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TCL Airconditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia [2013] HCA 5: A Case Note

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Abstract

Purpose - *The purpose of this paper is to present the details of a judgement of the High Court in relation to the constitutional validity of recent amendments to federal arbitration legislation in Australia.*

Design/methodology/approach – *The paper employs the approach commonly referred to in the legal literature as a case note.*

Decision – *The High Court concluded that, although the Federal Court is not empowered under the International Arbitration Act 1974 (Cth) to review an arbitral award for error of law, its task in determining the enforceability of arbitral awards is not incompatible with the institutional integrity of the Court, and there is no impermissible delegation of federal judicial power in contravention of the Australian Constitution.*

Implications – *This case establishes that the Federal Courts has jurisdiction to enforce awards resulting from commercial arbitration where the arbitral award is governed by a choice of law agreed between parties to an international arbitration agreement and the award may disclose an error of law.*

Keywords: *Australian Constitution, arbitration, commercial contracts.*

JEL Classifications: K12; K33; K41

PsycINFO Classifications: 3660

FoR Codes: 1801; 1503

Introduction

This case note examines the recent decision of the High Court of Australia as to the constitutional validity of amendments to federal arbitration legislation that were made to strengthen Australia's international arbitration regime by better providing for the finality of arbitral awards. At the centre of the argument are the principles embodied in the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) (the Model Law), which was given the force of law in Australia by the *International Arbitration Act 1974* (Cth) (the IA Act) and concurrently into the Commercial Arbitration Acts in the states and territories. The principle in question limits the grounds on which the enforcement of an arbitral award can be resisted. In particular the principle in the Model Law which does not permit a court to refuse enforcement of an arbitral award by reason of an error of law.

The extent to which this case was a significant test of the law was highlighted by the intervention of the Attorneys-General of the Commonwealth and each state and the *amici curiae* appearances of the Australian Centre for International Commercial Arbitration, the Institute of Arbitrators and Mediators Australia, and the Chartered Institute of Arbitrators.

Factual Background

TCL, a company registered and having its principal place of business in China, and Castel a company registered and having its principal place of business in Australia, entered into a written distribution agreement. According to the agreement TCL granted Castel the exclusive right to sell air conditioners in Australia that were manufactured by TCL. The agreement provided for submission of disputes to arbitration in Australia.

In July 2008 Castel submitted a dispute to arbitration in Australia arising from contractual claims against TCL, seeking damages. On 23 December 2010 the arbitral tribunal made an award upholding Castel's claims and requiring TCL to pay Castel \$3,369,351. On 27 January 2011 a further award was made requiring TCL to pay Castel \$732,500 in costs for the arbitration.

TCL failed to pay the amounts awarded and Castel sought enforcement in the Federal Court.¹ TCL opposed enforcement of the awards on the ground that the Federal Court lacked jurisdiction and in the alternative that, if the Federal Court did appear on the face of the award have jurisdiction, the awards should not be enforced due to an alleged breach of natural justice. On January 2012 Murphy J ruled that the Federal Court had jurisdiction under the IA Act which under s16(1) gives the force of law in Australia to the the Model Law.

TCL appealed to the High Court arguing that s16(1) of the IA Act is beyond power by requiring an exercise of judicial power inconsistent with the Ch III of Constitution. TCL argued that an application of the Model Law in the circumstances undermined the institutional integrity of the Federal Court. TCL argued that the institutional integrity of the Federal Court is undermined because Arts 35 and 36 of the Model Law preclude the Federal Court from refusing to enforce an arbitral award on the ground of legal error and hence require the Federal Court to perpetuate a legal error. TCL further argued that the

¹ *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209; *Federal Court (Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2))* [2012] FCA 1214).

institutional integrity of the Federal Court is undermined by the requirement under Art 28 of the Model Law, or an implied term of the arbitration agreement, that an enforceable award be correct in law

The High Court's Decision

The High Court unanimously dismissed the application by TCL (French CJ and Gageler J; and Hayne, Crennan, Kiefel and Bell JJ in separate judgments). In reaching its decision the Court distinguished between the judicial power of the Commonwealth and arbitral authority of the kind governed by the Model Law as summarised below.

The Model Law deals with the resolution of disputes between commercial parties in an international or multi-national context where the parties have chosen arbitration as their agreed method of dispute resolution. The essence of arbitration “is the determination of the parties’ rights by the agreed arbitrators pursuant to the authority given to them by the parties”²; and the Model Law defines an arbitration agreement as “an agreement by the parties to submit to arbitration all or certain disputes...between them in respect of a defined legal relationship”.³

The Model Law gives parties the freedom to determine the composition of the arbitral tribunal⁴ and the procedure to be followed by the tribunal.⁵ Article 28 of the Model Law grants the parties freedom to choose the applicable substantive law in recognition of the fact that parties to an international commercial agreement and dispute will be from different legal systems. As such Article 28 is directed to the rules of law to be applied, not the correctness of their application.

Per French CJ and Gageler J, it is “neither the effect of Art 28 of the Model Law nor an implied term of an arbitration agreement governed by Australian law that the arbitral tribunal must reach a correct conclusion on the question of law within the scope of the submission to arbitration.” [at 17]

Article 35 of the Model Law provides for recognition and enforcement of arbitral awards, arising from international commercial arbitrations, by a competent court. The Federal Court is a competent Court for the purposes of the Model Law. An error of law on the part of an arbitral tribunal in making an award is irrelevant to the question of legal right or legal obligation to be determined under Art 35 of the Model Law.

Article 36 of the Model Law enables recognition or enforcement of an arbitral award to be refused at the request of a party against whom the award is invoked on specified grounds. Those grounds do not include proof of an error of law on the face of the award.

The making of an arbitral award, which is recognised as binding on the parties by virtue of Art 35 of the Model Law, is not an exercise of the judicial power of the Commonwealth. The authority of an arbitral tribunal is founded on the agreement between the parties and hence lacks the essential foundation for the exercise of judicial power.

The enforcement of an arbitral award by a competent court under Art 35 of the Model Law is an exercise of the judicial power of the Commonwealth. The judicial power of the Commonwealth is governed by Ch III of the Constitution which prevents the conferral of

² *Associated Electric and Gas Services Ltd v European Reinsurance Co of Zurich* [2003] 1WLR 1041 at 1046

³ Articles 7 Model Law

⁴ Articles 10(1) and 11 of the Model Law

⁵ Article 19(1) of the Model Law

that power by the Commonwealth Parliament on any court other than a court referred to in s 71 of the Constitution. The judicial power of the Commonwealth is fundamentally a sovereign or governmental power “that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force.”⁶

A proceeding for the enforcement of an arbitral award under Art 35 of the Model Law is one that involves determination of legal rights or obligations resulting in an order that then operates of its own force.

Per French CJ and Gageler J, the “inability of the Federal Court, as a competent court under Arts 35 and 36 of the Model Law, to refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award does nothing to undermine the institutional integrity of the Federal Court. Enforcement of an arbitral award is enforcement of the binding result of the agreement of the parties to submit their dispute to arbitration, not enforcement of any disputed right submitted to arbitration. The making of an appropriate order for enforcement of an arbitral award does not signify the Federal Court’s endorsement of the legal content of the award any more than it signifies the endorsement of the factual content of the award.”[at 34]

French CJ and Gageler J, concluded that: “*The plaintiff’s argument that the conferral of jurisdiction on the Federal Court in an application under Art 35 of the Model Law is incompatible with Ch III of the Constitution has no merit.*” They further ordered that: “*The application for writs of prohibition and certiorari directed to the judges of the Federal Court should for that reason be dismissed with costs.*”

Hayne, Crennan, Kiefel and Bell JJ concluded that: “*Correctly understood, the task of the Federal Court to determine the enforceability of arbitral awards, by reference to criteria which do not include a specific power to review an award for error, is not repugnant to or incompatible with the institutional integrity of that Court. An arbitral award made in the exercise of a power of private arbitration does not involve any impermissible delegation of federal judicial power. In giving the force of law in Australia to Arts 5, 8, 34, 35 and 36 of the Model Law, s 16(1) of the IA Act does not contravene Ch III of the Constitution.*” They further ordered that: “*The application of TCL must be refused with costs.*”

Summation

Judicial support for arbitration as a means for a reliable and final method of determining international commercial disputes in Australia is clearly established in this decision of the High Court. The decision highlights the distinction between an exercise of judicial power as independent of the parties to a dispute and the exercise of arbitration as founded in an authority conferred by an agreement between parties to an arbitration agreement. The decision further highlights the freedom of parties to an international arbitration agreement to choose the applicable law governing their agreement and any dispute within its ambit. The decision highlights the finality of an arbitral award made pursuant to an authority conferred by the parties to an arbitration agreement. The High Court affirmed that pursuant to the Model Law, given force in Australia according to the IA Act, enforcement of arbitral awards properly falls within the jurisdiction of the Federal Court as a competent court. Enforcement does not however require that the award to be free from any error of law.

In future parties to an international arbitration agreement will be assured of the Federal Court’s jurisdiction in enforcing an arbitral award. At the same time, parties may be

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wary of an arbitration agreement which allows them freedom in a choice of law but no recourse where an arbitral award contains an error of law.

Reference List

Cases

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Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2) [2012] FCA 1214.

Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission (2001) 203 CLR 645 at 658 [31]; [2001] HCA 16.

Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (1998) 90 FCR 1 at 14.

Waterside Workers' Federation of Australia v JW Alexander Ltd (1918) 25 CLR 434; [1918] HCA 56.

Attorney-General of the Commonwealth of Australia v The Queen (1957) 95 CLR 529; [1957] AC 288.

Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd 2012

Legislation

International Arbitration Act 1974 (Cth)

Trade Practices Act 1974 (Cth)

UNCITRAL Model Law [Adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on 21 June 1985 and amended by UNCITRAL on 7 July 2006.]

Commercial Arbitration Act 2010 (NSW).