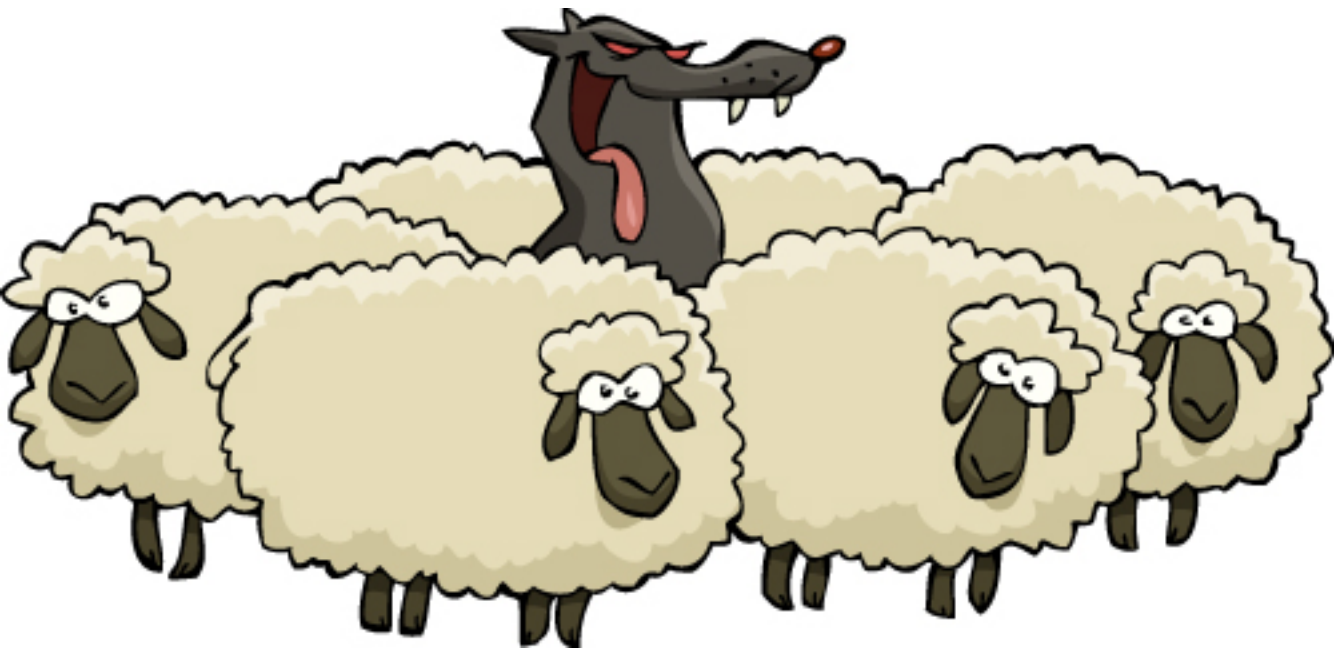
Insight: International arbitration: sheep, wolves and vegetarianism – a view from Down Under



Australia's apex court, the High Court of Australia, has recently rejected a constitutional challenge to Australia's adoption of the UNCITRAL Model Law on International Commercial Arbitration in Australia's International Arbitration Act. In so doing, it has provided useful guidance on the proper approach to the interpretation of the Model Law and has confirmed that Australia is an arbitration-friendly jurisdiction.

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In an article published in the March 2012 edition of this journal, John Digby QC (now the Hon Justice Digby of the Supreme Court of Victoria) posed the question: 'Is Australia unfriendly to arbitration?'[1] The question was posed in the light of the Victorian Court of Appeal's decision in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*,[2] a notoriously difficult case involving the enforcement in Australia of an arbitral award (made in Mongolia) against a non-signatory to the arbitration agreement. Mr Digby (as he then was) argued that the decision should be limited to its unusual set of facts and did not (notwithstanding the views of some commentators) represent a lack of a 'pro-arbitration' approach by Australian courts.[3]

Twelve months later, Australia's apex court, the High Court of Australia,[4] has confirmed in resounding fashion that Australia is arbitration-friendly. By its judgment in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (the '*TCL* case'),[5] the High Court unanimously rejected a constitutional challenge to Australia's adoption in the International Arbitration Act 1974 (Cth) (IAA) of the enforcement provisions contained in chapter VIII (Articles 35 and 36) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the 'Model Law'). The Model Law has been adopted by over 60 nation states around the world and is the benchmark against which arbitral laws are measured.

This article will describe the bases of the constitutional challenge and the High Court's rejection of it. I hasten to emphasise that Australia is not the first jurisdiction in which a constitutional challenge has been made to a domestic law that has adopted the Model Law.[6]

Background

The *TCL* case arises out of litigation between a Chinese air conditioner company and Australia's Castel Electronics. They entered into an exclusive distributorship agreement in 2003 under which they agreed to refer disputes under the agreement to arbitration seated in Melbourne according to Victorian law. Arbitration proceedings were commenced in July 2008, and in 2010 an arbitral tribunal awarded Castel about AU$3m plus costs.

Castel sought to enforce the awards[7] in the Federal Court of Australia. TCL contended that the Federal Court did not have jurisdiction to do so. In a judgment handed down on 23 January 2012, a single judge of the Federal Court held that the Federal Court is a 'competent court' for the purposes of enforcing an international arbitral award under Article 35 of the Model Law.[8]

Having determined that the Court had jurisdiction, in April 2012 the same judge (Murphy J) heard an application by Castel to enforce the awards, and also an application by TCL to set them aside on the basis that they were contrary to the public policy of Australia. In particular, TCL argued that a breach of the rules of natural justice had occurred in connection with the making of the awards – comprising a breach of the (supposed) 'no evidence' rule and the 'hearing' rule. On 2 November 2012, Murphy J handed down a second judgment in which he enforced the awards.[9]

In the meantime, TCL brought an application in the original jurisdiction of the High Court for the issue of constitutional writs of prohibition and certiorari directed to the judges of the Federal Court. TCL sought, first, to restrain the judges of the Federal Court from enforcing the arbitral awards and, secondly, to quash the first judgment which held that the Federal Court had jurisdiction to enforce the awards.

Reflecting the importance of the case, the Solicitor-General of the Commonwealth and the Attorneys-General of New South Wales, Victoria, Western Australia and South Australia intervened in the High Court proceeding. Further, Australia's peak arbitration bodies, the Australian Centre for International Commercial Arbitration (ACICA), the Institute of Arbitrators & Mediators Australia (IAMA) and Chartered Institute of Arbitrators (CIArb) Australia, made a joint submission as amici curiae in opposition to the constitutional challenge.

Regulatory framework

The Model Law is given the force of law in Australia by section 16 of the IAA. Australia adopted the original 1985 version of the Model Law in 1989 by amendment of the IAA. In 2010, the IAA was further amended to adopt the 2006 revision of the Model Law.

Foreign awards made in countries that are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the 'New York convention') may be enforced in Australia under sections 8 to 9 of the IAA, which implement Articles IV and V of the New York Convention. On the other hand, foreign awards made in non-Convention countries, and also international awards made in Australia (like the awards against TCL in favour of Castel), lie to be enforced under chapter VIII (Articles 35 and 36) of the Model Law.[10]

Article 35 of the Model Law provides that an arbitral award shall be recognised as binding and, upon application to a competent court, shall be enforced, subject to the provisions of Articles 35 and 36. Relevantly, Article 35 requires the award creditor to produce to the enforcement court the original or copy of the arbitral award while Article 36 sets out a list of exhaustive grounds for refusing recognition or enforcement of an arbitral award. Those grounds mirror the grounds contained in sections 8(5) and (7) of the IAA, which implement Article V of the New York Convention.

TCL's challenge

TCL alleged constitutional invalidity on two grounds. First, it said that Articles 35 and 36 effectively render international arbitration awards determinative, having regard to the very limited grounds for resisting enforcement under Article 36, and thus impermissibly purport to confer the judicial power of the Commonwealth on arbitral tribunals, as opposed to a court specified in chapter III of the Australian Constitution. Secondly, TCL argued that the Federal Court's discretion to resist enforcement of an international arbitration award was so limited under Articles 35 and 36 that it constituted an impermissible interference with the judicial power of the Commonwealth. It said this was because Articles 35 and 36 in effect require Australian courts to act administratively in 'rubber-stamping' international arbitration awards when entertaining applications to enforce them.

Underlying both grounds of attack was an argument that the IAA mandated Australian superior courts to enforce an international arbitration award made in Australia even if, on its face, it contained a manifest error of law. It contended that to oblige an Australian court to enforce an award in those circumstances was to require the court to act in a fashion that is repugnant to the judicial process.

The Court's reasoning

The majority judgment of the High Court was delivered by Hayne, Crennan, Kiefel and Bell JJ. Chief Justice French and Gageler J handed down a separate concurring joint judgment.

The Court noted that the international origins of the Model Law require it to be interpreted without any assumption that it embodies common law concepts – including the somewhat haphazard common law rule that an arbitral award may be set aside for error of law on the face of the award.

It also noted that, like the New York Convention, the Model Law operates on the basis that an arbitral award satisfies the parties' accord to refer their disputes to determination by arbitration, which supersedes (by agreement) the original rights and obligations of the parties.

Article 28 of the Model Law

Article 19 of the Model Law empowers the parties to choose rules of procedure applicable to the arbitration, while

Article 28 allows the parties to choose the rules of law according to which the substance of their dispute is to be determined.

TCL argued that Article 28 required an arbitrator to decide the dispute correctly in accordance with the rules of law chosen by the parties. Alternatively, it contended that there was an implied term in the arbitration agreement to that effect.

The Court held that there is nothing to suggest that Article 28 requires an arbitral tribunal to decide a dispute in accordance with the substantive rules of law chosen by the parties in a manner that a competent court would determine to be correct. The absence of an error of law ground in Article 36 strongly militated against TCL's submission concerning the interpretation of Article 28. Nor was there any implied term that required an arbitral award to be correct in law. Therefore, mis-application (as opposed to non-application) of the chosen rules of law was not a ground for impugning a Model Law award.

No delegation of judicial power

The Court rejected the contention that the making of the arbitral award pursuant to the Model Law amounted to an exercise of the judicial power of the Commonwealth. It noted that the essential distinction between judicial power and arbitral authority is that arbitral authority is based on the voluntary agreement of the parties, whereas judicial power is exercised coercively and operates independently of the consent of the parties. Moreover, unlike a judgment, an arbitrator's award is not binding of its own force. The exercise of judicial power in the present case only arose upon the court entertaining an application for enforcement under
Articles 35 and 36 of the Model Law.

No impairment of institutional integrity

As to the second ground of attack, the Court held that the inability of the Federal Court as a competent court under Articles 35 and 36 of the Model Law to refuse enforcement of an arbitral award on the ground of error of law did not undermine the institutional integrity of the Federal Court. This was because a court undertaking the task of enforcing an award pursuant to the IAA has power to refuse enforcement of an award (under Article 36) in a variety of circumstances, including if the award is in conflict with the public policy of Australia. The Court observed that those provisions are protective of the institutional integrity of courts in the Australian judicial system called upon to exercise jurisdiction under the IAA to enforce international arbitration awards. Moreover, enforcement of the arbitral award was the enforcement of the binding result of the parties' agreement to submit their dispute to arbitration, not enforcement of the underlying disputed rights submitted to arbitration.

Conclusion

The High Court's judgment confirms that Australia is an arbitration-friendly jurisdiction. It underlines that the Model Law is to be interpreted according to its international origins, harmoniously with the New York Convention, and not in a parochial, common law fashion. The judgment recognises that a global standard for the supervision and enforcement of international arbitration awards is an essential feature of an effective international arbitration system. As an aspiring seat for international arbitration in the Asia-Pacific region, Australia can ill-afford to insist on different rules of engagement (in particular, a more interventionist approach by the judiciary called on to supervise and enforce international arbitration awards).

Indeed, had the decision gone the other way, it may have sounded the death knell for international arbitration in Australia.[11] As an eminent Australian judge noted last year (shortly before the High Court heard the *TCL* case), 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. His Honour observed:
'it makes little sense for sheep to pass resolutions in favour of vegetarianism while the wolves remain of a different opinion.'[12]

Notes

1 John Digby, 'Is Australia unfriendly to arbitration?' (2012) 7(1) *CLInt* 38.
2 (2011) 282 ALR 717.
3 For a different analysis of the case, see A Monichino, L Nottage and D Hu, 'International Arbitration in Australia: Selected Case Notes and Trends' (2013) 19 Australian Journal of International Law 181, 197–200.
4 Australia has a federal constitutional system. It has eight state and territory supreme courts and a Federal Court, appeals from which courts lie to the High Court.
5 (2013) 295 ALR 596.
6 See, for example, *Quintette Coal Ltd v Nippon Steel Corp* (unreported, Supreme Court of British Columbia, 6 July 1988) at [27]–[28], which involved a constitutional challenge to British Columbia's international arbitration legislation on the grounds that it conferred judicial power on arbitral tribunals. Canada also has a federal structure. Most international arbitrations in Canada are governed by provincial, not federal, arbitration legislation, all of

which reflect the Model Law.
7 Comprising the award on the merits and an award as to costs.
8 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209.
9 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214. For an analysis of the two Federal Court judgments referred to above, see A Monichino and L Nottage, 'Blowing hot and cold on the International Arbitration Act' (2013) 51(4) Law Society Journal 56.
10 See s 20 of the IAA.
11 Ian Hunter QC, 'Case Note on *TCL v The Judges of the Federal Court of Australia*' (2013) 8(2) Global Arbitration Review 30.
12 P A Keane, 'The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House, Our Rules' (2013) 79(2) Arbitration 195, 207. Following the making of these remarks in an address on 25 September 2012, Keane CJ of the Federal Court was elevated to the High Court. He did not sit on the *TCL* case.

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