

The Role of the Courts in Australia's Arbitration Regime

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-and-

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[ALLSOP CJ]

1. Introduction

The title of our paper this evening is: “The Role of the Courts in Australia’s Arbitration Regime”. We last presented together on this topic as recently as March last year.¹ At that time, we attributed the significant increase in international arbitrations being heard in the Asia-Pacific to the well-documented economic growth throughout the region. Since then, the proliferation of regional free-trade agreements has continued—most notably, the Trans-Pacific Partnership which was signed just last month by 12 Pacific-rim nations, including Australia, the United States, Japan, Singapore, and New Zealand; as well as the China-Australia Free Trade Agreement concluded in June of this year. The increased economic growth and integration of our region continues to present exciting opportunities for the Australian arbitration sector, and we are continuing to build our arbitration infrastructure and capabilities as a result. For example, the Melbourne Commercial Arbitration and Mediation Centre, or the MCAM Centre—located just next door to our venue this evening, in the William Cooper Justice Centre—opened its doors in 2014; and earlier this year, the ACDC and the AIDC merged to become the Australian Disputes Centre, a “one-stop shop” for domestic and international dispute resolution in Sydney.

There is no doubt that developments such as these, as well as those discussed at the joint Federal and Supreme Court seminar held earlier this year—which no doubt many of you attended—will help make Australia attractive as an arbitral seat, and as a venue for arbitrations involving regional parties. However, the bedrock of an “arbitration-friendly” jurisdiction, both domestically and internationally, remains whether domestic courts are supportive or interventionist in their approach to

¹ Chief Justice James Allsop and Justice Clyde Croft, “Judicial Support for Arbitration” (Paper presented at the APRAG Tenth Anniversary Conference, Melbourne, 26 March 2014) <<http://www.supremecourt.vic.gov.au/home/contact+us/speeches/speech+judicial+support+of+arbitration>>.

arbitration. Indeed, as the Chief Justice of Singapore, Sundaresh Menon, recently reiterated:²

despite arbitration's roots in party choice, national courts remain the final gatekeepers of the legal fitness of arbitral awards and processes.

As many have said before, with court support and minimal intervention, arbitration has the potential to flourish in Australia. If the balance is struck differently however, parties will avoid choosing our jurisdiction as the seat for international arbitrations, and arbitration will also become less attractive to domestic parties. This sentiment is reflected in the results of the most recent Queen Mary International Arbitration Survey, released just last month; with the data suggesting that commercial parties' "preference for certain seats is based on intrinsic legal features of those seats" rather than factors of "personal convenience", such as "cultural familiarity" or "transport connections".³

It is encouraging to report that Australian courts continue to contribute to making Australia an "arbitration-friendly" jurisdiction. Late last year, the Supreme Court of Victoria introduced new arbitration rules and these rules are complemented by a detailed Practice Note designed to assist both domestic and international practitioners to make a variety of arbitration related applications.⁴ The Supreme Court's arbitration rules are based on Division 28.5 of the *Federal Court Rules 2011* (Cth)—an approach that was intended to promote uniformity across state and federal jurisdictions.⁵ Both sets of Rules provide a comprehensive set of rules and forms and are designed—so far as possible—to be 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 practitioners to find the relevant rule and

² Chief Justice Sundaresh Menon, "Standards in Need of Bearers: Encouraging Reform from Within" (Paper presented at the Chartered Instituted of Arbitrators, Singapore Centenary Conference, Singapore, 3 September 2015) 16.

³ Queen Mary, University of London, School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (Sponsored by White & Case LLP, 2015) <<http://www.arbitration.qmul.ac.uk/research/2015/>> 14–5.

⁴ *Supreme Court (Chapter II Arbitration Amendment) Rules 2014* (Vic); Supreme Court of Victoria, *Practice Note No 8 of 2014 – Commercial Arbitration Business*.

⁵ See also Federal Court of Australia, *Practice Note ARB 1 – Proceedings under the International Arbitration Act 1974*.

appropriate form or forms – a basis feature, but one which goes a long way to saving time and money for parties, as well as court time.

In light of these developments and others, it is our intention this evening to provide an update on how the role of the courts in arbitration has been interpreted and practised in recent times. In so doing, we will discuss the role of the courts in applications to enforce or to set aside arbitral awards, as well as in applications seeking support for arbitral processes, such as applications to stay court proceedings and refer the parties to arbitration, and applications for the issue of subpoenas. Justice Croft will also discuss a key challenge for courts in this area, namely, the temptation to approach arbitration-related matters through the prism of common law doctrines and equitable principles not found in the international legal framework within which Australia’s arbitration regime sits.

2. Legislative Framework

I turn first to the comprehensive legislative framework which now underpins the practice of domestic and international arbitration in Australia – namely the *International Arbitration Act 1974* (Cth) (“the International Arbitration Act”), which governs international arbitrations held both inside and outside Australia, and the Uniform Commercial Arbitration Acts (“the Uniform Domestic Acts”), which govern Australian domestic arbitrations, and which have been enacted in every State and Territory other than the Australian Capital Territory.⁶ The International Arbitration Act and the Uniform Domestic Acts give effect to the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, more commonly referred to as the UNCITRAL Model Law, or simply the Model Law.⁷ Section 16(1) of the International Arbitration Act gives the Model Law the “force of domestic law” in Australia and the Uniform Domestic Acts

⁶ *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).

⁷ *UNCITRAL Model Law on International Commercial Arbitration* (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

substantially reproduce the terms of the Model Law, with some amendments and additions. Another important object of the International Arbitration Act is to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention.⁸

Critically, in the context of considering the role of the courts in arbitration, Article 5 of the Model Law provides that:

In matters governed by this Law, no court shall intervene except where so provided in this Law.

This express restraint on the role of the courts in arbitration matters appears in similar terms in section 5 of the Uniform Domestic Acts, where the reference to the Model Law is replaced with a reference to "the Act".

National approaches to the role of the courts in this area, in particular before the widespread adoption of the Model Law,⁹ have differed greatly over time. At one extreme was the view that, absent extensive judicial intervention, arbitration risked descending into—as one commentator rather colourfully put it—"an unacceptable theatre of the absurd".¹⁰ At the other end of the spectrum was the view that anything other than minimalist judicial intervention would corrupt the contractual freedom of parties who have chosen to resolve their disputes using arbitration. The approach taken by the Model Law in this regard is one of "minimal curial intervention"¹¹ tempered with a recognition of the important role courts have to play

⁸ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959); *International Arbitration Act 1974* (Cth) s 2D(d).

⁹ Chief Justice James Allsop and Justice Clyde Croft, "Judicial Support for Arbitration" (Paper presented at the APRAG Tenth Anniversary Conference, Melbourne, 26 March 2014) <<http://www.supremecourt.vic.gov.au/home/contact+us/speeches/speech+judicial+support+of+arbitration>> 2–3.

¹⁰ Gerold Herrmann, "The Role of the Courts under the UNCITRAL Model Law Script" in Julian Lew (ed), *Contemporary Problems in International Arbitration* (Centre for Commercial Law Studies, Queen Mary College, University of London, 1986) 164–5.

¹¹ *AKN v ALC* [2015] SGCA 18, [37].

in arbitration. The importance of the courts in this area is encapsulated in the observations of another commentator who said that:¹²

In the absence of ... [court] intervention the fair resolution of disputes before an impartial tribunal, without unnecessary delay or expense, may not be achieved ...

[T]he reality is that arbitration would not survive without the courts. Indeed, as Lord Mustill observed, it is only a court with coercive powers that could rescue an arbitration which is in danger of foundering.

The approach of Australian courts is reflective of this balancing act between minimal intervention and appropriate support, and emphasises the consensual, party-driven nature of arbitration. The Australian approach has been shaped in no small part by the decision in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*. In that case, the High Court held that the court's power to enforce an arbitral award as if it were a judgment or order of the court did not contravene Chapter III of the *Constitution*.¹³ Hayne, Crennan, Kiefel and Bell JJ said:¹⁴

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.

Similarly, French CJ and Gageler J said:¹⁵

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 court's role is thus conceived as limited to enforcing contractual obligations—that is, upholding the contractual promise that disputes be submitted to, and be finally determined by, arbitration. A corollary of holding commercial parties to their bargains in this respect is that the court is also concerned to maintain the

¹² John Lurie, "Court Intervention in Arbitration: Support or Interference" (2010) 76(3) *The International Journal of Arbitration, Mediation and Dispute Management* 447.

¹³ (2013) 251 CLR 533, 557 [40], 576 [111].

¹⁴ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 575 [108]. See *International Arbitration Act 1974* (Cth) s 8(2).

¹⁵ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 555 [34].

“institutional integrity” of commercial arbitration—a point to which we will return later.¹⁶

In this context, Australia’s arbitration regime, as informed by the Model Law, contemplates several forms of legitimate judicial intervention. Permissible interventions include:

- Staying court proceedings where there is a valid arbitration agreement governing the dispute—thereby holding the parties to their bargain to arbitrate, not litigate;¹⁷
- Providing parties with interim measures of protection;¹⁸
- Assisting with the appointment of an arbitral tribunal;¹⁹
- Determining the jurisdiction of an arbitral tribunal;²⁰
- Recognising and enforcing interim measures issued by an arbitral tribunal subject to a number of grounds for resistance;²¹
- Assisting in taking evidence;²²
- And, perhaps most commonly seen in Australian courts, determining whether an arbitral award can be set aside, or recognising and enforcing an award.²³

Importantly, no provision is made for appeals from arbitral tribunals on questions of law or of fact. I note however, for the sake of completeness, that section 34A of the Uniform Domestic Acts is an exception to this rule, but that it operates on an opt-in basis only.

¹⁶ James Spigelman, “The Centrality of Contractual Interpretation: A Comparative Perspective” (Neil Kaplan Lecture, Hong Kong, 27 November 2013) < <http://neil-kaplan.com/#kaplan-lecture> > 9.
¹⁷ Model Law, Article 8; International Arbitration Act, s 7; Uniform Domestic Acts, s 8.
¹⁸ Model Law, Articles 9, 17J; Uniform Domestic Acts, s 17J. See International Arbitration Act, s 23.
¹⁹ Model Law, Articles 11, 13–14.
²⁰ Model Law, Article 16.
²¹ Model Law, Articles 17H–17I.
²² Model Law, Article 27; Uniform Domestic Acts, s 27.
²³ Model Law, Article 34–5; International Arbitration Act, s 8; Uniform Domestic Acts, ss 34, 35–6.

3. Enforcing and Challenging Awards

I now turn to consider in further detail the nature of the court's role when hearing applications to recognise and enforce, or to set-aside arbitral awards. The enforcement and setting-aside of awards is governed by section 8 of the International Arbitration Act, as well as by articles 34 to 36 of the Model Law – which, as I have mentioned, has the force of law in Australia – and by sections 34, 35 and 36 of the Uniform Domestic Acts. For practical purposes, I will proceed to refer only to the provisions of the International Arbitration Act, being those within the Federal Court's jurisdiction. I note, however, that the procedure and grounds for setting aside an award are essentially the same across all three legislative instruments. I also note that State and Territory Supreme Courts have jurisdiction to hear applications made under the International Arbitration Act.

Section 8(3) provides that a foreign arbitral award may be enforced in the Federal Court as if it were a judgment or order of the court, while subsection (3A) provides that the court may only refuse to enforce the award in limited circumstances, as set out in subsections (5) and (7). These limited grounds are:

- That a party to the arbitration agreement was under some incapacity at the time the agreement was made: sub-s (5)(a);
- That the arbitration agreement is not valid under the governing law of the agreement: sub-s (5)(b);
- That a party was not given proper notice of the appointment of the arbitrator, or was otherwise unable to present its case: sub-s 5(c);
- That the award deals with a difference not contemplated by the submission to arbitration, or goes beyond the scope of the submission: sub-s 5(d);
- That the arbitral procedure was not in accordance with the agreement of the parties: sub-s 5(e);

- That the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority at the arbitral seat: sub-s 5(f);
- That the subject matter of the difference between the parties is not capable of settlement by arbitration: sub-s 7(a); and
- Where to enforce the award would be contrary to public policy: sub-s 7(b).

For the avoidance of doubt, subsection (7A) provides that the enforcement of a foreign award would be contrary to public policy if the award was affected by fraud or corruption, or if a breach of the rules of natural justice occurred in connection with the making of the award.

As I alluded to earlier, these eight grounds are essentially concerned with the courts' role in maintaining the "institutional integrity"²⁴ of international arbitration—they are all about whether the arbitral process was fair and in accordance with the agreement between the parties. This is reflective of article 18 of the Model Law which establishes the fundamental rule of arbitration that:

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

I, together with Middleton and Foster JJ, had cause to consider the public policy ground for refusing enforcement, in the context of an alleged breach of the rules of natural justice, in the case of *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*.²⁵

a) The TCL Case

This case was a continuation of the High Court litigation to which I referred to earlier—the earlier proceedings being initiated in the High Court's original jurisdiction following a decision of Murphy J at first instance. The facts of the case were relatively straightforward and involved the distribution in Australia of air conditioning units manufactured in China by the respondent in the arbitration, TCL.

²⁴ James Spigelman, "The Centrality of Contractual Interpretation: A Comparative Perspective" (Neil Kaplan Lecture, Hong Kong, 27 November 2013) < <http://neil-kaplan.com/#kaplan-lecture> > 9.

²⁵ (2014) 311 ALR 387 ("*TCL*").

TCL breached its promise to Castel of exclusivity of rights of distribution of certain TCL products and Castel successfully obtained an arbitral award in its favour following a 10-day hearing.

TCL sought to resist enforcement and have the award set-aside, arguing that the arbitration tribunal had failed to accord it procedural fairness, thereby breaching the rules of natural justice and rendering enforcement of the award contrary to the public policy of Australia. Importantly in the present context of considering the court's role in such applications, TCL argued that the proper approach was to revisit in full the questions which were before the tribunal in order to determine whether the rules of natural justice had been breached. Murphy J dismissed TCL's arguments and enforced the award. Despite its unsuccessful challenge to the constitutional validity of his Honour's decision in the High Court, TCL pressed its appeal to the Full Federal Court.

By its grounds of appeal, TCL challenged the primary judge's findings –

- that an asserted breach of the rules of natural justice must be sufficiently serious to offend fundamental notions of fairness before the discretion to refuse enforcement is exercised;
- that there is a need to balance the efficacy of enforcing international arbitral awards with public policy; and
- that uniformity across jurisdictions is a relevant consideration when determining whether enforcement would be contrary to the public policy of Australia.

TCL also sought to comprehensively re-agitate arguments made before the primary judge as to the asserted inadequacies of the factual findings of the tribunal.

At this point, it is convenient to read to you a substantial quote from the judgment which summarises our findings in relation to TCL's grounds of appeal and

encapsulates the proper approach to allegations of breaches of the rules of natural justice. At paragraphs 54 and 55, we said:²⁶

If the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been conducted regularly and fairly. That danger is acute if natural justice is reduced in its application to black-letter rules, if a mindset appears that these rules can be “broken” in a minor and technical way and if the distinction between factual evaluation of available evidence and a complete absence of supporting material is blurred. All these things occurred in the argument in this case. Their presence persuaded or required the judge to spend three days reviewing the award that was the product of a ten-day reference. That should not be how such a review takes place. We are not being critical of the primary judge. His reasons are careful, thorough and substantially correct. The application was a disguised attack on the factual findings of the arbitrators dressed up as a complaint about natural justice.

An international commercial arbitration award will not be set aside or denied recognition or enforcement under Arts 34 and 36 of the Model Law (or under Art V of the New York Convention) unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness. The demonstration of real unfairness or real practical injustice will generally be able to be expressed, and demonstrated, with tolerable clarity and expedition. It does not involve the contested evaluation of a fact finding process or “fact interpretation process” or the factual analysis of asserted “reasoning failure”, as was argued here.

As is clear from this quote, the central question with which an enforcement court is concerned, is whether a party to an arbitration agreement has been treated unfairly or has suffered “real practical injustice in the dispute and litigation context in which it finds itself.”²⁷ In this case, we found that TCL had received a “scrupulously fair

²⁶ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, 398 [54]–[55].

²⁷ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, 415 [110].

hearing in a hard fought commercial dispute”, and so dismissed the appeal accordingly.²⁸

In the course of reasoning to these conclusions, we also had cause to consider the international provenance of Australia’s arbitration regime, to which I referred earlier. Of great practical importance for courts, counsel and practitioners alike, we said that—²⁹

it is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law. It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the ... [International Arbitration Act] permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand.

²⁸ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, 427 [167].
²⁹ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, 405 [75].

[CROFT J]

4. The “Temptation of Domesticity”³⁰

I want to begin by introducing an important overriding challenge for courts in this area—one which has the potential to arise in every kind of application brought in connection with arbitration proceedings. The “temptation of domesticity” concerns the intuitive appeal to a court of approaching matters for determination through the prism of legal doctrines and principles with which the court is most familiar. In the case of Australian courts, this, at the very least, means considering matters through a common law lens, if not going so far as to apply common law doctrines and equitable principles expressly. Like all temptation, such an approach is attractive in the short-term, but ultimately has the potential to interfere with broader, longer-term objectives. Chief among these long-term objectives is the promotion of international uniformity in international commercial arbitration practice. As the Chief Justice has already discussed, the international provenance of Australia’s arbitration regime necessitates an international judicial approach. As we have just heard, particular regard is to be had to the reasoned decisions of courts in other countries—particularly those in our region—where their arbitration law shares a common basis with that of Australia in the New York Convention and the Model Law. As such, courts must resist the temptation to approach arbitration related matters in the context of principles not found in these international instruments, and which may be peculiar to a particular jurisdiction or domestic legal system.

In the spirit of internationalism, it is fitting that I now refer—for the second time this evening—to the Chief Justice of Singapore. Delivering the judgment of the Singapore Court of Appeal earlier this year in the case of *AKN v ALC*, Chief Justice Menon said:³¹

A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just

³⁰ See Justice Clyde Croft, “The ‘Temptation of Domesticity’ and the Role of the Courts in Australia’s Arbitration Regime” (2015) 89 *Australian Law Journal* [yet to be paginated].

³¹ [2015] SGCA 18, [37] (emphasis added).

as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. *The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases.* This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law ...

Chief Justice Menon is referring here to perhaps the most prevalent manifestation of the “temptation of domesticity”, namely that the court is invited to intervene to correct errors of law or fact made by an arbitral tribunal.³² His Honour continued—echoing much of the sentiment of the Full Federal Court in the *TCL* case—and said:³³

In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration.

As in the *TCL* case, Chief Justice Menon had in mind here challenges to awards based on alleged breaches of the rules of natural justice. Another example of an invitation being extended to the court to inappropriately interfere with the procedural conduct of an arbitration came before me earlier this year in the case of *Cameron Australasia Pty Ltd v AED Oil Ltd*.³⁴

a) *The Cameron Case*

The *Cameron* case involved an application to set aside two procedural rulings—which were rendered in separate partial awards—and the final award of an arbitral tribunal. The substantive dispute submitted to arbitration concerned a claim in negligence for costs incurred in rectifying a leak at an oil well in the Timor Sea. Being, as it was, a domestic arbitration, the application was made under section 34 of

³² See Chief Justice Sundaresh Menon, “Standards in Need of Bearers: Encouraging Reform from Within” (Paper presented at the Chartered Institute of Arbitrators, Singapore Centenary Conference, Singapore, 3 September 2015) 17.

³³ [2015] SGCA 18, [39].

³⁴ [2015] VSC 163 (“*Cameron*”).

the Victorian *Commercial Arbitration Act*, in accordance with rule 9.19 of the *Supreme Court Arbitration Rules*.³⁵

The first procedural ruling complained of was a decision not to allow the respondent in the arbitration, Cameron, to re-open its case in order to withdraw its voluntary admission that it owed a duty of care in tort to the claimant, AED. In its pleading in the arbitration, Cameron did not admit the existence of the duty of care pleaded by AED. However, in preparing its opening written submissions, and in light of a recent decision of the New South Wales Court of Appeal, Cameron decided to admit the existence of the duty. The admission was made despite the High Court granting special leave to appeal that Court of Appeal decision. The arbitration hearing proceeded on this basis, but before the tribunal rendered its award, the High Court overturned the Court of Appeal decision. Cameron therefore sought to re-open the arbitration hearing in order to withdraw its admission—based, as it was, on the overturned Court of Appeal decision. The tribunal refused Cameron’s application.

As a result, Cameron submitted that it was unable to present its case before the tribunal.³⁶ Cameron argued that although the tribunal articulated the correct test with respect to an application to re-open, it did not apply that test. Cameron claimed that the “serious legal errors” of the tribunal in refusing the application to re-open “comprised an affront to the basic fairness of the arbitral process”.³⁷

The second procedural ruling complained of was a decision not to allow Cameron to rely on an expert report in circumstances where Cameron chose not to call the expert as a witness in the arbitration. Cameron argued that the arbitral procedure was therefore not in accordance with the parties’ agreement—namely, that the tribunal would not be bound by the rules of evidence.³⁸ Cameron sought to rely on rule 44.04 of the *Supreme Court Rules* which provides that a party may put in evidence a report served on that party without calling the expert.³⁹ Given that the governing law of

³⁵ *Commercial Arbitration Act* 2011 (Vic); *Supreme Court (Miscellaneous Civil Proceedings) Rules* 2008 (Vic).

³⁶ *Commercial Arbitration Act* 2011 (Vic) s 34(2)(a)(ii).

³⁷ *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163, [45].

³⁸ *Commercial Arbitration Act* 2011 (Vic) s 34(2)(a)(iv).

³⁹ *Supreme Court (General Civil Procedure) Rules* 2005 (Vic).

the arbitration was that of Victoria, Cameron argued that the tribunal was not permitted to refuse to admit evidence that was admissible under the rules of evidence.

I rejected both grounds for setting the awards aside and found that Cameron was, in effect, attempting to pursue a merits appeal in the form of an appeal on questions of law. Indeed, the nature of Cameron’s arguments revealed that the purported grounds were simply appeals from determinations of the tribunal—to borrow the phrase used by the Full Federal Court in the *TCL* case, “dressed up”—as either complaints about the fairness of the arbitral process or as breaches of the agreed arbitral procedure. As in the *TCL* case, a telltale sign of this was the fact that Cameron sought to re-argue why it should have been permitted to rely on the expert report in the arbitration. In terms of the “temptation of domesticity”, to have succumbed to temptation in this context would have meant considering these arguments on their merits, despite the tribunal having exercised its powers in a “considered and reasoned manner, in circumstances where there was no suggestion that the parties did not have a full or reasonable opportunity” to put those arguments to the tribunal.⁴⁰

At this point, I might add that invitations to intervene in the factual or legal merits of an arbitral award are not the only ways in which a court might be tempted by the comfort of domesticity. Indeed, temptation may present itself in circumstances where an award is yet to be rendered, or even where there is no arbitration on foot. Examples to which I will return later include applications seeking a stay of court proceedings and referral to arbitration, and applications for the issue of subpoenas to attend before or produce documents to an arbitral tribunal. Before exploring these examples however, I wish to turn to another enforcement application heard in the Arbitration List this year—namely, the case of *Giedo van der Garde BV v Sauber Motorsport AG*.⁴¹

⁴⁰ *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163, [55].

⁴¹ (2015) 317 ALR 792 (“*Sauber*”).

b) The Sauber Case

As many of you would no doubt have seen, the *Sauber* case concerned a Dutch Formula 1 race car driver seeking to be reinstated as a driver for the Sauber F1 Team. The applicant driver, Mr van der Garde, and the company set up to manage his interests sought enforcement in Victoria of a Swiss arbitral award, the critical dispositive provision of which required Sauber to –

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

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 the *Arbitration Practice Note*. The matter was listed for the hearing of an urgent *ex parte* application the following day (a Thursday), at which van der Garde sought orders permitting substituted service of the Originating Application on Sauber in Switzerland. I made orders for substituted service and listed the substantive application for hearing on the following Monday, the Labour Day public holiday, less than a week before the first race of the season, the Australian Grand Prix at Albert Park.

At the hearing, Sauber sought – amongst other arguments – to resist enforcement on public policy grounds. Sauber submitted that the critical dispositive provision was too uncertain to constitute an order of the Court. In support of this submission, Sauber argued that the subject of an order “must be able to ascertain in precise terms what it is that they must do, or refrain from doing”, where default may ground an action for contempt.⁴² In addition to this uncertainty argument, Sauber submitted that enforcement would be futile because the award did not require Sauber to take any positive step to reinstate van der Garde as one of its drivers.

I delivered my judgment and written reasons one day after the hearing. In allowing the application and enforcing the award, I found that the critical dispositive provision was not too vague or uncertain, nor was enforcement futile; noting that the

⁴² *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 732, 795 [7].

court was available to assist the parties in the event of any “doubt or difficulty” in this regard.⁴³ The Court of Appeal affirmed this approach, finding that “all concerned are well aware of the nature of the dispute and its resolution”, and that there was “no demonstrated lack of utility in the award as to render it against public policy to enforce it as an order of the court”.⁴⁴

Although not described explicitly as such, Sauber’s submissions on uncertainty and futility appeared to draw directly on equitable principles – principles which, despite their intuitive appeal to the common lawyer, are not found in the Model Law, or the New York Convention. In this context, it is important to remember that these international instruments constitute an amalgam of common law and civil law concepts. Clearly, the application of principles peculiar to one legal system has the potential to hinder the uniformity project which the Model Law exists to serve and which Australia’s arbitration legislation is unequivocally designed to support. A challenge for courts then is to identify the jurisprudential basis of submissions like those advanced by Sauber, before exercising the restraint mandated by Australia’s arbitration regime and, to the extent permitted by Parliament, applying concepts found in these international instruments with reference to international jurisprudence.

5. Supporting Arbitral Processes

I turn now to consider the role of the courts in applications other than enforcement or setting aside proceedings. As will become apparent, there is nothing special about the role of the court in enforcement or setting aside applications, compared with applications for some kind of intervention in the arbitral process itself – the same general principles apply.

a) Stay and Referral to Arbitration

I turn first to applications to stay court proceedings and refer the parties to arbitration. In *Robotunits Pty Ltd v Mennel*, the Defendant, Mr Mennel, sought orders

⁴³ *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 732, 797 [22].

⁴⁴ *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786, 789–90 [12]–[13].

that proceedings commenced by the Plaintiff, Robotunits Pty Ltd, be stayed and that the parties be referred to arbitration.⁴⁵ The proceedings in question involved a claim for the return of money which Robotunits claimed that Mennel, its former managing director, had wrongly caused it to pay to his bank account. Mennel sought a stay and referral to arbitration in reliance on an arbitration agreement contained in a shareholders agreement to which he and Robotunits were parties. Mennel claimed that he was entitled to make the bulk of the payments under the shareholders agreement, and that therefore the proceeding involved the “determination of a matter that, in pursuance of the [arbitration] agreement, [was] capable of settlement by arbitration”, and so was required to be stayed in accordance with section 7(2) of the International Arbitration Act.

In resisting the application, Robotunits submitted that, in order to constitute a “matter” under that section, the assertions giving rise to the dispute between the parties must be “sustainable”, in that they must have a reasonable prospect of success. Robotunits argued that Mennel’s assertion that the shareholders agreement authorised some or all of the payments did not meet this sustainability requirement and so there was no matter—or dispute—to which the arbitration agreement could apply. Upon reviewing the authorities, including from Hong Kong, Singapore and the UK, I found that neither section 7(2)(b), nor its Model Law equivalent in article 8—nor for that matter section 8 of the Uniform Domestic Acts—imposed a threshold requirement of this kind. I noted that—⁴⁶

to find otherwise would be to succumb to the temptation of “domesticity” referred to above, by allowing the determination of whether to stay proceedings and refer the parties to arbitration to be coloured by the merits of the case.

Earlier, in relation to the role of the courts in applications of this kind, I had observed that—⁴⁷

Even though the merits of the case are necessarily yet to be canvassed by an arbitration tribunal, courts are no more entitled to delve into the

⁴⁵ (2015) 297 FLR 300.

⁴⁶ *Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300, 321 [42].

⁴⁷ *Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300, 306 [14].

merits of the case in the context of a stay application, than they are in the context of enforcement or setting-aside proceedings.

Further to its submissions on sustainability, Robotunits submitted that, in any event, the matters for determination in the proceeding were not “capable of settlement by arbitration”. Robotunits argued that there was a strong public interest in having conduct which could constitute serious criminal offences—namely potential breaches of directors’ duties under section 184 of the *Corporations Act*—ventilated in a public forum so that ASIC could be aware of it. In rejecting these submissions and finding that the *Corporations Act* issues pleaded were arbitrable, I commented that:⁴⁸

In my view, and as a general proposition, there is not a sufficient element of legitimate public interest in matters involving the *Corporations Act* to make their resolution by arbitration — that is, outside the national court system — inappropriate.

I noted further that I did not consider there to be any reason why the possible interest or standing of a statutory body such as ASIC in prosecuting conduct at issue in a dispute should make that dispute inappropriate for binding private dispute resolution.

b) Subpoenas

Finally, I turn to consider the role of the courts in applications for the issue of subpoenas to attend before, or produce to an arbitration tribunal under section 27A(1) of the Uniform Domestic Acts or section 23 of the International Arbitration Act. Applications of this kind may only be made with the permission of the arbitral tribunal and both the Supreme Court and Federal Court Rules require that applications be accompanied by an affidavit stating the terms of the permission and the nature of the arbitration, as well as a copy of the draft subpoena.⁴⁹

In *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd*, Esposito applied for the issue of subpoenas to a number of corporate entities in relation to a domestic arbitration.⁵⁰

⁴⁸ *Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300, 330 [69].

⁴⁹ *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) r 9.14; *Federal Court Rules* 2011 (Cth) r 28.46.

⁵⁰ [2015] VSC 183.

Before setting out the applicable principles, I reiterated my view as expressed in the *ASADA* case that it is –⁵¹

clearly inappropriate for the Court, in an application ... by a party to obtain subpoenas, to embark upon a process which would, in effect, “second guess” the arbitral tribunal which has already given permission for the application to obtain a subpoena ...

In ordering that the proposed subpoenas be issued, I noted that the principles applicable to the question of whether an arbitral tribunal should grant permission to a party to apply to the Court for the issue of a subpoena are not necessarily the same as the principles which the Court applies in deciding whether to issue a subpoena. Nevertheless, I remarked that there is “every reason why an arbitral tribunal should not grant permission in circumstances where it is reasonably clear that the court will ... not issue the subpoena.”⁵²

In relation to the court’s role in this kind of application, practitioners and counsel ought be reminded that courts are not a mere rubber stamp on the determination of an arbitral tribunal to permit a party to apply to the court. Courts retain a discretion whether to issue the subpoena and it is for the court, not the arbitral tribunal, to determine whether the coercive powers of the state to compel a person to do something should be exercised. This gives rise to a relatively delicate balancing act whereby the court must exercise its discretion without “second guessing” the tribunal’s decision to allow the application to be made, or otherwise interfering with the substantive or procedural issues in the arbitration. In light of this, it was particularly helpful in the *Esposito* case that the tribunal had furnished detailed reasons for its decision to permit the application to be made to the court. As such, I was able to see that the Tribunal appeared to have accorded procedural fairness to the parties and that the principles applicable to the issue of subpoenas by a court had been considered and applied.

⁵¹ *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd* [2015] VSC 183, [5] (“*Esposito*”) citing *ASADA v 34 Players and One Support Person* [2014] VSC 635, [63].

⁵² *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd* [2015] VSC 183, [7].

6. Conclusion

In closing, I wish to return to the findings of the 2015 Queen Mary International Arbitration Survey. Over 90% of respondents indicated that international arbitration is their preferred dispute resolution mechanism—leading the authors to observe that—⁵³

The strong preference for international arbitration by its users demonstrates that arbitration better meets their demands than other readily available options, such as commercial litigation.

It is clear then that commercial arbitration is here to stay. The challenge now for Australia’s arbitration sector is follow the lead of Hong Kong and Singapore by leveraging the popularity of arbitration internationally and turning Australia into an arbitral seat of choice in our region. As we have outlined today, the courts are doing their bit to make Australia an “arbitration-friendly” jurisdiction by adopting a principled, measured approach to arbitration-related matters and paying due regard to the international provenance of Australia’s arbitration regime.

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Useful links

<http://www.fedcourt.gov.au/case-management-services/ADR/arbitration>

<http://www.supremecourt.vic.gov.au/home/law+and+practice/specialist+areas+of+law/arbitration/>

⁵³ Queen Mary, University of London, School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (Sponsored by White & Case LLP, 2015) <<http://www.arbitration.qmul.ac.uk/research/2015/>> 5.