

The Judicial Approach to Arbitration: An Asia Pacific Perspective*

The Hon. Justice Clyde Croft**
Supreme Court of Victoria

* A paper presented at the Arbitrators' & Mediators' Institute of New Zealand Conference 2014, Queenstown. I would like to thank my Senior Associate, Mr Luke Virgona, LLB (Monash), MCom (Swinburne), for his assistance in the preparation of this paper.

** B Ec LLM (Monash), PhD (Cambridge), LFACICA, LFIAMA, JFAMINZ, FCIArb – Judge in charge of a Commercial List, the Arbitration List and the Taxation List in the Commercial Court of the Supreme Court of Victoria.

Introduction

It is a great pleasure to be with you in Queenstown today speaking at such an important and significant conference in relation to the judicial approach to arbitration in our region of the world – the Asia Pacific. Digressing slightly, it is significant that New Zealand, *The New Oxford History of New Zealand*¹ observes, has had a very significant influence in this region, particularly the Pacific, for a very long time, probably many hundreds of years.

This session addresses an issue of great importance given the pivotal role that courts have to play in ensuring the continued success and development of international and domestic arbitration in this region. A critical factor in the mix which determines whether a particular jurisdiction is attractive or otherwise for international arbitration is the balance that has been struck in that jurisdiction between court support and court intervention. With court support and minimum intervention, arbitration has the potential to flourish, but if the balance is struck differently, then parties will avoid that jurisdiction as an arbitral seat.

In this context, I will focus on some recent and important decisions with respect to the challenges to and enforcement of international arbitration awards – which demonstrate that Australian courts are moving to a significantly more positive, pro-arbitration, position

Role of the courts

The importance of judicial support for the development and growth of arbitration on both the domestic and international level cannot be overestimated. In the past, there may have been a perception that Australian courts hindered effective commercial arbitration by being unduly interventionist in a number of ways. Regardless whether this was warranted, it may be said that Australian courts were sometimes inconsistent in their approaches. In response to this perception, sweeping changes were introduced by Australian federal and state legislatures which adopted the 2006 revised Model Law² to provide a modern legislative framework for both international and domestic arbitration.

The Model Law (whether in its original form or as revised in 2006) has been adopted by the majority of the significant arbitral jurisdictions in the Asia-Pacific region. Under the Model Law, courts are empowered to intervene in arbitral proceedings but, by reason of Article 5, only to the extent provided for under its provisions. Thus, judicial support of arbitration may occur by:

- Staying court proceedings when there is a valid arbitration agreement governing the parties' dispute;³
- Providing parties with interim measures of protection;⁴

¹ (OUP, 2009).

² UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on 21 June 1985, and as amended by UNCITRAL on 7 July 2006).

³ Art 8 of the Model Law.

- Assisting with the appointment of a tribunal;⁵
- Determining the jurisdiction of a tribunal;⁶
- Recognition and enforcement of interim measures issued by an arbitral tribunal subject to a number of grounds for resistance;⁷
- Assisting in taking evidence;⁸

A further aspect of the Model Law - that of judicial support for arbitration under the Model Law - relates to the powers of the courts under Articles 34 to 36, which provide limited grounds to set aside or refuse enforcement of an award. Although the general position is that arbitral awards are considered to be final and binding, the limited and narrow grounds for challenging an award and resisting its enforcement are crucial to instil confidence in the arbitration process.

The Model Law was incorporated into Australia's international and domestic arbitration legislation by the *International Arbitration Act 1974* (Cth) (as amended by the *International Arbitration (Amendment) Act 2010*) ("the IAA") and domestically by, for example, the *Commercial Arbitration Act 2011* (Vic) (Uniform State and Territory Legislation). Courts in Australia now have clear guidance in the direction of a more supportive approach towards arbitration.

Although it is my lot to concentrate on the Australian position, I should, and do, note New Zealand's ongoing leadership in the development of its arbitration law – particularly its adoption of the Model Law as the basis for its domestic and international arbitration laws as early as the *Arbitration Act 1996*, enacted after the New Zealand Law Commission Report (NZLCR 20), "Arbitration", published in 1991.⁹

⁴ Arts 8 and 17J of the Model Law, but noting that Art 17J is only available under the 2006 Model Law.

⁵ Articles 11, 13 and 14 of the Model Law

⁶ Article 16 of the Model Law

⁷ Arts 17H and 17I of the 2006 model law only.

⁸ Article 27 of the Model Law

⁹ See T. Kennedy-Grant, *The New Zealand Experience of the UNCITRAL Model Law – A review of the position as at 4 December 2009* (www.kennedygrant.com).

Pro-arbitration approach of the courts

This new-found pro-arbitration approach has been highlighted by a number of Australian judges speaking and writing extra-curially. For example, Chief Justice Marilyn Warren of the Supreme Court of Victoria has said:¹⁰

“In arbitration, the directive role of the Court needs to be minimised. The focus instead turns to ways in which the Court can support the arbitration process and enforce arbitral awards in a timely and cost effective manner.”

Additionally, Justice James Allsop¹¹ (now the Chief Justice of the Federal Court of Australia) observed at CI Arb’s Asia Pacific Conference in 2011:¹²

“The clear trend in judicial decision-making about arbitration in Australia [has transformed] from suspicion, to respect and support...In terms of intervention [by the judiciary], restraint is essential. Arbitration depends for its success on the informed and sympathetic attitude of the courts.”

Despite the support shown for arbitration, the new legislative frameworks for international and domestic arbitration were potentially threatened in a recent and most significant case before the High Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*.¹³ This case arose from an application before the Federal Court of Australia by a party seeking to enforce an Australian arbitration award. The unsuccessful party sought to challenge the enforcement of the award; a challenge which the Federal Court rejected. The unsuccessful party then sought special leave from the High Court to appeal the decision on the basis that the legislative framework for international arbitration in Australia was not constitutionally valid.

It was argued that Articles 35 and 36 of the Model Law, as adopted in the IAA, required a court to enforce an international award subject only to very narrowly defined exceptions. Under these provisions, a court is not permitted to refuse enforcement of an international award on the basis that the award, on its face, contains an error of law. It was contended that this requirement under the IAA was incompatible with the Australian Constitution. In other words, the enforcement of international arbitral awards in the manner envisaged by the IAA meant that the Federal Court was exercising judicial power without any independent judicial process. Consequently, it was said by the

¹⁰ Chief Justice Marilyn Warren, “The Victorian Supreme Court’s Perspective on Arbitration” (Speech delivered at the International Commercial Arbitration Conference, Melbourne, December 4, 2009).

¹¹ Now the Chief Justice of the Federal Court of Australia.

¹² Justice James Allsop, “International Arbitration and the Courts: the Australian approach” in CI Arb’s Asia Pacific Conference 2011 – *Investment & Innovation: International Dispute Resolution in the Asia Pacific* (2011), 1 and 7.

¹³ *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5. This case concerned arbitration proceedings which were more recently the subject of a judgment of the Full Court of the Federal Court of Australia in relation to an application for setting aside and non-enforcement of the arbitral award under Articles 34 and 36 of the Model Law: *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 (discussed below).

appellant that courts would be required to give “judicial imprimatur” to an award despite its legal flaws.

The High Court rejected this argument, unanimously holding that arbitral power is not judicial power. Judicial power operates regardless of the parties’ consent whereas arbitral power is dependent on it. Thus, in enforcing an arbitral award, a court is merely enforcing an agreement between the parties. Further, the High Court rejected the argument that the IAA imbues arbitrators with the Commonwealth’s judicial powers, which is not compatible with Chapter III of the *Australian Constitution*. In this respect I note the comments made by French CJ and Gageler J:¹⁴

“34 ...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.”

The High Court’s unanimous decision was welcomed by the Australian arbitration community; the importance of which was highlighted by the appearances – as *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 (consisting of six justices) confirm that Australia sits well within international standards and norms for the enforcement of awards.

Recent court decisions

There have been a number of recent and very important decisions of Justice Foster of the Federal Court of Australia.¹⁵ There have also been decisions of the State courts; for example, *Subway Systems Australia Pty Ltd v Ireland*.¹⁶ As time does not permit me to discuss these decisions in great detail, I simply observe that they demonstrate the commitment of the Australian courts to facilitating and supporting international arbitration. This is epitomised by his Honour’s statement in *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* that:¹⁷

“[It is not] against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award. The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of

¹⁴ *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at [34] and following.

¹⁵ *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696; *Eoply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356; and see also *Emerald Grain Australia Pty Ltd v Agrocrop International Pty Ltd* [2014] FCA 414 (Pagone J).

¹⁶ [2014] VSCA 142.

¹⁷ [2011] FCA 131 at [126].

international trade, in order to support certainty and finality in international dispute resolution..." (emphasis added)

More recently, the Full Court of the Federal Court of Australia handed down a significant decision in *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd*,¹⁸ which both affirms Australia's pro-enforcement approach to international arbitral awards and also indicates that Australian courts will give great weight to prior decisions of courts at the seat of arbitration when dealing with similar issues.

In *Gujarat*, the dispute arose from an agreement between the parties for the sale of metallurgical coke. Coeclerici, the claimant, sought to recover payments from Gujarat and Jagatramka, the respondents. The agreement was governed by English law, and disputes between the parties had to be arbitrated in London under the terms of the London Maritime Arbitration Association rules. Prior to the commencement of the arbitration hearing, the parties reached a settlement whereby the respondents admitted liability and agreed to a settlement payment structure. It was also agreed that if the settlement payments were not made by the respondents within the time schedule, the claimant would be entitled to an immediate consent award, without the need for any pleadings or hearing. Following the failure by the respondents to make the first payment, the claimant requested the tribunal to make an award in its favour. The tribunal emailed the solicitors for the respondents asking whether there was any reason why the award should not be made. The respondents' solicitors emailed the arbitrators over a number of days stressing that they had not been afforded a reasonable opportunity to present their case that there had been a breach of the settlement agreement. The arbitral tribunal ultimately made the award in favour of the claimant. The respondents then unsuccessfully sought to have the award set aside by the English High Court on the basis that they had not been provided with an opportunity to be heard and there was serious irregularity.

The claimant then sought to have the award enforced by the Federal Court of Australia pursuant to s 8 of the IAA. The respondents resisted the enforcement on similar grounds to those raised before the English High Court, namely that they had not been afforded a reasonable opportunity to present their case in arbitration and there had been a breach of the rules of natural justice so that enforcement would be contrary to public policy. Foster J granted the application to enforce the award. His Honour rejected the respondents' argument and found that they had ample opportunity to put their case to the arbitrators before the award was made against them. Notably, his Honour also said that given the evidence and submissions that were before him were similar to those before the English High Court, there was a possibility that the question of reasonable opportunity was subject to issue estoppel and *res judicata*. In any event, even if that were incorrect, Foster J observed it would be inappropriate to reach a different conclusion to the same question already answered by the court of the seat of the arbitration; namely the English High Court.

On appeal, the Full Court (consisting of Allsop CJ, Besanko and Middleton JJ) agreed with the English High Court that the respondents had been afforded a reasonable opportunity to plead their case.

¹⁸ [2013] FCAFC 109.

The Full Court also noted that, generally speaking, it would be inappropriate for an enforcement court in a New York Convention country to reach a different conclusion on the same question as that reached by a court at the seat of the arbitration. With respect to issue estoppel, the Full Court said that it was not necessary to deal with that matter. In relation to enforcement, the Full Court made some important observations, including the following:

“65. ...the primary judge was correct to hold that it will generally be inappropriate for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration. We endorse and apply the following observations of Colman J in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 as to the weight to be given to the views of the supervising court of the seat of the arbitration. That experienced commercial judge said at 331:

In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards, so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word ‘normally’ because there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement application is to be most strongly deprecated.”

With the greatest respect for the judges making these statements, I endorse their views as being entirely consistent with the provisions and philosophy of the New York Convention and the Model Law in seeking to establish a consistent international system for the enforcement of arbitral awards world-wide. The ability of a party to forum shop for courts which allow issues going to enforcement to be revisited is not a position supporting a consistent international system.

A very recent Australian decision which, again, supports a consistent international system for the enforcement of arbitral awards is that of the Full Court of the Federal Court of Australia in another of the series of decisions in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*.¹⁹ This appeal arose out of an application by TCL for the setting aside or non-enforcement of the arbitral award under Articles 34 (setting aside) and 36 (resisting enforcement) of the Model Law. The grounds relied upon in support of both these grounds was identical; namely, the alleged failure of the arbitral tribunal to accord TCL procedural fairness to the extent that there had been a breach of the rules of natural justice in connection with the making of the award.²⁰ It was also asserted that

¹⁹ [2014] FCAFC 83 (Allsop CJ, Middleton and Foster JJ).

²⁰ As to the nature of the alleged breaches of the rules of natural justice, see [2014] FCAFC 83, at [7] to [10],

the award was, as a consequence, in conflict with or contrary to the public policy of Australia. In this respect, reliance was placed on Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law (which provide, respectively, for setting aside or refusing recognition or enforcement where the court finds that “the award is in conflict with the public policy of this State”) and sections 16 and 19 of the IAA. Section 16 gives the Model Law the force of law in Australia and section 19 addresses public policy in the following terms:

“19. Articles 17I, 34 and 36 of Model Law--public policy

Without limiting the generality of Articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of any doubt, that, for the purposes of those Articles, an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if:

- (a) the making of the interim measure or award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.”

In relation to the issue of “public policy”, reference was also made to the provisions of s 8(7A) of the IAA:

“(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.”

Reference should also be made to the provisions of s 8(7) of the IAA, which provides the context and basis for s 8(7A):

“(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

- (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
- (b) to enforce the award would be contrary to public policy.”

It is not necessary for present purposes to consider the allegations of breach of the rules of natural justice in any detail, save to note that the grounds included asserted lack of evidence for three

critical findings by the arbitral tribunal.²¹ The grounds were found to be without merit: “They involved the dressing up of complaints about the factual findings into a claim concerning asserted procedural unfairness”.²² In other words, the grounds were “... a disguised factual challenge to the conclusions of the arbitrators”.²³ In conclusion, the Full Court found that “... TCL received a scrupulously fair hearing in a hard fought commercial dispute. Its complaints are about the evaluation of factual material. No rule of natural justice was breached”.²⁴

In addition to the proper approach to s 8(7A) and s 19 of the IAA, the Full Court said:²⁵

54. It is convenient to state our conclusions immediately in order that the following discussion of the statutory and jurisprudential background be given some greater focus. 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.
55. 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.

The Full Court also considered in detail the provisions of the IAA with respect to public policy and, in so doing, reviewed the legislative history of the IAA and, in this context, the development and

²¹ [2014] FCAFC 83, at [52].

²² [2014] FCAFC 83, at [53].

²³ [2014] FCAFC 83, at [155].

²⁴ [2014] FCAFC 83, at [167].

²⁵ [2014] FCAFC 83, at [54] and [55].

thinking behind the New York Convention and the Model Law, with particular reference to the notion of “public policy”. In so doing, reference was made to the work of Professor van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*; particularly that “The legislative history of Art V(2)(b) of the New York Convention [the public policy reservation with respect to recognition and enforcement] reveals that the phrase was understood to be directed to fundamental principles and was not to be given a broad interpretation that might pick up particular national domestic policy manifestations”.²⁶

Concluding on these matters, the Full Court said:²⁷

73. This history demonstrates that there was no evident purpose in the introduction of ss 19 and 8(7A) of amending the meaning of public policy to incorporate any idiosyncratic national approach. In Australia, the introduction of a reference to natural justice was expressly *for the avoidance of doubt*: “to avoid doubt” (s 8(7A)); “for the avoidance of any doubt” (s 19). The rules of natural justice can thus be seen to fall within the conception of a fundamental principle of justice (that is within the conception of public policy), being, as they are, equated with, and based on, the notion of *fairness*: *Kioa v West* 159 CLR at 583; *Wiseman v Borneman* [1971] AC 297 at 308, 309 and 320. Fairness incorporates the underlying requirement of equality of treatment of the parties. The incorporation of the rules of natural justice into the IAA embodied a fundamental principle contained within public policy and *ordre public* – fairness and equality of treatment of the parties, which is at the heart of the arbitral process in Art 18. There is nothing technical or domestically particular about the requirement that an arbitration be conducted fairly. The conceptions of fairness and equality are deeply powerful. They lie at the heart of the constitutional conception of due process. They are inhering elements of law and justice that inform and bind any legal system and any legal order. See the discussion of the norm of equal justice in *Green v The Queen* [2011] HCA 49; 244 CLR 462 at 472-473 [28] and also *Jarratt v Commissioner for Police for NSW* [2005] HCA 50; 224 CLR 44 at 56-57 [26].

The Full Court also considered in some detail the legislation and case law with respect to natural justice and the setting aside of awards on public policy grounds in other jurisdictions – including New Zealand, Singapore and Hong Kong.²⁸

The pro-arbitration approach of Australian courts was again highlighted recently in the Victorian Court of Appeal decision in *Flint Ink NZ Limited v Huhtamaki Australia Pty Ltd and Lion-Dairy & Drinks Pty Ltd*²⁹ (“Flint Ink”), where the Court recognised the growing judicial acknowledgment of the commercial utility of arbitration as a means of resolving disputes and the importance of holding parties to their agreements to arbitrate.³⁰

²⁶ [2014] FCAFC 83, at [64], referring to van den Berg, *op cit*, 361-2.

²⁷ [2014] FCAFC 83, at [73].

²⁸ [2014] FCAFC 83, at [116] to [154].

²⁹ [2014] VSCA 166

³⁰ *Ibid*, at [40] (Warren CJ)

The nature of the dispute in Flint Ink centred around the proper construction of s 7 of the *International Arbitration Act 1974* (Cth). Section 7 provides:

7 Enforcement of foreign arbitration agreements

...

(2) Subject to this Part, where:

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and

(b) the proceeding involved the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involved the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

...

(4) For the purposes of subsection (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

In the proceeding in the trial division, Lion-Dairy and Drinks Pty Ltd (“Lion Dairy”) sought damages from Huhtamaki Australia Pty Ltd (“Huhtamaki Australia”) following a recall of goods necessitated by defective packaging supplied to it by Huhtamaki Australia. Huhtamaki Australia then filed a third party notice against Flint Ink NZ Limited (“Flint Ink”), alleging that Flint Ink had been engaged by Huhtamaki Australia to supply it with ink for use in packaging. The packaging had been manufactured in New Zealand by another member in the Huhtamaki group of companies, Huhtamaki New Zealand Limited (“Huhtamaki NZ”). The ink was supplied by Flint Ink to Huhtamaki NZ pursuant to an agreement between those two parties, with the agreement containing an arbitration clause that any dispute arising out of the agreement be settled by arbitration in accordance with the Arbitration Act 1996 (NZ). Flint Ink had not entered into any agreement with Huhtamaki Australia.

The trial judge held that Huhtamaki Australia’s claim against Flint Ink was not a matter capable of settlement by arbitration ‘because there was no arbitration agreement which was applicable to the parties to the third party claims’.³¹ His Honour further held Huhtamaki Australia was not claiming ‘through or under’ Huhtamaki NZ within the meaning of the *International Arbitration Act* (Cth) as Huhtamaki Australia’s claim was not in any relevant sense derived from Huhtamaki NZ.³²

³¹ *Lion-Dairy & Drinks Pty Ltd (formerly National Foods Limited) v Huhtamaki Australia Pty Ltd & Anor* [2013] VSC 555 at [45].

³² *Ibid* [66] – [67].

In allowing the appeal, Chief Justice Warren noted (in a separate judgment):³³

Whilst it may be accepted that s 7(4) does not provide for disputes that go beyond the scope of the arbitration agreement to be referred to arbitration, it does enlarge the content of the meaning of a ‘party to the agreement’ and in this way, enables the referral of disputes which could not be referred to arbitration in the absence of the sub-section.”

Similar views were expressed by Nettle JA (who also allowed the appeal in a separate judgment), where his Honour noted that the authorities indicate that the concept of ‘claiming through or under a party within the statutory provisions like s 7(4) of the IA Act is a relatively flexible concept.’³⁴ The decision shows a clear intention of the Court to ensure that support is given for arbitral awards by taking a flexible and broad approach, whenever appropriate, to provisions of arbitration legislation.

Court Assistance through specialist lists and facilities

From an Australian perspective, the Supreme Court of Victoria and other State and territory Supreme Courts are vested with broad jurisdiction with respect to both domestic and international commercial arbitration. The Federal Court of Australia only has jurisdiction with respect to international arbitration.³⁵ On 1 January 2010, the Arbitration List of the Commercial Court in the Supreme Court of Victoria began operation. The Commercial Arbitration List of the New South Wales Supreme Court³⁶ is the only other specialist arbitration list in Australia.³⁷ The benefits flowing from having a specialist arbitration list in a state Supreme Court are many;³⁸ including, and of real significance, having a specialist judge who is aware of the developments in arbitration, from both a legal and practical perspective, and who can ensure a more consistent body of arbitration related decisions is developed. It is critical that consistent interpretation and application is given to both the international and the domestic legislative provisions – which are based upon the Model Law - so that they conform with international thinking and arbitral practice, particularly having regard to the Model Law’s international heritage.

In terms of the judicial approach to arbitration, I also draw attention to the support of the Supreme Court of Victoria, particular Chief Justice Warren, for the establishment of the Melbourne Commercial Arbitration and Mediation Centre, which was opened in the heart of the Melbourne

³³ *Flint Ink NZ Limited v Huhtamaki Australia Pty Ltd and Lion-Dairy & Drinks Pty Ltd* [2014] VSCA 166 at [36] (Warren CJ)

³⁴ [2014] VSCA 166 at [57] (Nettle JA)

³⁵ As defined in the Australian *International Arbitration Act* 1974 (Cth) (“IAA”), as amended in 2010.

³⁶ See Practice Note No. SC Eq 9, accessed at <http://www.lawlink.nsw.gov.au/practice_notes> on 3 May 2013. The Practice Note was issued on 15 December 2009 and commenced on 1 February 2010.

³⁷ The Federal Court of Australia has a panel of judges available to hear arbitration matters, but it has not established a separate list.

³⁸ See The Hon Justice Clyde Croft, *The Supreme Court of Victoria’s Arbitration List and its role within Australia’s arbitration framework*, a paper prepared for the ICC International Court of Arbitration, Paris, 23 May 2011 and accessible at <<http://www.supremecourt.vic.gov.au/find/publications/the+supreme+court+of+victorias+arbitration+list+and+its+role+within+australias+arbitration+framework>>

legal precinct in March this year. The Chief Justice has long advocated the establishment for a “grid” of arbitration centres throughout Australia, including – at least initially – Melbourne, Sydney and Perth. The governing Board, chaired by the Hon Stephen Charles QC, a retired judge of the Victorian Court of Appeal, contains representatives of Australian Centre for International Commercial Arbitration (ACICA), the Chartered Institute of Arbitrators (CI Arb), the Institute of Arbitrators and Mediators Australia (IAMA), the Victorian Bar, the Law Institute of Victoria, the Supreme Court, Court Services Victoria and the Department of Justice. The new Centre is a modern state of the art facility – as a visit to www.mcamh.com.au – will demonstrate. It is to be hoped that this Centre and the Australian “grid” will also develop very close links with New Zealand.

Conclusion

It is no understatement to say that the continued success of international arbitration in this region will depend significantly on the level of assistance and support for arbitration and its processes provided by the courts – together with enforcement of its product: arbitral awards. The judicial approach taken by courts to challenges to and enforcement of international arbitral awards is important in many ways. From an economic point of view, a country where the courts are inconsistent in their approach and unpredictable in their treatment of international arbitral processes and awards does not, and is not likely to, attract any significant arbitration work. As the *2010 Queen Mary Survey* indicates, parties usually select the governing law first, followed by the arbitral seat and then the arbitration institution and rules, in that order.³⁹

³⁹ Queen Mary, University of London, School of International Arbitration, *2010 International Arbitration Survey: Choices in International Arbitration*, sponsored by White & Case LLP ('2010 QM Survey') accessed at <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf> on 16 July 2013. Please also note that there has been a further survey and study conducted and released, though it does not touch upon the issue of the choice of seat of arbitration: see Queen Mary, University of London, School of International Arbitration, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*.