Promoting Australia as Leader in International Arbitration

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Supreme Court of Victoria

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1. Introduction

The shift of the centre of the global economy towards the Asia-Pacific region has created exciting opportunities for the commercial arbitration sector in Australia. The spread of free trade agreements in the region in particular, such as the recently concluded China–Australia Free Trade Agreement, is expected to further increase regional trade, and disputes between international parties will not be far behind. Arbitration is increasingly becoming the dispute resolution method of choice in such disputes.[1] However, in the highly competitive global and regional market, international parties can afford to "shop around" in order to find a jurisdiction that best suits their commercial needs.[2]

Redfern and Hunter point out that the venue or place of arbitration is often chosen because it is a place with which the parties have no connection; that is, it is a "neutral forum".[3] Australia is well placed to provide a forum of this kind to regional disputing parties, but clearly neutrality is not enough. Indeed, among other things, international commercial parties want an arbitration-friendly jurisdiction which understands commercial imperatives such as the importance of the expeditious and expert resolution of disputes. Moreover, to attract more international arbitration to its shores, Australia must both be, and project itself to be, an accessible, reliable, and cost-effective provider of arbitration and other dispute resolution services.[4]

The good news is that all of these pull-factors are present in Australia. There is no doubt that we have the substance here in Australia to be a frontrunner in international arbitration in the Asia-Pacific region — but — we are not out there telling people about it. We are not out there enough telling people about the

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1 Gerry Lagerberg and Robert Kus, *Global Survey Sheds Light on Perceptions of International Arbitration*, Australian Centre for International Commercial Arbitration <http://www.acica.org.au /downloads/International%20arbitration%20FINAL%20sept%2025%2007.pdf>.

2 Chief Justice Marilyn Warren, "Australia — a Vital Commercial Hub in the Asia Pacific Region, Victoria — a Commercial Hub" (Remarks made at the Federal Court and Supreme Court Commercial Seminar, Melbourne, 25 February 2015).

3 Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed, 2009) 630 [11.29].

4 Chief Justice Warren, above n 2.

arbitration-friendly environment in Australia and educating fellow practitioners and in-house counsel about how they can draft dispute resolution clauses which make Australia the seat of any arbitration, and Melbourne, Sydney or another capital city the venue.

This Paper sets out five principal factors which demonstrate Australia's potential to become a regional frontrunner in international arbitration. These are —

a) a comprehensive legislative framework that is now well established;

b) a supportive judiciary (at both a state and federal level) and well-equipped courts;

c) world-class alternative dispute resolution facilities;

d) a high quality profession; and

e) broad stakeholder involvement and support.

To help demonstrate some of the ways in which these factors manifest themselves in practice, I would like to discuss a recent and rather extraordinary matter originating in the Supreme Court of Victoria's Arbitration List; the *Sauber Case*.[5] In particular, this case is demonstrative of the judicial support for arbitration and the facilitative court rules and processes that the Court has developed.

2. The *Sauber Case*

The *Sauber Case* attracted worldwide attention, and not only because it involved a race car driver seeking to be reinstated as one of his team's two drivers for the 2015 Formula 1 Season. On Thursday 5 March 2015, with the Melbourne Grand Prix just over a week away, Dutch driver Giedo van der Garde ("van der Garde") filed an Originating Application to Enforce Foreign Award ("the Originating Application")[6]

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5 *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80; *Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSCA 37 (collectively "the *Sauber Case*").

6 Form 2–9B of the *Supreme Court (Chapter II Arbitration Amendment) Rules* 2014.

with the Commercial Court Registry. Van der Garde and the company set up to manage his interests as a race driver, Giedo van der Garde BV, sought enforcement of an arbitral award made only days earlier on 2 March 2015 which ordered Formula 1 racing team Sauber Motorsport AG ("Sauber") to refrain from taking any steps the effect of which would prevent van der Garde from racing for Sauber in the 2015 Season ("the Award").[7]

a) Factual Background

In January 2014, van der Garde and his company entered into agreements with Sauber whereby Sauber agreed to nominate van der Garde as a test and first reserve driver for the 2014 Season and, upon exercise of a contractual option, as one of its two nominated race drivers in the 2015 Season. In June 2014, Sauber exercised the option in question, confirming van der Garde as one of its two drivers for the 2015 Season. However, in early November 2014, Sauber informed van der Garde that the two positions had been given to other drivers and that as a result, van der Garde would be without a drive in 2015.

The relevant arbitration agreement provided that any disputes were to be settled by a single arbitrator in accordance with the International Arbitration Rules of the Geneva Chamber of Commerce, being the Swiss Rules of International Arbitration, published by the Swiss Chambers' Arbitration Institution.[8] The arbitral seat was Geneva, Switzerland, the governing law was that of England, and the language of the arbitration was to be English.

b) The Arbitral Proceedings

Van der Garde moved quickly, making an application for emergency relief proceedings under Article 43(1) of the *Swiss Rules* within days of being notified of the new arrangements by Sauber. As part of these proceedings, van der Garde

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7 *Giedo Van Der Garde BV & Giedo Gijsbertus Gerrit Van Der Garde v Sauber Motorsport AG* (First Partial Award, 2 March 2015) SCAI Case No. 300315ER-2014.

8 Swiss Chambers' Arbitration Institution, *Swiss Rules of International Arbitration* (June 2012) ("the *Swiss Rules*").

sought interim injunctive relief to restrain Sauber from taking any action, the effect of which would be to deprive him of an opportunity to participate in the 2015 Season, pending final determination at arbitration in February.[9] Following an exchange of submissions, an emergency arbitrator, Mr Simon Greenberg (who, incidentally, is an Australian) ("the Emergency Arbitrator") granted the interim injunction.

Following the determination of the Emergency Arbitrator, the parties agreed to an accelerated timetable for the hearing of van der Garde's claim for permanent injunctive relief. The matter was set down for a hearing in early February, allowing just enough time for sole arbitrator, Mr Todd Wetmore, ("the Arbitrator") to render his award before the commencement of the 2015 Formula 1 Season at Albert Park in Melbourne on 15 March 2015. The Arbitration was conducted in London over two days and the Arbitrator published his 109 page First Partial Award on 2 March 2015. The critical dispositive provision of the Award had the effect of granting the relief sought, ordering Sauber to —

> refrain from taking any action the effect of which would be to deprive … van der Garde of his entitlement to participate in the 2015 Formula One Season as one of Sauber's two nominated race drivers.[10]

c) Interlocutory Steps

Two days after the rendering of the Award, van der Garde's Australian representatives contacted my Associates in accordance with paragraphs 10 to 12 and 14 of *Practice Note No 8 of 2014 — Commercial Arbitration Business (*"the *Practice Note")*, which took effect on 1 December 2014. The matter was listed for the hearing of an urgent *ex parte* application the following day (a Thursday) at 11am, at which van der Garde sought orders permitting substituted service of the Originating Application on Sauber.

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9 *Giedo Van Der Garde BV & Giedo Gijsbertus Gerrit Van Der Garde v Sauber Motorsport AG* (First Partial Award, 2 March 2015) SCAI Case No. 300315ER-2014, [26]–[27].

10 Ibid [339].

Sauber is a Swiss company and its registered business address is in Switzerland. As such, without an order for substituted service, service would have to had to have been affected in accordance with Order 80 of the *Supreme Court (General Civil Procedure Rules)* 2005 which sets out the procedure for service under the *Hague Convention* protocols.[11] Amongst other things, this would have required —

a) an application to be made to the Prothonotary in his capacity as a forwarding authority for request of service of the Originating Application in Switzerland, to be made to the relevant authority in Switzerland; and

b) unless service was accepted voluntarily, the Originating Application to be translated into one of Switzerland's three official languages, that is into German, French or Italian.

In the circumstances and on the basis of extensive written submissions, I found that service in accordance with the *Hague Convention* protocols was impracticable. Accordingly, and following a brief *ex parte* hearing, orders were made for substituted service under rule 6.10(1), directing service to be made by delivery of the relevant documents —

f) to the offices the Australian Grand Prix Corporation;

g) to Sauber by fax and email; and

h) to Sauber's representatives in the Arbitration by email.

It was further ordered that —

a) Sauber file and serve any appearance by 4pm the following day;

b) all documents upon which the parties wished to rely in the enforcement proceedings, including submissions, be filed only three days later (on a Sunday) by email to my Associates; and

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[11] *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, concluded 15 November 1965 (entered into force 10 November 1969) ("the *Hague Convention*").

c) the hearing of the Originating Application be adjourned to 10am that coming Monday (a public holiday).

The parties duly filed their materials in accordance with these orders, leaving me Sunday evening to read extensive written submissions and affidavit material from both sides.

Given the interest in the matter, I allowed the domestic and international media full access to the courtroom, including to the ABC, who filmed the entire proceeding. The hearings were also webcast live on the Supreme Court website.

d) At First Instance

During the course of the hearing on Labour Day Monday, a public holiday, 9 March 2015, the other two drivers selected and nominated by Sauber for entry in the 2015 Season (referred to in the judgment as "the Other Drivers")[12] sought leave to be represented and heard. Neither of the Other Drivers was a party to the relevant arbitration agreement; nor were they represented or heard in the course of any aspect of the arbitral proceedings. However, in view of their claimed interest in the enforcement application and the conceded lack of any prejudice to van der Garde and his company, leave was granted.[13]

It was common ground between the parties at the hearing of the matter at first instance that the threshold requirements of section 8 (with reference to section 9) of the *International Arbitration Act* 1974 (Cth) ("the *IAA*") had been satisfied, namely that the party seeking enforcement produce to the Court duly certified copies of the original award and the arbitration agreement.[14]

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12 Messrs Marcus Ericsson and Luiz Felipe de Oliveria Nasr.
13 *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80, [6].
14 Ibid [5]; *IAA* s 9(1).

Arguments Against Enforcement

Sauber sought to resist enforcement on grounds that it would be contrary to the public policy of Australia.[15] Sauber relied on the following four principal and alternative arguments to support this proposition —

a) that enforcement would be futile because, regardless of the Court's decision, there was no chance of van der Garde being able to drive in the Australian Grand Prix that weekend. In this regard, Sauber cited the need for extensive technical modifications to the race car if van der Garde were to be reinstated, and his lack of a "Super License", which is required by all Formula 1 race drivers.

b) that enforcement would compel Sauber to breach the *Crimes Act* 1958 by engaging in conduct that may endanger lives and/or place spectators and others at risk of serious injury, essentially because of van der Garde's lack of practice in the new race car and general lack of preparation with the team.

c) that the critical dispositive provision sought to be enforced was vague and uncertain, such that Sauber would be unable to ascertain what it must refrain from doing in order to comply with any order; and

d) that the failure to give the Other Drivers an opportunity to be heard during the arbitral proceedings constituted a breach of the rules of natural justice in connection with the making of the Award.[16]

Sauber also argued pursuant to section 8(5)(d) of the *IAA* that the Award dealt with matters beyond the scope of the submission to arbitration and therefore should not be enforced. This submission was based on an argument that the Arbitrator wrongly proceeded on the basis that van der Garde had a personal contractual right enforceable against Sauber in circumstances where, it was argued, it was van der

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15 *IAA* s 8(7)(b)

16 See *IAA* s (7A)(b). The Other Drivers made a similar submission.

Garde's company, not him personally, who had entered the relevant agreements with Sauber.

Finally, the Other Drivers argued under s 8(7)(a) of the *IAA* that, having regard to the claimed serious prejudice to their respective positions that enforcement would entail (namely the fact that one of the Other Drivers would be required to make way for van der Garde), the matter was not capable of settlement by arbitration.

Decision

Judgment was handed down on 11 March 2015, just over 36 hours after the conclusion of the full hearing. I rejected all of the arguments advanced by Sauber and the Other Drivers against enforcement and made orders giving effect to the critical dispositive provision of the Award, namely the prohibitive injunction restraining Sauber from taking any action that would deny van der Garde of his place in the team for the 2015 Season.

Sauber pressed the argument that enforcement of the Award would be futile if, as Sauber claimed, there was no chance of van der Garde racing that weekend. However, no authority was cited in support of the position that futility would enliven the public policy ground for resisting enforcement. I was not, however, satisfied that futility was established, or that the issue would, in any event, be relevant to the application, noting in the judgment that —

> the critical dispositive provision sought to be enforced applies to the whole of the 2015 Formula 1 Season — not just in relation to the coming few days in Melbourne for the Australian Grand Prix.[17]

Accordingly, even if van der Garde were unable to race in Melbourne, it did not follow that he would be unable to race in the rest of the 2015 Season. More importantly however, and as I also set out in the judgment, —

> [the evidence before the Emergency Arbitrator indicated that] the utility of the orders sought in the arbitral proceedings was an issue which was clearly in the minds of the parties — and the Arbitrator, as the Award indicate[d]. Consequently, as the issue is

[17] *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80, [30].

> one which goes in many respects to matters canvassed in evidence and considered in the arbitral proceedings, and by the Arbitrator in the Award, it is not an issue into which an enforcing court should venture. To do so would be to enter into the merits of the Award, a step which is not permitted in an application such as this under the *IAA*.[18]

The other arguments advanced against enforcement also failed. In relation to the safety concerns, I found that no issue of public policy arose in this context because "nobody, [and] certainly not the Court, would contemplate that compliance with the Orders would involve compromising safety".[19] Indeed, there was nothing in the critical dispositive provision that required Sauber to breach any laws or risk safety; if the Formula 1 governing body or other competent authority determined that it was unsafe for van der Garde to race, so be it. Under such circumstances, the Orders would not have required Sauber to ensure that van der Garde raced in any event, and so no issue of public policy arose on that basis.

Finally, in relation to the natural justice arguments, I found that —

> there cannot be a breach of the rules of natural justice every time a person who may be affected by the outcome of an arbitration (however seriously) is not invited to join the process and to make submissions.[20]

Accordingly, the fact that the Other Drivers were not told about or invited to join the arbitral proceedings was irrelevant to the grounds upon which the Court can refuse enforcement under sections 8(7)(b), (7A)(b) of the *IAA*. The overriding justification for this conclusion was that "arbitral proceedings are necessarily *inter partes* in nature".[21]

e) On Appeal

Within hours of judgment being handed down on the Wednesday morning, Sauber filed a Notice of Appeal with the Court of Appeal Registry. An appeal bench comprising of Whelan, Beach and Ferguson JJA sat that very afternoon to determine

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18 Ibid [27].
19 Ibid [28].
20 Ibid [26].
21 Ibid [18], [26].

Sauber's application for leave to appeal and the substantive appeal in the event that leave were granted. The hearing concluded the following morning — Thursday — and the appeal judgment was handed down that afternoon.

The Court of Appeal granted leave to appeal but dismissed the appeal in its entirety for the reasons given at first instance.[22] Sauber's grounds of appeal were essentially the same as those arguments advanced against enforcement at first instance.[23] In relation to the safety concerns, the Court of Appeal confirmed that —

> [n]o person is required to undertake any illegal or unsafe activity. These events are highly regulated. We proceed on the assumption that the regulators will ensure all safety requirements are complied with.[24]

Further, and in relation to the natural justice grounds of appeal, the Court of Appeal restated and emphasised that the Court is not permitted to consider the merits of an arbitral award when hearing an enforcement application.[25] It was in this context that their Honours found that —

> [t]he complaint now made [by Sauber] in this regard is a complaint as to a legal or factual conclusion which is, to use the words of the Full Court of the Federal Court in [*TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*], 'dressed up as a complaint about natural justice'.[26]

Finally, the Court of Appeal rejected the argument of the Other Drivers, also advanced at first instance, that the failure to give notice to the Other Drivers of the arbitral proceedings rendered the matter incapable of arbitration.[27] In so doing, their Honours emphasised the "necessarily *inter partes* nature" of arbitral proceedings, as I had done at first instance.[28] Accordingly, their Honours reasoned that the Arbitrator

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22 *Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSCA 37, [10], [20].
23 Ibid [2].
24 Ibid [14].
25 Ibid [17].
26 Ibid; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, 398 [54].
27 *IAA* s 8(7)(a).
28 *Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSCA 37, [19].

had determined who the parties to the relevant contracts were and that neither Sauber nor the Other Drivers had "established that it would be contrary to public policy to enforce that determination".[29]

f) Contempt Proceedings

Shortly before the appeal judgment was handed down, late Thursday afternoon, van der Garde's representatives notified my Associates of their intention to make a further application in the event that the appeal failed. As anticipated, within minutes of the appeal being dismissed, van der Garde commenced contempt proceedings against Sauber on the grounds that it had failed to comply with my Orders made the day before. At a resumed hearing before me immediately following the appeal judgment, van der Garde sought, among other things —

a) a freezing order over Sauber's assets located in Victoria;

b) a declaration that Sauber was guilty of contempt;

c) an order that Sauber's CEO be punished for the contempt committed by Sauber; and

d) orders that sequestrators be appointed with the power to take possession of Sauber's assets located in Victoria.

In support of the application, van der Garde argued that Sauber had breached the Orders by —

a) preparing to participate in the Australian Grand Prix without van der Garde as a driver; and

b) refusing or declining to prepare to participate in the Australian Grand Prix with van der Garde as a driver.

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[29] Ibid.

Critical to the evidence in this regard, in senior counsel's submission, was an email from Sauber's solicitors — sent close to midnight only the day before — in which Sauber claimed that the relevant contracts with van der Garde had previously been terminated.

In response, senior counsel for Sauber indicated that he had been unable to obtain instructions from his client. Consequently, the proceeding was adjourned until the following morning, the Friday before the Australian Grand Prix (which was to take place on the Sunday). Later on that Friday, the matter was adjourned after senior counsel for van der Garde indicated that some "constructive discussions" were taking place between the parties, and the Court resumed sitting at 10am the next day, Saturday.[30] Upon resumption, senior counsel submitted consent orders seeking leave to withdraw its summons filed in the contempt proceedings and to discontinue the proceedings following successful negotiations overnight.

3. Promoting Australia as a Regional Leader

The *Sauber Case* is a clear demonstration of the capacity that we have in Australia to handle high profile, urgent arbitration matters. This provides an excellent platform upon which to promote Australia as an arbitral forum of choice in the Asia-Pacific. In this context, there are in my view five principal factors which together help demonstrate Australia's potential to become a regional frontrunner in international arbitration. These factors have already been mentioned in overview and I now turn to address them in some detail.

a) Legislative Framework

First, the comprehensive legislative framework which governs arbitration in Australia is now well established and operating largely as intended. The Uniform Commercial Arbitration Acts, which govern domestic commercial arbitrations, have now been implemented in all states and territories other than the Australian Capital

[30] Transcript of Proceedings, *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80 (Supreme Court of Victoria, S CI 2015 00978, Croft J, 13 March 2015) page 59, line 26.

Territory,[31] and the *International Arbitration Act* 1974 (Cth) was recently upheld as constitutionally valid by the High Court in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*.[32]

In *TCL* the High Court held that arbitral power is not judicial power for the purposes of Chapter III of the *Constitution*. Judicial power operates regardless of the parties' consent whereas arbitral power is dependent on it. As such, in enforcing an arbitral award, a court is merely enforcing an agreement between the parties. In this respect, I note the comments of French CJ and Gageler J that —

> 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 its endorsement of the factual content of the award.[33]

I also note the comments of Hayne, Crennan, Kiefel and Bell JJ rejecting the proposition that arbitration involves a delegation of judicial power —

> [107] … the conclusion that an arbitrator is the final judge of questions of law arising in the arbitration does not demonstrate that there has been some delegation of judicial power to arbitrators. The determination of a dispute by an arbitrator does not involve the exercise of the sovereign power of the State to determine or decide controversies.
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> [108] To conclude that a particular arbitral award is final and conclusive does no more than reflect the consequences of the parties having agreed to submit a dispute of the relevant kind to arbitration. As has already been noted, one of those consequences is that the parties' rights and liabilities under an agreement which gives rise to an arbitration can be, and are, discharged and replaced by the new obligations that are created by an arbitral award.[34]

The High Court's unanimous decision was welcomed by the Australian arbitration community; the importance of which was highlighted by the appearances — as

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31 *Commercial Arbitration Act* 2010 (NSW); *Commercial Arbitration Act* 2011 (SA); *Commercial Arbitration (National Uniform Legislation Act* 2011 (NT); *Commercial Arbitration Act* 2011 (Tas); *Commercial Arbitration Act* 2011 (Vic); *Commercial Arbitration Act* 2012 (WA); *Commercial Arbitration Act* 2013 (Qld).

32 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 ("*TCL*").

33 Ibid [34].

34 Ibid [107]–[108].

amicus curiae — of the Attorneys-General of four Australian states and important arbitration stakeholders, arguing for the constitutional validity of the *IAA*. The strong, unanimous and pro-arbitration findings of the High Court confirm that Australia sits well within international standards and norms for the enforcement of arbitral awards.[35]

b) Judicial Support, Specialist Lists and Harmonised Rules

Second, Australia's potential as a regional frontrunner in arbitration is greatly assisted by the judicial support for arbitration throughout the Australian court hierarchy. The *Sauber Case* is a paradigm example of the importance of a supportive judiciary to the creation of an arbitration-friendly environment and also shows what can be achieved when courts have the infrastructure in place to manage arbitration matters effectively and, particularly, expeditiously.

As a federation, achieving a consistent body of jurisprudence in respect of the interpretation of the *Model Law* is no easy task, with concurrent jurisdiction conferred on the eight state and territory Supreme Courts, as well as the Federal Court. By contrast, two of the most established arbitral seats in the Asia-Pacific are unitary legal systems. Both Singapore and Hong Kong have developed an approach to arbitration where a select number of judges (with arbitration experience) hear arbitration related matters at first instance and on appeal.[36] With the role of judicial interpretation of arbitration legislation being placed in the hands of a small group of judges with the relevant experience, the chances of maintaining a consistent body of jurisprudence is greatly enhanced.

In light of this regional comparison, the establishment of specialist arbitration lists in Victoria and New South Wales, as well as a de facto arrangement that is in place in Western Australia,[37] greatly contributes to Australia's arbitration-friendly

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35 See also other Australian decisions such as in *Flint Ink NZ Limited v Huhtamaki Australia Pty Ltd and Lion-Dairy & Drinks Pty Ltd* [2014] VSCA 166.

36 Albert Monichino, "International Arbitration in Australia: The Need to Centralise Judicial Power" (2012) 86 *Australian Law Journal* 118, 130.

37 Chief Justice Warren, above n 2, 9.

environment. The Arbitration List in the Supreme Court of Victoria has been in operation since the beginning of 2010 and sits within the Commercial Court. Previously, a panel of two judges had been allocated responsibility for all arbitration business; however, little practical direction was given to practitioners as to how to proceed when seeking judicial support for the arbitration process. The establishment of the Arbitration List, as well as the commencement of the accompanying *Supreme Court (Chapter II Arbitration Amendment) Rules* 2014 ("the *Arbitration Rules*") and *Practice Note*, have greatly assisted in this regard.

The *Arbitration Rules*, which commenced operation on 1 December 2014, follow the approach of Part 28 of the *Federal Court Rules* 2011 *(*Cth), both in terms of the language and structure used, as well as in the manner by which they provide a comprehensive set of rules and forms. Maintaining consistency with the Federal Court accords with the approach recommended by both the Supreme Court of Victoria's Arbitration List Users Group, as well as that of the Australian Centre for International Commercial Arbitration ("ACICA") Judicial Liaison Committee, a committee chaired by the Hon. Murray Gleeson AC QC, and comprised of the arbitration judges from Australian Supreme Courts, and the Federal Court.

The structure of the *Arbitration Rules* and the *Practice Note* is, as far as possible, "transactional" in that they are designed to produce a user's guide to the appropriate procedure for the variety of applications which may arise with respect to arbitration proceedings. This means that it is easy for a party to find the relevant rule and appropriate form or forms — an improvement which goes a long way to saving time and money for parties, as well as court time. The *Practice Note* also expressly acknowledges that urgent interlocutory applications arise from time to time in the course of arbitration proceedings.[38]

In this regard, the expeditious and effective manner with which the *Sauber Case* was managed through the Court, both at first instance and on appeal, provides an

[38] Supreme Court of Victoria, *Practice Note No 8 of 2014 — Commercial Arbitration Business*, [12].

excellent example of the effectiveness of the *Arbitration Rules* and the benefits of specialist lists. At the conclusion of the final hearing, senior counsel thanked the Supreme Court and the Court of Appeal on behalf of the parties for the "extraordinary time and effort … put into hearing … and resolving" the matter.[39] In open court, James Peters QC commented that —

> There are very few cases in legal history where a matter [has been] started, appealed and then [had] contempt proceedings resolved within eight days. … [W]e're very grateful to the Supreme Court of Victoria for going to that effort.[40]

The ASADA Case[41]

The effectiveness of the *Arbitration Rules* was also demonstrated in the first proceeding to be governed by them. In early December 2014, an application was made by the Chief Executive Officer of the Australian Sports Anti-Doping Authority ("ASADA") for the issuing of subpoenas with respect to non-parties attending before and producing documents before the Australian Football League ("AFL") Anti-Doping Tribunal ("the Tribunal"). Considerable urgency attended the making of the application, as the Tribunal was due to commence the hearing to which the subpoenas related shortly after the proceeding was commenced in the Supreme Court.

The main question for determination was whether the Tribunal was an "arbitral tribunal" for the purposes of section 27 of the *Commercial Arbitration Act* 2011, and if so, whether it was both domestic and commercial, as prescribed by the Act. After consideration of the complex set of regulations, codes and rules which established the jurisdiction of the Tribunal, and with reference to the features of an arbitration adopted by Thomas J in the English decision of *Walkinshaw v Diniz*,[42] I found that the

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39 Transcript of Proceedings, *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80 (Supreme Court of Victoria, S CI 2015 00978, Croft J, 14 March 2015) page 64, line 2–9.

40 Ibid.

41 *Chief Executive Officer of the Australian Sports Anti-Doping Authority and Australian Football League v 34 Players and One Support Person* [2014] VSC 635 ("the *ASADA Case*").

42 *Walkinshaw v Diniz* [2000] 2 All ER (Comm) 237.

AFL Anti-Doping Tribunal was more like a domestic disciplinary tribunal and not an "arbitral tribunal".[43]

Notably, for present purposes, the *ASADA Case* was first heard the day after the application was filed, heard in full the following week, and judgment was handed down a week after that. While not quite so quickly disposed of as the *Sauber Case*, the *ASADA Case* nevertheless highlights how effective case-management is greatly enhanced by the establishment of specialised lists and rules of court, and, in any event, the case was dealt with as expeditiously as the circumstances required. Clearly, not all cases will require the same urgent handling and disposition as the circumstances of these two cases necessitated. However, these are prime examples of the resources available and the capacity of the Australian judiciary to support arbitration in a commercially meaningful way.

c) Arbitration Facilities

Third, Australia has the physical infrastructure needed in order to become a frontrunner in international arbitration in the region. For example, the official opening of the Melbourne Commercial Arbitration and Mediation Centre ("MCAM Centre" or "the Centre") in March 2014 established Melbourne as a critical part of the developing "grid" of Australian arbitration centres. The MCAM Centre is located at the William Cooper Justice Centre in the heart of Melbourne's legal precinct. The Centre provides commercial arbitrators, mediators and other ADR professionals, parties and clients with world-class facilities and services.

The Centre's services and facilities are also available for Australian domestic arbitration, mediation and ADR. An online booking service enhances the Centre's accessibility, internationally and domestically. The online booking service also provides a choice of other hearing and dispute resolution facilities available in Melbourne — a facility which enhances Melbourne's attractiveness an arbitration venue.

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[43] *Chief Executive Officer of the Australian Sports Anti-Doping Authority and Australian Football League v 34 Players and One Support Person* [2014] VSC 635, [23].

Activity at the MCAM Centre continues to build and the Centre has hosted multiple arbitrations already this year. The Centre is also being utilised for domestic mediations, and in November 2014 the Centre sponsored and hosted a seminar run by the International Chamber of Commerce. This seminar was aimed at in-house counsel and covered various aspects of the commercial "dispute resolution process, from the drafting of effective resolution clauses to strategic decision-making in international arbitration."[44] This kind of event is not only an excellent way to promote the Centre but is also a great way of getting the message out to commercial parties and within the profession about international arbitration in Australia.

The existence of the MCAM Centre also provides a platform to develop existing international networks and to pursue opportunities in the region by facilitating closer connections with other leading arbitral hubs, particularly Hong Kong, Singapore and Seoul. The Centre works closely with other similar centres in Australia, particularly the Australian International Disputes Centre ("AIDC") in Sydney, commercial arbitration and legal professional bodies and other similar centres internationally. Close co-operation of this kind is a hallmark of good service for disputing parties, their advisors and the arbitrators, and helps promote Australia as an "arbitration friendly" jurisdiction.

d) A High Quality Profession

Fourth, one of Australia's greatest strengths is the high quality of its legal profession. Australians are sought after throughout the world for their legal expertise and it is no coincidence that an Australian — a former Supreme Court Prize Winner from Deakin University (2002), Simon Greenberg — was involved as the Emergency Arbitrator in the arbitral proceedings that gave rise to the *Sauber Case*. However, if Australia is to be a frontrunner in international arbitration in the Asia-Pacific, more local practitioners need to explore opportunities overseas, particularly as counsel or instructors in arbitrations held in our region. Another means of helping to promote

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[44] International Chamber of Commerce, 'Dispute Resolution Seminar for In-House Counsel and Other Party Representatives' (Conference Flyer, Melbourne, 10 November 2014).

Australia in this way would be by more Australians making it a priority to attend some of the numerous arbitration-focused regional conferences held each year by industry bodies and arbitral centres. These kinds of activities help develop and reinforce links with other jurisdictions and also provide a platform to demonstrate and share the expertise of Australian lawyers.

Dispute resolution practitioners should also remember the importance of speaking with their front-end commercial colleagues about the benefits of arbitration in order to ensure that more sound arbitration clauses make their way into commercial contracts. In this context, I note some of the resources available to practitioners such as draft dispute resolution clauses which make — or should be revised or completed to make — Australia the seat of any arbitration. For example, the *UNCITRAL Arbitration Rules* provide the following model clause which practitioners may wish to include in contracts —

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.[45]

It is noted that parties should consider adding the following to the clause —

> (a) The appointing authority shall be … [name of institution or person];
>
> (b) The number of arbitrators shall be … [one or three];
>
> (c) The place of the arbitration shall be … [town or country];
>
> (d) The language to be used in the arbitral proceedings shall be … .[46]

In my view, the latter part of this model clause is just as important as the agreement to arbitrate and should be omitted sparingly in order to avoid uncertainty. ACICA also publishes a model arbitration clause freely accessible on their website as part of the *ACICA Arbitration Rules*,[47] while the MCAM Centre and the AIDC provide

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45 United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules* (2010), Annex.

46 Ibid.

47 Australian Centre for International Commercial Arbitration, *ACICA Arbitration Rules Incorporating the Emergency Arbitrator Provisions 2011*, <http://acica.org.au/acica-services/acica-arbitration-rules>. See also Australian Centre for International Commercial Arbitration, *Arbitration Clauses*, <http://acica.org.au/acica-services/arbitration-clauses>.

readily accessible information about international commercial arbitration on their respective websites.[48]

Practitioners should also be aware of the various training programs and policy development activities undertaken by organisations such as the Chartered Institute of Arbitrators ("CIArb") and LEADR & IAMA (formerly the Institute of Arbitrators and Mediators Australia)[49] as a means of enhancing their skills in this area.[50]

e) Stakeholder Involvement and Support

Fifth, the importance of cooperation and stakeholder involvement cannot be underestimated if Australia is to attract more international commercial parties to conduct arbitrations within its jurisdiction. Success in this regard is clearly not guaranteed solely by the support of those directly engaged in the area, be they arbitration practitioners, arbitrators or arbitral centres. As has been discussed, both the courts and legislatures play a critical role in creating an "arbitration-friendly" legal environment. These institutions need to continue to communicate and receive feedback from commercial arbitration stakeholders, as occurred with the involvement of the Arbitration List Users Group and the ACICA in the development of the new *Arbitration Rules* and *Practice Note* in Victoria.

In this regard, it is particularly encouraging to note the active and ongoing involvement of various stakeholders in the MCAM Centre, including the Supreme Court, the Victorian Government, the Victorian Bar, the Law Institute of Victoria, the Australian Corporate Lawyers Association, the ACICA, LEADR & IAMA, and CIArb. It is clear that continued active engagement in this area can only enhance the development of Australia's international legal expertise and help make Australia an attractive destination for commercial parties to choose to arbitrate.

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48 See Melbourne Commercial Arbitration and Mediation Hub, *Arbitration*, <http://www.mcamh.com.au/alternative-dispute-resolution/arbitration/>; Australian International Disputes Centre <www.disputescentre.com.au>.

49 The IAMA and LEADR joined to become LEADR & IAMA on 1 January 2015.

50 See generally <www.iama.org.au> and <www.ciarb.net.au>.

4. Conclusion

Australia is well placed to become a frontrunner in international arbitration in the Asia-Pacific region. We have the substance of what makes a successful arbitration jurisdiction; now the challenge is how to promote Australia within the region and build a wider body of expertise and practical experience in the sector. The *Sauber Case* is an excellent example of how the courts can assist and support the arbitral process and will help promote the Australian arbitration sector.

Finally, and as I emphasised in my judgment in the *Sauber Case*, practitioners should remember that the Supreme Court's Arbitration List is available at all times and at all hours, seven days a week.[51] This is a critically important service and one well worth talking about to fellow practitioners both in Australia and overseas — and, most importantly, to the end-users of arbitration services, namely commercial clients and in-house counsel.

[51] *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80, [22].