the enforcement proceedings. The Tribunal held that given the availability of an appeal, the onus was on White to show that an appeal would have been "ineffective or futile".[58] By contrast, the Tribunal had "no difficulty" in finding that the nine-year delay in the setting aside proceedings meant that India had not provided an effective means for enforcing rights.[59]

One interesting point in respect of the effective means protection (not addressed by the award) is the issue of causation. Specifically, the Tribunal did not address the possibility of White enforcing the award outside India. While not relevant to whether India had breached the treaty, it was relevant to the

[52] *Agreement between the Government of Australia and the Government of the Republic of India on the Protection and Promotion of Investments*, signed 26 February 1999, [2000] ATS 14 (entered into force 4 May 2000).

[53] For a general introduction to investor-state arbitration, see Mangan M, "Australia's Investment Treaty Program and Investor-state Arbitration" in Nottage L and Garnett R (eds), *International Arbitration in Australia* (The Federation Press, 2010).

[54] In this regard, the Tribunal held that "denial of justice" is a higher standard than "effective means to enforce rights".

[55] Interestingly, the Tribunal did not discount this amount on account of the risk of White not being able to successfully enforce the ICC Award.

[56] See, for example, *Ecuador-United States Bilateral Investment Treaty*, Art II(7).

[57] *White Industries v Government of India*, Final Award (30 November 2011) at 106-108.

[58] *White Industries v Government of India*, Final Award (30 November 2011) at 117.

[59] *White Industries v Government of India*, Final Award (30 November 2011) at 118-119. The Tribunal adopted the same standard for "effective means" as in *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador*, Partial Award on the Merits (30 March 2010) at 121-124.

amount of loss (if any) caused by the breach. In other words, there was no obvious impediment to White enforcing the award outside of India even if the Indian courts purported to set aside the award. The delay in dealing with the setting aside application, and in turn the enforcement application in India, was causative of loss only if White had no economic option but to enforce the award in India. Whether or not this was the case is not specifically addressed in the award.

The decision is no doubt welcome news for investors in India or any country where courts are hostile to arbitration. It demonstrates a method of obtaining remedies outside India's courts. In this way, it may offer a (limited) "second bite of the cherry" where difficulties arise with local courts in the enforcement of foreign awards.[60] That said, the case puts arbitrators in an investor-state arbitration in the difficult position of second-guessing the correctness of decisions of national courts and, moreover, the efficiency of entire judicial systems.[61] In this regard, this use of the effective means standard will remain contentious.

Phillip Morris Asia Ltd v Commonwealth

The dispute between Philip Morris and the Australian government is one of the most closely watched arbitration cases in Australian history.[62] In April 2010, the Australian government announced its intention to introduce plain-packaging legislation for cigarettes. Essentially, the legislation will ban any decoration or logos on cigarette packages, which will instead be a drab brown colour.[63]

A number of tobacco companies, including Philip Morris, brought proceedings against the government in the High Court of Australia, alleging that the legislation is unconstitutional. On 15 August 2012, the High Court rejected the constitutional challenge.[64]

In November 2011, a Hong Kong based company called Philip Morris Asia Ltd (PM Asia) commenced an arbitration against the Australian government, pursuant to the Australia-Hong Kong BIT.[65] PM Asia owns 100% of the shares in Philip Morris Australia Ltd (PM Australia).

PM Asia claims that, as the owner of PM Australia (and its intellectual property), it is a protected investor for the purpose of the HK-Australia BIT. Its investment is said to be the intellectual property currently displayed on cigarette packages, which are banned under the legislation. PM Asia alleges that the plain packaging legislation amounts to various breaches of the BIT, including the expropriation and fair and equal treatment provisions, as well as being in violation of multilateral trade agreements on intellectual property.[66] It seeks suspension of the legislation and compensation "of the order of billions of Australian dollars".

Australia's answer has raised jurisdictional objections and denied all of the alleged breaches. On jurisdiction, Australia submitted that PM Asia did not acquire an interest in Philip Morris Australia until February 2011 – almost a year after the announcement of the plain packaging legislation.[67] Thus, PM Asia made its investment knowing that such legislation was imminent. Australia has submitted that PM Asia thus had no investment in Australia at the time that the dispute arose, with the result that

[60] See Greenaway J, *Does Investment Arbitration Now Provide a Second Bite at the Cherry?* (28 March 2012), http://www.kluwerarbitrationblog.com/blog/2012/03/28/does-investment-arbitration-now-provide-a-second-bite-at-the-cherry viewed 22 July 2012.

[61] This sits squarely within the view that investor-state arbitration is contributing to the development of "global administrative law". See van Harten G and Loughlin M, "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17 Eur J of Int'l Law 121.

[62] The Australian government has set up a website providing background to the case: http://www.ag.gov.au/Internationallaw/Pages/Investor-State-Arbitration---Tobacco-Plain-Packaging.aspx viewed 8 October 2012.

[63] See *Tobacco Plain Packaging Act 2011* (Cth).

[64] See *JT International SA v Commonwealth; British American Tobacco Australasia Ltd v Commonwealth* [2012] HCA 43.

[65] In full, the *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993).

[66] For an analysis of the so-called "right" to use trademarks under these agreements, see Davison M, "Plain Packaging of Tobacco and the 'Right' to use a Trademark" (2012) 8 EIPR 498.

[67] See *Australia's Response to the Notice of Arbitration* at [6]-[7].

the Tribunal has no jurisdiction to hear the dispute and, in any case, there can be no substantive breach without a relevant investment at the time of the announcement of the proposed legislation. Moreover, Australia's response submits that the Tribunal has no jurisdiction to hear disputes relating to other international agreements, arguing that these are plainly outside the scope of the BIT and that there are already agreed dispute settlement mechanisms in place to deal with such matters.[68]

The arbitration is ongoing. The outcome will have major implications for health regulation around the world. In this regard, it is important to note that, unlike many other BITs, the HK-Australia BIT contains no broad public health exception.[69] The outcome may also affect the Australian government's policy on investment arbitration generally, as discussed below.

OTHER DEVELOPMENTS

Investment arbitration policy

The prospect of challenges to its tobacco legislation no doubt informed the Australian government's policy shift in April 2011 to no longer include investor-state dispute settlement (ISDS) clauses in its trade agreements. The decision fits squarely within the broader "backlash" against investment arbitration around the world.[70]

Debate over the government's policy shift has intensified this year. Supporters of the government's decision have pointed to the *Philip Morris* arbitration, noting the potential threat to Australia's sovereignty in areas such as health policy.[71] One commentator has even argued that investment arbitration "is a direct affront to the rule of law".[72] They also note that, because Australia's legal system is well regarded internationally, a lack of treaty protection will not discourage inbound investment.[73] Further, the supporters point out the other options available for businesses wishing to protect their overseas investments, such as political risk insurance and entering into specific contracts with the state in which they are investing.

Those opposed to the change include the Australian Chamber of Commerce and Industry (ACCI), and several leading arbitration practitioners. This group wrote to the Prime Minister in July 2012 to express its concerns, arguing that the policy shift could leave Australian investors without any effective legal mechanism to protect their overseas investments.[74] A particular worry is that Australian investors could face discrimination in less-developed countries, where governments may favour domestic firms for political reasons and the judiciary is not free from political influence. Without recourse to an ISDS mechanism, the usual protections contained in BITs are often illusory. The investor instead has to enlist diplomatic pressure, or resort to equivalent remedies in the domestic law

[68] Ukraine, Honduras and the Dominican Republic have filed a dispute at the World Trade Organization (WTO) against Australia, alleging that the plain packaging legislation breaches various WTO agreements.

[69] By contrast, see the *Australia-Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009), Annex 10B.

[70] See generally, Waibel M et al, *The Backlash against Investment Arbitration* (Kluwer Law International, 2010).

[71] See Tienhaara K, "ACCI's Right to Sue Campaign not Supported by the Facts", *The Conversation* (online) (13 August 2012), http://www.theconversation.edu.au/accis-right-to-sue-campaign-not-supported-by-the-facts-8800 viewed 8 October 2012. See also the comments by Minister for Trade, Dr Craig Emerson MP, in Kitney G, "Business Push for Sovereign Risk Protection", *The Australian Financial Review* (9 August 2012) p 12.

[72] See Faunce T, "An Affront to the Rule of Law: International Tribunals to Decide on Plain Packaging", *The Conversation* (online) (29 August 2012), http://www.theconversation.edu.au/an-affront-to-the-rule-of-law-international-tribunals-to-decide-on-plain-packaging-8968 viewed 8 October 2012.

[73] *The Economist* adhered to this view in an article earlier this year: "Foreign Investment Disputes: Come and Get Me", *The Economist* (18 February 2012) pp 38-40.

[74] See Australian Chamber of Commerce and Industry, *Letter to The Hon Julia Gillard MP* (13 July 2012), http://www.acci.asn.au/getattachment/3061e3f7-017c-49e4-8f67-53353e02e48f/ISDS-Letter-to-PM_COMPLETE_16072012.aspx viewed 18 August 2012. See also Kitney, n 71, p 12.

of the host state (assuming they are available). Rather than simply refusing to include ISDS clauses in investment treaties, Australia could protect itself by creating broad public health exceptions in future BITs.[75]

It is respectfully submitted that the understandable concern about the legal strategy of tobacco companies should not be misdirected at investment arbitration as a whole. There are valid criticisms to be made about investor-state arbitration, including issues of consistency, environmental protection and human rights. There is no question that these should be addressed. But it should not be forgotten that investment arbitration is a peaceful way to resolve disputes by reference to legal treaties to which states have consented.

The issue remains a live one as Australia negotiates and concludes further free trade agreements. The Australia-Malaysia Free Trade Agreement, concluded this year, contains no ISDS provision.[76] Likewise, Australia is apparently resisting United States requests to include such a provision in the Trans-Pacific Partnership, currently being negotiated.

Constitutional challenge to the IAA

Potentially the most important development in the past 12 months is the recent (undecided) constitutional challenge in *TCL Air Conditioner v Judges of the Federal Court of Australia*.[77] The case arises out of the litigation between TCL and Castel (outlined above). Following his determination of the jurisdictional objection, Murphy J proceeded to hear TCL's public policy objection. Murphy J's judgment on this aspect of the case is still pending. Meanwhile, TCL has brought an application in the original jurisdiction of the High Court of Australia contending that the implementation of the Model Law in the IAA as part of Australia's domestic law is unconstitutional. The matter has been set down for hearing in the High Court on 6 November 2012.

It appears that TCL alleges constitutional invalidity on two grounds. First, it is said that Arts 35-36 effectively make international arbitration awards immediately enforceable, having regard to the very limited grounds for resisting enforcement under Art 36, and thus, in substance, purport to confer the judicial power of the Commonwealth on a non-Ch III body, namely arbitral tribunals.[78] Secondly, TCL argues that the Federal Court's discretion is so limited under Arts 35-36 that it constitutes an impermissible interference with the judicial power of the Commonwealth and/or undermines the institutional integrity of a Ch III court.[79] This is because Arts 35-36 in effect, it is argued, require Australian superior courts to act robotically in "rubber stamping" international arbitration awards.

On both grounds, it may be expected that TCL will emphasise that an Australian court is mandated to enforce an international arbitration award made in Australia even if, on its face, it manifests an error of law, and that to oblige an Australian court to enforce an award in those circumstances is to require the court to act in a fashion that is repugnant to the judicial process.[80]

A successful constitutional challenge would have serious implications for Australia. A common global standard for enforcement of international arbitration awards is an essential feature of an

[75] As in *Australia-Chile Free Trade Agreement*, n 69, Annex 10B. For a fuller treatment of reform options, see Nottage L, *The Rise and Possible Fall of Investor-state Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement"* (10 June 2011), pp 14-16, 22-23, http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1860505 viewed 16 September 2012.

[76] See the *Malaysia-Australia Free Trade Agreement*, signed 22 May 2012, [2011] ATNIF (not yet in force).

[77] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2012] HCATrans 172.

[78] As to whether arbitrators exercise judicial power, see *QH Tours Ltd v Ship Design & Management* (1991) 105 ALR 371 at 385-386; *Westport Insurance v Gordian Runoff* (2011) 244 CLR 239 at 261.

[79] See *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245; *Kirk v Industrial Relations Commission* (2010) 239 CLR 531.

[80] See the Hon Justice WMC Gummow AC, *A Fourth Branch of Government?*, Paper delivered to the 2012 National Administrative Law Conference (Adelaide, 19 July 2012) p 18. Error of law is not a ground for setting aside an award under Art 34 of the Model Law, nor is it a ground for resisting enforcement of an award under Art 36.

effective international arbitration system. If Australia's implementation of Ch VIII of the Model Law is struck down as unconstitutional, there is a risk that Australia may develop a reputation as an unreliable venue for the enforcement of international arbitration awards; certainly where those awards are seated in Australia. In turn, this may have the adverse effect of dissuading parties from selecting Australia as a seat for their arbitration. As Chief Justice Keane of the Federal Court of Australia has recently noted, international traders (and their advisers) have unprecedented freedom to choose their dispute resolution arrangements. They expect high-quality, but minimal, judicial intervention in arbitration. If a jurisdiction does not offer this, they vote with their feet.[81] As a minor player in international arbitration, Australia is not in a position to insist on special rules.[82]

ACICA Judicial Liaison Committee first meeting

The ACICA Judicial Liaison Committee met for the first time in March this year. The Committee, comprised of representatives of the Federal and State Supreme courts, aims to promote uniformity in international arbitration matters in Australian courts. On this issue, one of the authors has elsewhere advocated the need for centralisation of judicial power, including by amendment of the IAA to establish the Federal Court as the single intermediate appellate court in international arbitration matters, in order to promote a uniform approach to international arbitration in Australia.[83]

Supreme Court of New South Wales Arbitration Practice Note

A welcome development in this regard was the new Practice Note from the Supreme Court of New South Wales, issued in February 2012. The Practice Note establishes a stand-alone commercial arbitration list for cases relating to arbitration. A specific judge, Justice Hammerschlag, with experience in arbitration cases, has been appointed to administer the list. This was not the case in the previous Practice Note, which appeared to allow any judge from the Commercial List of the Supreme Court of New South Wales to hear arbitration matters.

Proposed International Disputes Centre in Melbourne

As noted in last year's article, 2010 saw the opening of the Australian International Disputes Centre in Sydney. Since then, there have been a number of calls to establish a similar facility in Melbourne. Chief Justice of the Supreme Court of Victoria, Marilyn Warren AC, has said that an announcement would be made on this "very soon".[84]

As this is being debated, plans for new facilities in Asian arbitration institutions are well underway. In 2013, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) will move into new, larger premises, with 20 hearing rooms, an auditorium and administrative and business facilities. This is being funded by the Malaysian government, which believes that it is essential to compete with Hong Kong and Singapore as a seat of arbitration.[85]

Conclusion

The number of arbitrations in Australia remains low compared to the rest of the Asia-Pacific. While the recent arbitration reforms have been broadly successful, Australian practitioners and policymakers need, with respect, to be aware of the legislative reform and policy issues outlined in this article. The response to these issues will, in no small part, influence whether or not the reforms are ultimately successful and the long-term goal of establishing Australia as a regional hub for arbitration is realised.

[81] See Keane, n 2, pp 16-17.

[82] See Keane, n 2, p 17, who noted "it makes little sense for sheep to pass resolutions in favour of vegetarianism while the wolves remain of a different opinion".

[83] See Monichino A, "International Arbitration in Australia: The Need to Centralise Judicial Power" (2012) 86 ALJ 118. See also Keane, n 2, p 16, who noted the appeal of the proposal.

[84] Boxsell A, "AIDC to Set Up Vic Hub", *The Australian Financial Review* (8 June 2012) p 44.

[85] Rajoo S, "KLRCA: A Dynamic & Upcoming Institution" (2011) (Oct/Dec) *KLRCA Newsletter* 20.