HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ

TCL AIR CONDITIONER (ZHONGSHAN) CO LTD PLAINTIFF

AND

THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA & ANOR DEFENDANTS

TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia
[2013] HCA 5
13 March 2013
S178/2012

ORDER

Application dismissed with costs.

Representation

B W Walker SC with N L Sharp for the plaintiff (instructed by Norton Rose Australia)

Submitting appearance for the first defendant

A J Myers QC with D L Bailey for the second defendant (instructed by Browne & Co Solicitors and Consultants)

Interveners

J T Gleeson SC, Acting Solicitor-General of the Commonwealth with M J O'Meara and D M Forrester for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M G Hinton QC, Solicitor-General for the State of South Australia with D F O'Leary for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with G A Hill for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with M J Paterson for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

J G Renwick SC with S Robertson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

A S Bell SC with J A Redwood for the Australian Centre for International Commercial Arbitration Limited, the Institute of Arbitrators and Mediators Australia Limited and the Chartered Institute of Arbitrators (Australia) Limited, as amici curiae (instructed by King & Wood Mallesons)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia

Constitutional law – Judicial power of Commonwealth – Constitution, Ch III – Section 16(1) of *International Arbitration Act* 1974 (Cth) provided that UNCITRAL Model Law on International Commercial Arbitration ("Model Law") has "force of law in Australia" – Article 35 of Model Law provided that arbitral award shall be enforced upon application to "competent court" – Where Federal Court of Australia had no power to refuse to enforce arbitral award for error of law on face of award – Whether institutional integrity of Federal Court impermissibly impaired – Whether judicial power of Commonwealth vested in arbitral tribunals.

Words and phrases – "arbitral award", "institutional integrity", "judicial power".

Constitution, Ch III.
International Arbitration Act 1974 (Cth), Pt III, ss 16(1), 19, Sched 2 Arts 5, 8, 28, 34, 35, 36.

FRENCH CJ AND GAGELER J.

Introduction

1 The *International Arbitration Act* 1974 (Cth) ("the IAA") gives the force of law in Australia to the UNCITRAL Model Law on International Commercial Arbitration adopted in 1985 and amended in 2006 ("the UNCITRAL Model Law") by the United Nations Commission on International Trade Law ("UNCITRAL")[1]. In these reasons, "the Model Law" refers to the UNCITRAL Model Law as given the force of law in Australia.

2 An application to enforce an arbitral award under Art 35 of the Model Law is a "matter … arising under [a law] made by the [Commonwealth] Parliament" within s 76(ii) of the Constitution. That is because rights in issue in the application depend on Art 35 of the Model Law for their recognition and enforcement and because the Model Law is a law made by the Commonwealth Parliament[2]. The Federal Court of Australia has original jurisdiction in a matter arising under a law made by the Commonwealth Parliament, defined under s 77(i) of the Constitution by s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). The Federal Court is therefore a "competent court" to which an application can be made under Art 35 of the Model Law. In an application to enforce an arbitral award under Art 35 of the Model Law, the Federal Court has power under s 23 of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") to make such orders as are "appropriate" in relation to the matter in which it has jurisdiction under s 39B(1A)(c) of the Judiciary Act. These reasons will explain that appropriate orders may include an order that the arbitral award be enforced as if the arbitral award were a judgment or order of the Federal Court.

3 The plaintiff, in this application in the original jurisdiction of the High Court under s 75(v) of the Constitution for writs of prohibition and certiorari directed to the judges of the Federal Court, argues that the jurisdiction conferred on the Federal Court in an application under Art 35 of the Model Law is incompatible with Ch III of the Constitution. The facts and procedural history are set out in the reasons for judgment of Hayne, Crennan, Kiefel and Bell JJ.

4 The plaintiff's argument, as refined in oral submissions, reduces to the proposition that the inability of the Federal Court under Arts 35 and 36 of the Model Law to refuse to enforce an arbitral award on the ground of error of law

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1 Section 16(1) of the IAA.

2 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; [1983] HCA 31.

appearing on the face of the award either: undermines the institutional integrity of the Federal Court as a court exercising the judicial power of the Commonwealth, by requiring the Federal Court knowingly to perpetrate legal error; or impermissibly confers the judicial power of the Commonwealth on the arbitral tribunal that made the award, by giving the arbitral tribunal the last word on the law applied in deciding the dispute submitted to arbitration. The undermining of the institutional integrity of the Federal Court is compounded, the plaintiff argues, because the arbitral award that is to be enforced by the Federal Court, in spite of any legal error that may appear on its face, is one that Art 28 of the Model Law, or an implied term of the arbitration agreement, requires to be correct in law.

5 The argument should be rejected. Chapter III of the Constitution does not operate to limit the implementation of the UNCITRAL Model Law in Australia in the manner propounded by the plaintiff. Article 35 of the Model Law neither undermines the institutional integrity of the Federal Court nor confers judicial power on an arbitral tribunal. Neither Art 28 of the Model Law nor an implied term of an arbitration agreement requires an arbitral award to be correct in law.

Model Law

6 The IAA requires that regard be had to its objects in the interpretation of the Model Law[3]. The relevant object is to give effect to the UNCITRAL Model Law[4]. The IAA also specifically facilitates reference in the interpretation of the Model Law to documents of UNCITRAL and of the UNCITRAL working group for the preparation of the UNCITRAL Model Law[5].

7 The Model Law itself requires in its interpretation that regard be had "to its international origin and to the need to promote uniformity in its application and the observance of good faith"[6]. The origin of some of its key provisions, including Arts 35 and 36, may be traced to provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958 ("the New York Convention"). The New York Convention is adhered to by over 140 Contracting States. The New York Convention is implemented in Australia by Pt II of the IAA, which applies to the exclusion of Arts 35 and 36 of the Model

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3 Sections 39(1)(b) and 39(2)(a) of the IAA.

4 Section 2D(e) of the IAA.

5 Section 17 of the IAA.

6 Article 2A(1) of the Model Law.

Law where both would otherwise apply in relation to an award[7]. The Model Law applies without regard to the system of law that governs an arbitration agreement. Articles 35 and 36 apply without regard to the place of arbitration or to the place of making an arbitral award.

8 Those considerations of international origin and international application make imperative that the Model Law be construed without any assumptions that it embodies common law concepts or that it will apply only to arbitral awards or arbitration agreements that are governed by common law principles. The first of those considerations makes equally imperative that so much of the text of the Model Law as has its origin in the New York Convention be construed in the context, and in the light of the object and purpose, of the New York Convention[8].

9 In common with the New York Convention, the Model Law nevertheless proceeds on a conception of the nature of an arbitral award, and a conception of the relationship of an arbitral award to an arbitration agreement, identical in substance to the conception that has for centuries underpinned the understanding of an arbitral award at common law as "a satisfaction pursuant to [the parties'] prior accord of the causes of action awarded upon" and as thereby "precluding recourse to the original rights the determination of which had been referred to arbitration"[9]. That conception, in short, is that "the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators pursuant to the authority given to them by the parties"[10]. The English law of arbitration, which has combined statute law with common law since the seventeenth century, has at "every stage" of its development "approached the relationships between the parties and the arbitrator, and between the parties and each other, unequivocally in terms of private law"[11]. The same approach has been evident in the historical development of the statute law and the common law governing arbitration in

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7 Section 20 of the IAA.

8 Article 31 of the Vienna Convention on the Law of Treaties (1969).

9 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 653-654; [1935] HCA 49.

10 *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 at 1046 [9].

11 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 4. See also Blackaby et al, *Redfern and Hunter on International Arbitration*, 5th ed (2009) at [1.02].

Australia[12]. That is so notwithstanding the truth of the observation that performance of the arbitral function is not "purely a private matter of contract, in which the parties have given up their rights to engage judicial power" and is not "wholly divorced from the exercise of public authority"[13].

10 The conception is captured, and its international commercial significance is explained, in the following observation[14]:

> "The New York Convention and the [UNCITRAL] Model Law deal with one of the most important aspects of international commerce – the resolution of disputes between commercial parties in an international or multinational context, where those parties, in the formation of their contract or legal relationship, have, by their own bargain, chosen arbitration as their agreed method of dispute resolution. The chosen arbitral method or forum may or may not be the optimally preferred method or forum for each party; but it is the contractually bargained method or forum, often between parties who come from very different legal systems. An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce …
>
> The recognition of the importance of international commercial arbitration to the smooth working of international commerce and of the importance of enforcement of the bilateral bargain of commercial parties in their agreement to submit their disputes to arbitration was reflected in both the New York Convention and the [UNCITRAL] Model Law."

11 The analytical commentary published by the UNCITRAL Secretariat to accompany the 1985 draft of the UNCITRAL Model Law ("the UNCITRAL analytical commentary") spelt out that the UNCITRAL Model Law was "designed for consensual arbitration", which the UNCITRAL analytical commentary explained to mean "arbitration based on voluntary agreement of the parties"[15]. That design is reflected in the definition in the Model Law of an

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12 Law Reform Commission of New South Wales, *Report on Commercial Arbitration*, Report No 27, (1976) at [1.6], [9.1.1].

13 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 261-262 [20]; [2011] HCA 37.

14 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 94-95 [192]-[193].

15 UNCITRAL analytical commentary, Art 1 [15].

arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes … between them in respect of a defined legal relationship"[16] and in the freedom that the Model Law gives to the parties both to determine the composition of the arbitral tribunal[17] and to determine the procedure to be followed by the arbitral tribunal[18]. The design is not inconsistent with default provisions within the Model Law which fill gaps in the agreement between the parties[19], and which provide for court assistance to facilitate the process of arbitration[20]. Nor is the design inconsistent with provisions of the Model Law incapable of derogation by the agreement of the parties, directed primarily to ensuring equality and fairness in the arbitral process[21] and to the form and correction of an arbitral award[22].

12 The design is followed through in Art 36 of the Model Law in providing, in common with Art V of the New York Convention, for recognition or enforcement of an arbitral award to be refused at the request of a party against whom the arbitral award is invoked, if and to the extent that the party can furnish proof to the competent court of one or more specified grounds of refusal. Those grounds include: that the arbitration agreement is not valid under its governing law[23]; that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration[24]; and that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties[25]. Whether one or more of those grounds is established

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16 Article 7 of the Model Law.

17 Articles 10(1) and 11 of the Model Law.

18 Article 19(1) of the Model Law.

19 See, eg, Arts 10(2), 11(3), 13(2), 17, 17B, 19(2), 20(1), 21, 22(1), 23, 24(1), 25, 26, 28(2) and 29 of the Model Law.

20 Articles 17J and 27 of the Model Law. See also ss 23 and 23A of the IAA.

21 Article 18 of the Model Law.

22 Articles 31 and 33(2) of the Model Law.

23 Article 36(1)(a)(i) of the Model Law and Art V.1(a) of the New York Convention.

24 Article 36(1)(a)(iii) of the Model Law and Art V.1(c) of the New York Convention.

25 Article 36(1)(a)(iv) of the Model Law and Art V.1(d) of the New York Convention.

is an objective question to be determined by the competent court on the evidence and submissions before it, unaffected by the competence of an arbitral tribunal to rule on its own jurisdiction under Art 16 of the Model Law[26]. Arbitration in this way remains "the manifestation of parties' choice to submit present or future issues between them to arbitration" in that, without "specific authority" to do so, arbitrators "cannot by their own decision … create or extend the authority conferred upon them"[27].

13 The requirement of Art 28 of the Model Law, that the arbitral tribunal "decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute", is a further manifestation of the same design. Article 28 was described in the UNCITRAL analytical commentary as a "recognition or guarantee of the parties' autonomy"[28] and as allowing the parties to an arbitration agreement "to designate as applicable to their case rules of more than one legal system, including rules of law which have been elaborated on the international level"[29]. Its dual significance was elaborated in an explanatory note by the UNCITRAL Secretariat on the UNCITRAL Model Law as amended in 2006 ("the UNCITRAL Explanatory Note") as follows[30]:

> "It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of 'rules of law' instead of 'law', the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention."

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26 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at 808-813 [20]-[30].

27 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at 810 [24].

28 UNCITRAL analytical commentary, Art 28 [3].

29 UNCITRAL analytical commentary, Art 28 [4].

30 UNCITRAL Explanatory Note at [39].

14 The working papers of the UNCITRAL working group for the preparation of the UNCITRAL Model Law contain nothing to suggest that the requirement of Art 28 for an arbitral tribunal to decide "in accordance with" the substantive rules of law chosen by the parties was intended to encompass a requirement that the arbitral tribunal apply those laws in a manner that a competent court would determine to be correct[31]. The working papers rather reveal that Art 28 was understood to adopt the language of Art 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention")[32]. The understanding of Art 42 of the ICSID Convention that prevailed in 1985 (and that has not since been doubted) is that a mis-application (as distinct from a non-application) of the rules of law chosen by the parties does not amount to an excess of power leading to nullification of an arbitral award governed by the ICSID Convention[33].

15 The plaintiff's argument that Art 28 limits the authority of the arbitral tribunal to a correct application of the chosen rules of law therefore finds no foothold in the text of Art 28, runs counter to the autonomy of the parties to an arbitration agreement which infuses the Model Law, and of which Art 28 is a particular guarantee, and is opposed by the drafting history of Art 28. Article 28 is directed to the rules of law to be applied, not the correctness of their application.

16 The plaintiff's alternative argument, that it is an implied term of every arbitration agreement governed by Australian law that the authority of the arbitral tribunal is limited to a correct application of law, should also be rejected. That argument is answered by the combination of the autonomy of the parties guaranteed by Art 28 of the Model Law and the absence from Art 36 of any ground to refuse recognition or enforcement of an arbitral award under Art 35 for error of law. The one authority on which the plaintiff relies for that argument[34] concerned an arbitration agreement entered into against a statutory background which allowed the resultant arbitral award to be set aside for error of law appearing on the face of the award under a common law rule. It will be necessary to return to that common law rule in addressing the relationship

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31 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (1989) at 764-807.

32 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (1989) at 789.

33 Schreuer, *The ICSID Convention: A Commentary*, (2001) at 555-558.

34 *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 284; [1967] HCA 18.

between arbitration and judicial power. It is sufficient to note at this point that Art 5 of the Model Law displaces the rule. The consequence is that no term limiting an arbitral tribunal to a correct application of law is to be implied by force of Australian law in an arbitration agreement within the scope of the Model Law. Nor is such a term "necessary for the reasonable or effective operation of [an agreement] of that nature" so as to be implied on the basis of the presumed or imputed intention of the parties[35]. The presumed or imputed intention is ordinarily to the contrary: parties who enter into an arbitration agreement for commercial reasons ordinarily intend all aspects of the defined relationship in respect of which they have agreed to submit disputes to arbitration to be determined by the same arbitral tribunal[36].

17 An arbitral award that Art 35 of the Model Law requires to be recognised as binding and enforced is the embodiment of a decision on a dispute – whether of fact or law or both – voluntarily submitted by the parties to an arbitration agreement to an agreed arbitral tribunal applying agreed procedures. The arbitral award is recognised as binding and is enforced if and to the extent the decision is made within the scope of authority conferred on the arbitral tribunal by the parties. It is conceivable that parties might choose in an arbitration agreement to limit the submission to arbitration so as to exclude a question of law[37]. However, it is neither the effect of Art 28 of the Model Law nor an implied term of an arbitration agreement governed by Australian law that the arbitral tribunal must reach a correct conclusion on a question of law within the scope of the submission to arbitration.

18 The statement in Art 35 of the Model Law that an arbitral award "shall be recognized as binding and … shall be enforced" subject to the provisions of Arts 35 and 36 is modelled closely on the obligation under Art III of the New York Convention that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them" under conditions laid down in subsequent articles of the New York Convention. The UNCITRAL analytical commentary explained that close modelling to be "the result of extensive deliberations on basic questions of policy" to which the prevailing answer was that the provisions for

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35 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422; [1995] HCA 24. See *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 30-31, 34; [1995] HCA 19.

36 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 87-93 [162]-[187]; *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at 956-958 [5]-[14].

37 cf *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 262; [1972] HCA 4.

recognition and enforcement were to operate "in full harmony with" the New York Convention[38].

19 The UNCITRAL analytical commentary pointed out that Art 35 was drafted to bring out a "useful distinction between recognition and enforcement in that it takes into account that recognition not only constitutes a necessary condition for enforcement but also may be standing alone", an example of which is "where an award is relied on in other proceedings"[39]. The UNCITRAL analytical commentary also pointed out a related temporal distinction between recognition and enforcement: that "an award shall be recognized as binding … means, although this is not expressly stated, binding between the parties and from the date of the award"; whereas enforcement is to occur only "upon application in writing to the 'competent court'"[40].

20 The working papers of the UNCITRAL working group for the preparation of the UNCITRAL Model Law are also useful in clarifying the implicit ambit of the statement in Art 35 of the Model Law that an arbitral award "shall be recognized as binding". The working group considered two specific suggestions that Art 35 be amended. One was to add "between the parties" after "binding" so as to "clarify that a decision which is founded on an arbitration agreement between two (or more) parties cannot bind other persons" and "also help to convey the idea of *res judicata*, without using that term which is not known in all legal systems although the concept seems to be commonly shared"[41]. The other was "to indicate the exact point of time from which an award shall be recognized as binding"[42]. The working group rejected both suggestions on the basis that "there was no need for express statements"[43].

21 Australia's obligation as a Contracting State under Art III of the New York Convention to "recognize arbitral awards as binding and enforce them" is given

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38 UNCITRAL analytical commentary, Art 35 [1].

39 UNCITRAL analytical commentary, Art 35 [4].

40 UNCITRAL analytical commentary, Art 35 [4].

41 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (1989) at 1029.

42 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (1989) at 1029.

43 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (1989) at 1033.

effect in Pt II of the IAA by s 8. Section 8(1) provides that, subject to Pt II, "a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made". Section 8(3) provides that, subject to Pt II, "a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court".

22 The manner in which s 8 of the IAA implements Art III of the New York Convention assists in the translation and application of Art 35 of the Model Law. That is particularly so having regard to the intention, revealed by the UNCITRAL analytical commentary, that the UNCITRAL Model Law should operate in harmony with the New York Convention and that the operation of Art 35 with respect to recognition of an arbitral award should be distinct from the operation of Art 35 with respect to enforcement of an arbitral award.

23 First, s 8(1) of the IAA demonstrates that the requirement of Art 35 of the Model Law that an arbitral award "shall be recognized as binding" is appropriately and succinctly translated as part of the law of Australia to mean that an arbitral award is binding by force of the Model Law on the parties to the arbitration agreement for all purposes, on and from the date the arbitral award is made. The purposes for which an arbitral award is recognised as binding include reliance on the award in legal proceedings in ways that do not involve enforcement, such as founding a plea of former recovery[44] or as giving rise to a res judicata or issue estoppel[45].

24 Second, the terms of s 8(2) of the IAA are indicative of a kind of order that may be appropriate for the Federal Court to make under s 23 of the Federal Court Act in relation to the matter in which it has jurisdiction under s 39B(1A)(c) of the Judiciary Act on an application under Art 35 of the Model Law for the enforcement of an arbitral award. An appropriate order, although not necessarily the only appropriate order, for the Federal Court to make under s 23 of the Federal Court Act would be an order that the arbitral award be enforced as if the arbitral award were a judgment or order of the Federal Court.

25 Section 54(1) of the Federal Court Act provides that the Federal Court "may, upon application by a party to an award made in an arbitration … in relation to a matter in which the Court has original jurisdiction, make an order in the terms of the award". The enforcement of an arbitral award under Art 35 of the Model Law might in a particular case fall within the scope of that power but

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44 Spencer Bower and Handley, *Res Judicata*, 4th ed (2009) at [20.02].

45 *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 453; [1973] HCA 59; Spencer Bower and Handley, *Res Judicata*, 4th ed (2009) at [8.27].

will not in every case fall within the scope of that power[46]. That is because the power conferred on the Federal Court by s 54(1) of the Federal Court Act, which is modelled on the power conferred on the High Court by s 33A of the Judiciary Act, arises only where the arbitration giving rise to the award is in relation to a matter in which the Federal Court has original jurisdiction: that is, where the Federal Court would have jurisdiction independently of the arbitral award to determine the dispute submitted to arbitration[47].

Chapter III and arbitration

26 Chapter III of the Constitution has been understood since 1918 to prevent the conferral by the Commonwealth Parliament of the judicial power of the Commonwealth other than on a court referred to in s 71 of the Constitution[48], and since 1956 to prevent the conferral by the Commonwealth Parliament on a court referred to in s 71 of the Constitution of any function that is not within or incidental to the judicial power of the Commonwealth[49].

27 The judicial power of the Commonwealth has defied precise definition. One dimension concerns the nature of the function conferred: involving the determination of a question of legal right or legal obligation by the application of law as ascertained to facts as found "so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons"[50]. Another dimension concerns the process by which the function is exercised: involving an open and public enquiry (unless the subject-matter necessitates an exception)[51], and observance of the

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46 contra *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209 at 221 [58].

47 *Minister for Home and Territories v Smith* (1924) 35 CLR 120 at 126-127; [1924] HCA 41.

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

49 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; [1956] HCA 10; affirmed *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529; [1957] AC 288.

50 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374; [1970] HCA 8. See *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110 [41]; [1999] HCA 28.

51 *Russell v Russell* (1976) 134 CLR 495 at 505, 520, 532; [1976] HCA 23.

rules of procedural fairness[52]. Yet another dimension concerns the overriding necessity for the function always to be compatible with the essential character of a court as an institution that is, and is seen to be, both impartial between the parties and independent of the parties and of other branches of government in the exercise of the decision-making functions conferred on it[53].

28 Underlying each of those dimensions of the judicial power of the Commonwealth is its fundamental character as a sovereign or governmental power exercisable, on application, independently of the consent of those whose legal rights or legal obligations are determined by its exercise. That fundamental character of the judicial power of the Commonwealth is implicit in the frequently cited description of judicial power as "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects", the exercise of which "does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action"[54]. Judicial power "is conferred and exercised by law and coercively", "its decisions are made against the will of at least one side, and are enforced upon that side *in invitum*", and it "is not invoked by mutual agreement, but exists to be resorted to by any party considering himself aggrieved"[55].

29 Therein is the essential distinction between the judicial power of the Commonwealth and arbitral authority, of the kind governed by the Model Law, based on the voluntary agreement of the parties. The distinction has been articulated in the following terms[56]:

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52 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56]; [1999] HCA 9; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101 [42]; [2000] HCA 57.

53 *South Australia v Totani* (2010) 242 CLR 1 at 43 [62]; [2010] HCA 39.

54 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357; [1909] HCA 36. See *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110-111 [43].

55 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 452.

56 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at 658 [31]; [2001] HCA 16. See also *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 at 14.

> "Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it."

The context of that articulation puts its reference to "private arbitration" in appropriate perspective. The context was that of a challenge to the capacity of a statutory body consistently with Ch III of the Constitution to exercise a statutory function to settle a dispute where so empowered by an agreement entered into as a result of statutory processes. The reference to "private arbitration" was not to a private function, as distinct from a public function, but rather to a function the existence and scope of which is founded on agreement as distinct from coercion.

30 The application of that distinction requires differentiation between recognition of an arbitral award as binding on the parties by force of Art 35 of the Model Law and enforcement of an arbitral award by a competent court, on application, under Art 35 of the Model Law.

31 The making of an arbitral award, which is recognised as binding on the parties from the time it is made by force of Art 35 of the Model Law, is not an exercise of the judicial power of the Commonwealth. That is because the existence and scope of the authority to make the arbitral award is founded on the agreement of the parties in an arbitration agreement. The exercise of that authority by an arbitral tribunal to determine the dispute submitted to arbitration for that reason lacks the essential foundation for the existence of judicial power.

32 The enforcement of an arbitral award by a competent court, on application, under Art 35 of the Model Law is an exercise of the judicial power of the Commonwealth. That is because the determination of an application under Art 35 is always to occur in accordance with judicial process and necessarily involves a determination of questions of legal right or legal obligation at least as to the existence of, and parties to, an arbitral award. Where a request is made under Art 36, determination of an application under Art 35 must also involve a question of whether the party making the request has furnished proof of a ground for refusal. An order of the competent court determining the application on the merits then operates of its own force as a court order to create a new charter by reference to which those questions are in future to be decided as between the parties to the application. That is so for an order dismissing the application just as it is for one ordering that the arbitral award be enforced.

33 Neither of those conclusions is affected where an arbitral award within the scope of a submission to arbitration contains an error of law on its face. The arbitral award, as recognised under Art 35 of the Model Law, remains one founded on the agreement of the parties in an arbitration agreement. A proceeding for the enforcement of the arbitral award, on application under Art 35 of the Model Law, remains one that involves a determination of questions of legal right or legal obligation resulting in an order that then operates of its own force. Except to the extent that it might, in a particular case, bear on proof of a particular ground for refusing enforcement under Art 36, an error of law on the part of the arbitral tribunal in making the award is irrelevant to the question of legal right or legal obligation to be determined under Art 35 of the Model Law.

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

35 To the extent that the argument of the plaintiff seeks to draw support from the existence at common law of a rule that an arbitral award could be set aside for error of law on the face of the award, the argument overstates the scope for historical considerations to deprive functions conferred on a court by modern legislation of the character of judicial power[57]. The argument also takes too undiscriminating an approach to the common law. Not every common law rule reflected well on common law courts. Very few common law rules were the manifestation of some fundamental characteristic of judicial power.

36 The common law rule that an arbitral award could be set aside for error of law on the face of the award had no application where the parties to an arbitration agreement specifically agreed to submit a question of law for the determination of an arbitral tribunal: the arbitral award determining such a question of law bound the parties and was enforceable by action in a common law court whether

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57 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11-12; [1977] HCA 62; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [48]-[49]; [2007] HCA 29.

or not an error of law appeared on the face of the arbitral award[58]. It is therefore impossible to treat the common law rule as the manifestation of some general principle that a common law court would not recognise or enforce a legally erroneous arbitral award, much less as a manifestation of some fundamental characteristic of the power exercised by a common law court.

37 Common law courts asserted no common law jurisdiction to supervise the conduct of arbitrators[59]. The general common law principle, to which the particular common law rule was an exception, was that "where a cause or matters in difference [were] referred to an arbitrator, whether a lawyer or a layman, [the arbitrator was] constituted the sole and final judge of all questions both of law and of fact"[60].

38 The common law rule, moreover, was obscure in origin[61] and "operated haphazardly, because the ability of the court to exercise it depended upon whether or not the arbitrator had chosen to set out in the award itself the legal reasoning on which he had based it"[62]. It had come to be regarded by common law courts themselves as a matter of regret by the middle of the nineteenth century[63], by which time it appears to have been rejected in the United States[64]. It was described by the Privy Council in an appeal from the Supreme Court of New South Wales in 1979 as "an accident of legal history"[65].

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58 *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570; [1927] HCA 26.

59 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 978-979.

60 *Hodgkinson v Fernie* (1857) 3 CB (NS) 189 at 202 [140 ER 712 at 717].

61 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 439.

62 *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257 at 261.

63 *Hodgkinson v Fernie* (1857) 3 CB (NS) 189 at 202, 205 [140 ER 712 at 717, 718]; *Hogge v Burgess* (1858) 3 H&N 293 at 297 [157 ER 482 at 484].

64 *Burchell v Marsh* 58 US 344 (1854).

65 *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257 at 262.

39 The common law rule that an arbitral award could be set aside for error of law on the face of the award therefore formed no part of, and bore no meaningful resemblance to, the supervisory jurisdiction of the Supreme Court of a State to set aside an exercise of administrative or judicial power for jurisdictional error. It served no systemic end, and was a "defining characteristic" neither of judicial power nor of any court[66].

Conclusion

40 The plaintiff's argument that the conferral of jurisdiction on the Federal Court in an application under Art 35 of the Model Law is incompatible with Ch III of the Constitution has no merit. The application for writs of prohibition and certiorari directed to the judges of the Federal Court should for that reason be dismissed with costs.

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66 cf *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [98]; [2010] HCA 1.

41 HAYNE, CRENNAN, KIEFEL AND BELL JJ. The *International Arbitration Act* 1974 (Cth) ("the IA Act"), and the international conventions and law to which it gives effect[67], facilitate the use of arbitration agreements and the curial recognition and enforcement of arbitral awards made in relation to international trade and commerce[68].

42 The plaintiff ("TCL"), a company registered, and having its principal place of business, in the People's Republic of China, entered into a written distribution agreement with the second defendant ("Castel"), a company registered, and having its principal place of business, in Australia ("the agreement"). The agreement provided for the submission of disputes to arbitration in Australia. Following a commercial arbitration two awards were made requiring TCL to pay to Castel $3,369,351 and costs of $732,500. In default of payment, Castel applied under the IA Act to the Federal Court of Australia to enforce the awards. In separate proceedings, TCL applied to set aside those awards.

43 Of particular relevance is Pt III (ss 15-30A) of the IA Act. Headed "International Commercial Arbitration", it concerns arbitration agreements and the recognition and enforcement of arbitral awards governed by the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law")[69]. Section 16(1) of the IA Act gives "the force of law in Australia" to the Model Law, the English text of which is contained in Sched 2 to the IA Act.

44 In the proceedings in this Court's original jurisdiction, TCL submitted that s 16(1) of the IA Act is beyond power because it infringes Ch III of the Constitution. What follow are our reasons for rejecting TCL's submissions and refusing to grant the relief sought by TCL.

Arbitration

45 In *The Rule of Law*, Lord Bingham of Cornhill described arbitration as involving[70]:

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67 *International Arbitration Act* 1974 (Cth), s 2D(d), (e) and (f).

68 *International Arbitration Act* 1974 (Cth), s 2D(b) and (c).

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

70 (2010) at 86.

> "the appointment of an independent arbitrator, often chosen by the parties, to rule on their dispute according to the terms of reference they give him. This can only be done by agreement, before or after the dispute arises, but where it is done the arbitrator has authority to make an award which is binding on the parties and enforceable by the process of the courts."

That description of private arbitration[71], and of the relationship between private arbitration and the courts, is as apt for Australia[72] as it is for the United Kingdom[73] and the United States of America[74]. Arbitration has a long history as an alternative method, distinct from litigation, of resolving civil disputes[75]. The features of private arbitration identified by Lord Bingham underpin the widely shared modern policy of recognising and encouraging private arbitration as a valuable method of "settling disputes arising in international commercial relations"[76], a policy reflected in the objects of the IA Act[77]. Parties from different legal systems can agree to resolve an international commercial dispute

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71 The term "private arbitration" refers to arbitration undertaken in fulfilment of an agreement to submit a dispute to arbitration. Private arbitration is distinguishable from arbitration concerned with the enforcement of public rights derived from statute, such as arbitration to resolve industrial law disputes.

72 *Dobbs v National Bank of Australasia Ltd* ("*Dobbs*") (1935) 53 CLR 643 at 652-654; [1935] HCA 49; *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 284; [1967] HCA 18; *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* ("*CFMEU*") (2001) 203 CLR 645 at 658 [31]; [2001] HCA 16; *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 261-262 [19]-[20]; [2011] HCA 37.

73 *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at 956 [5].

74 *Stolt-Nielsen SA v AnimalFeeds International Corp* 176 L Ed 2d 605 at 624 (2010).

75 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989), Ch 29. See also Stephen, "Historical Origins of Arbitration", (August, 1991) *The Arbitrator* 45; Jones, *Commercial Arbitration in Australia*, (2011) at 4-11 [1.150]-[1.200].

76 Stated in the preamble to the Resolution of the General Assembly of the United Nations of 11 December 1985, approving the Model Law adopted by UNCITRAL.

77 *International Arbitration Act* 1974 (Cth), s 2D(a), (b) and (c).

by arbitration and choose both the law (or laws) to be applied and the processes to be followed.

46 From the 1920s onwards, various international conventions and laws dealing with international commercial arbitration agreements[78] have been directed to encouraging a level of uniformity in national statutes covering such matters as the international validity of arbitration agreements, the limits of curial assistance or intervention in the arbitral process and the enforcement of awards[79]. The IA Act gives effect to three of those international instruments, as described below.

47 Part II (ss 3-14) of the IA Act, headed "Enforcement of foreign awards", implements[80] the New York Convention[81]. Section 7[82] of the IA Act provides for the recognition of arbitration agreements by mandating a stay of court proceedings brought in breach of an arbitration agreement governed by the New York Convention[83]. Section 8 provides for the enforcement of "foreign awards" in Australia "as if the award were a judgment or order" of the Federal

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78 For present purposes the most important are: the Geneva Protocol on Arbitration Clauses in Commercial Matters (1923) ("the Geneva Protocol"); the Geneva Convention on the Execution of Foreign Arbitral Awards (1927) ("the Geneva Convention"); the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (commonly, "the New York Convention"); and the Model Law.

79 See generally Blackaby et al, *Redfern and Hunter on International Arbitration*, 5th ed (2009), Ch 1; Born, *International Commercial Arbitration*, (2009), vol 2, Ch 25; Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd ed (2009); Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (1989) at 1-17.

80 *International Arbitration Act* 1974 (Cth), s 2D(d).

81 Adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its 24th meeting (s 2D(d)). The English text is contained in Sched 1 to the IA Act. Article VII(2) of the New York Convention provides that that Convention replaces the Geneva Protocol and the Geneva Convention as between States which are parties to the New York Convention.

82 Implementing Art II of the New York Convention.

83 An "arbitration agreement" for the purposes of Pt II is defined in s 3(1).

Court or a State or Territory court[84]. In implementing Art V of the New York Convention[85], s 8 contains limited grounds upon which a court may refuse to enforce a foreign award[86].

48 Part III, as noted, concerns arbitral awards governed by the Model Law. Provisions in Art 36(1) limiting the grounds upon which a court may refuse to enforce a foreign award, described in more detail below, are modelled on Art V of the New York Convention. An account of the development of the Model Law, and before it the New York Convention, can be found in the reasons of French CJ and Gageler J[87].

49 Part IV (ss 31-38) concerns arbitration agreements and the recognition and enforcement of awards governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)[88].

50 Part V (ss 39 and 40) is headed "General matters". Section 39 applies in respect of all provisions of the IA Act governing the curial recognition and enforcement of awards. Relevantly, s 39 provides that courts exercising jurisdiction under the IA Act, including courts considering exercising powers under the Model Law[89], which may include the Federal Court or a State or Territory court, must have regard to the fact that "arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes" and that "awards are intended to provide certainty and finality"[90].

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84 *International Arbitration Act* 1974 (Cth), s 8(3) and (2).

85 Which sets out the limited grounds upon which a court may refuse to enforce an award. This provision followed in some respects and expanded the limited grounds for the same purpose set out in the Geneva Convention, Arts 1 and 2.

86 *International Arbitration Act* 1974 (Cth), s 8(5) and (7).

87 See [7]-[11] above.

88 Signed by Australia on 24 March 1975 (ss 2D(f) and 31(1)). The English text is contained in Sched 3 to the IA Act.

89 *International Arbitration Act* 1974 (Cth), s 39(1)(a)(iii) and (iv).

90 *International Arbitration Act* 1974 (Cth), s 39(2)(b)(i) and (ii).

Enforcement of arbitral awards under the Model Law

51 Article 35 of the Model Law provides for the recognition and enforcement of arbitral awards made in international commercial arbitrations arising under relevant arbitration agreements[91]. A commercial arbitration is international if (among other circumstances) "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States"[92].

52 Article 35(1) of the Model Law provides:

> "An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36."

The Federal Court is a "competent court" for certain identified functions which a court performs pursuant to the Model Law[93]. Further, s 16(1) of the IA Act enacts the Model Law as a federal statute. Consequently, a controversy under the IA Act is a "matter" for the purposes of s 76(ii) of the Constitution[94] and the Federal Court is a competent court for the purposes of Art 35 of the Model Law[95].

53 Article 36(1) provides for the only grounds on which recognition or enforcement of an award may be refused by a competent court. The grounds are primarily, but not exclusively, concerned with the independence and impartiality of the arbitrator and the fairness of the arbitral process. Those grounds do not include a ground of error of law: whether error generally or error apparent on the face of the award. They do, however, include the substantive ground of a competent court finding that "the recognition or enforcement of the award would

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91 *International Arbitration Act* 1974 (Cth), s 16(2) (implementing Model Law, Art 7(1)).

92 Model Law, Art 1(3)(a).

93 *International Arbitration Act* 1974 (Cth), s 18.

94 See *Ruhani v Director of Police* (2005) 222 CLR 489 at 515 [64] per McHugh J, 528-529 [111]-[113] per Gummow and Hayne JJ; [2005] HCA 42.

95 *Judiciary Act* 1903 (Cth), s 39B(1A)(c).

be contrary to the public policy of [Australia]"[96]. For the avoidance of doubt, s 19 of the IA Act states that an award is contrary to the public policy of Australia if its making "was induced or affected by fraud or corruption"[97] or "a breach of the rules of natural justice occurred in connection with the making of the ... award"[98]. Article 5 limits the power of a court to intervene in matters governed by the Model Law to those categories of curial intervention provided for in the Model Law.

54 Article 34(1), relied upon by TCL in its separate proceedings in the Federal Court to set aside the awards, provides that "[r]ecourse to a court against an arbitral award may be made only by an application for setting aside" the award and only on the grounds set out in Art 34(2), which substantially mirror those in Art 36(1) limiting the grounds upon which a court may refuse to recognise or enforce a foreign award.

The issues

55 TCL applied in this Court's original jurisdiction for the issue of constitutional writs of prohibition, directed to the judges of the Federal Court, and of certiorari, to remove into this Court to be quashed a decision of the Federal Court (Murphy J) made on 23 January 2012[99].

56 TCL contends that to the extent that s 16(1) of the IA Act gives the force of law in Australia to Arts 5, 8[100], 34, 35 and 36 of the Model Law, and designates the Federal Court as having jurisdiction to recognise and enforce arbitral awards governed by the Model Law, it is invalid because of what TCL styled two "constitutional objections". Both objections involved asserting that the IA Act provided for the exercise of the judicial power of the Commonwealth in a manner contrary to Ch III of the Constitution.

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96 Model Law, Art 36(1)(b)(ii).

97 *International Arbitration Act* 1974 (Cth), s 19(a).

98 *International Arbitration Act* 1974 (Cth), s 19(b).

99 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209.

100 Article 8 permits a court to refer to arbitration a matter brought before the court which is the subject of an arbitration agreement.

57 The first objection is that the jurisdiction conferred under the IA Act requires judges of the Federal Court to act in a manner which substantially impairs the institutional integrity of that Court. The second objection, a corollary of the first, is that the IA Act impermissibly vests the judicial power of the Commonwealth in arbitral tribunals because the enforcement provisions of the IA Act render an arbitral award determinative.

58 In response, Castel submitted that curial recognition and enforcement of arbitral awards has long been an unexceptional exercise of judicial power. It was contended that TCL's constitutional objections to the IA Act were misconceived and that the relief sought should be refused.

59 Castel's response was supported by interventions by the Attorneys-General for the Commonwealth, New South Wales, Victoria, South Australia, Queensland and Western Australia, pursuant to s 78A of the *Judiciary Act* 1903 (Cth). The Australian Centre for International Commercial Arbitration Limited, the Institute of Arbitrators and Mediators Australia Limited, and the Chartered Institute of Arbitrators (Australia) Limited were granted leave to intervene as amici curiae limited to the filing of written submissions, which supported the validity of the IA Act.

60 On 21 August 2012 a single Justice of this Court referred TCL's application for hearing by the Full Court[101]. The judges of the Federal Court filed a submitting appearance.

The facts and related proceedings below

61 Under the agreement, TCL granted Castel the exclusive right to sell in Australia air conditioners manufactured by TCL. In July 2008 Castel submitted to arbitration in Australia a dispute arising from contractual claims against TCL, seeking damages. Following a hearing, on 23 December 2010 an arbitral tribunal constituted by Dr Gavan Griffith AO QC, the Honourable Alan Goldberg AO and Mr Peter Riordan SC ("the tribunal") made an award which upheld Castel's claims and required TCL to pay Castel a sum of $3,369,351. On 27 January 2011, the tribunal made a further award that TCL pay Castel $732,500 in respect of the costs of arbitration.

62 TCL failed to pay Castel the amounts owing under the arbitral awards. On 18 March 2011, Castel applied to the Federal Court to enforce the arbitral awards. TCL opposed their enforcement on the ground that the Federal Court

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101 High Court Rules 2004 (Cth), r 25.03.3.

lacked jurisdiction and on the alternative ground that, if the Federal Court did have jurisdiction, the arbitral awards should not be enforced as to do so would be contrary to public policy because of an alleged breach of the rules of natural justice by the tribunal. TCL also applied in separate proceedings in the Federal Court to set aside the arbitral awards on the basis that they were contrary to public policy because of that alleged breach of the rules of natural justice.

63 On 23 January 2012, Murphy J ruled that the Federal Court had jurisdiction under the IA Act to enforce the arbitral awards[102]. Subsequently, his Honour rejected TCL's claims of a breach of the rules of natural justice by the tribunal[103].

Submissions

TCL

64 TCL's first objection – that the IA Act impairs the institutional integrity of the Federal Court – was articulated in various ways. TCL submitted that the effect of the Model Law is to co-opt or enlist the Federal Court "into providing assistance during the course of the arbitral proceeding and in enforcing the resulting awards" while denying the Federal Court "any scope for reviewing substantively the matter referred to arbitration, and the ability to act in accordance with the judicial process". TCL submitted that this distorts the institutional independence of the Federal Court. The lack of "independence" complained about was in respect of substantive review in order to correct error, or set aside an arbitral award when error of law appeared or was manifest on the face of an award.

65 TCL further submitted that "[i]n a real sense, the judicial process has been wholly delegated to the arbitral tribunal but the court has retained no substantive supervision over that process". TCL pointed out, correctly, that by the combined operation of several provisions of the Model Law[104], the Federal Court can be obliged to enforce an award "notwithstanding that an error of law appears on the face of the [award]". That circumstance was described as "novel" and was said

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102 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209.

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

104 Articles 5, 34, 35 and 36.

to prevent the Federal Court from performing its "independent adjudicative function", and to "constrain[] the court's adjudicative function to an unacceptable degree". Thus, TCL's arguments continued, the IA Act "cuts across" what TCL described as "the court's historical function in super-intending arbitrations" and, invoking *Marbury v Madison*[105], the IA Act was said to take away "from the courts their core province and duty 'to say what the law is' in a constitutional system reliant upon the separation of judicial power for the maintenance of the rule of law".

66 In relation to its second objection – that the IA Act impermissibly vests the judicial power of the Commonwealth in arbitral tribunals – TCL relied again on its contention that no independent exercise of judicial power by the Federal Court was required for the enforcement of an award. A significant indicator of this state of affairs was said to be the exclusion, to a significant degree, of any curial power to supervise the arbitral process, in particular by conducting substantive review of an award.

67 It became clear in oral argument that one proposition underpinned TCL's submissions in relation to both objections: namely, that to avoid contravening Ch III of the Constitution courts *must* be able to determine whether an arbitrator applied the law correctly in reaching an award.

68 In further support of that proposition, it was submitted by TCL that Art 28(1) of the Model Law, which provides that "[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties", confines an arbitrator's authority under an arbitration agreement to deciding a dispute *correctly* and therefore an award founded on an erroneous principle is not binding upon the parties[106]. Alternatively, it was submitted that such a term could be implied into every arbitration agreement.

Castel

69 Castel submitted that the source of the authority of an arbitral tribunal is the private agreement of the parties, not the State. Castel also submitted that a

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105 5 US 137 (1803).

106 In its entirety Art 28(1) reads: "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules."

valid arbitral award made pursuant to such an agreement precludes subsequent recourse to the courts to determine afresh the rights and obligations referred to arbitration. The clear exclusion in the IA Act of a power to set aside an award for error apparent on the face of the award was said to be consistent with the general rule supporting the finality of arbitral awards. Because, as a matter of history, curial review of arbitral awards has always had limits, it was submitted that the IA Act's support of the finality of arbitral awards, save in limited circumstances, cannot be characterised as impairing the institutional integrity of courts or as impermissibly vesting the judicial power of the Commonwealth in arbitral tribunals. Castel also pointed out that judicial control over the arbitral process and arbitral awards is retained under the IA Act in defined circumstances, including the circumstance of a breach of the rules of natural justice in connection with the making of the award.

Article 28 of the Model Law

70 Before giving closer attention to TCL's constitutional objections, it is convenient to consider TCL's submission based on Art 28(1) of the Model Law. TCL submitted that the authority of an arbitrator under a relevant agreement was confined to determining a dispute correctly. It was contended that parties governed by Art 28(1) were not subjecting themselves to the risk of error of law apparent on the face of the award; therefore, no arbitral award could be recognised or enforced under the Model Law if an award showed error of law.

71 Articles 28(1) and 28(2) are primarily directed to questions of choice of law. Article 28(3) permits an arbitral tribunal to decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so. Article 28(4) requires arbitral tribunals to decide in accordance with the terms of the agreement and to take into account the applicable usages of the trade.

72 Even if any of these provisions can be understood as obliging arbitrators to decide a dispute according to law, senior counsel for TCL correctly accepted in argument that the Model Law makes it plain that recognition and enforcement of an arbitral award could only be denied in limited circumstances. Legal error is not one of those circumstances.

73 TCL's argument must be rejected: it depends on treating the language of part of Art 28(1) as forming part of the agreement between the parties, whilst simultaneously treating the provisions of the Model Law regulating the recognition and enforcement of awards as not forming part of that agreement.

74 The alternative argument advanced by TCL, that it is an implied term of every arbitration agreement that the authority of an arbitrator is limited to the

correct application of the law, must also be rejected. No term of the kind asserted can be implied into an agreement to submit a dispute to arbitration. Implication of such a term (even if it could be said to be reasonable and equitable) is not necessary to give business efficacy to an arbitration agreement and is not so obvious that "it goes without saying"[107].

Judicial power and arbitration

75 The exercise of judicial power is an assertion of the sovereign[108], public[109] authority of a polity[110]. Whilst it is "both right and important to observe that the determination of rights and liabilities lies at the heart of the judicial function"[111], parties are free to agree to submit their differences or disputes as to their legal rights and liabilities for decision by an ascertained or ascertainable third party[112], whether a person or a body[113]. As will be explained, where parties do so agree, "the decision maker does not exercise judicial power, but a power of private arbitration"[114].

76 An agreement to submit disputes to arbitration does not, apart from statute, take from a party the power to invoke the jurisdiction of the courts to enforce that party's rights by instituting an action to determine a dispute of a kind

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107 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.

108 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; [1909] HCA 36.

109 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 261 [19] per French CJ, Gummow, Crennan and Bell JJ.

110 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 573 [108] per Gummow and Hayne JJ; [1999] HCA 27.

111 *South Australia v Totani* ("*Totani*") (2010) 242 CLR 1 at 86 [220] per Hayne J; [2010] HCA 39.

112 *Dobbs* (1935) 53 CLR 643 at 652, 654; *CFMEU* (2001) 203 CLR 645 at 658 [31].

113 References in these reasons to "an arbitrator" include an arbitral tribunal.

114 *CFMEU* (2001) 203 CLR 645 at 658 [31].

that the parties have agreed should be arbitrated[115]. The jurisdiction of the courts is not and cannot be ousted by a private agreement.

77 However, if parties do go to arbitration and the arbitrator makes an award, the making of the award has legal significance in respect of the parties' dispute and their rights and liabilities. As the plurality in *Dobbs*[116] said: "if, before the institution of an action, an award was made, *it* [the award] governed the rights of the parties and precluded them from asserting in the Courts the claims which the award determined" (emphasis added). In such a case, the arbitrator's award governs the rights of the parties because "[b]y submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them"[117].

78 This gives rise to the general rule that an award made by an arbitrator pursuant to such authority is final and conclusive. Further, the arbitrator's making of an award in exercise of such authority both extinguishes the original cause of action and imposes new obligations on the parties in substitution for the rights and liabilities which were the subject of the dispute referred to arbitration. The former rights of the parties are discharged by an accord and satisfaction. The accord is the agreement to submit disputes to arbitration; the satisfaction is the making of an award in fulfilment of the agreement to arbitrate[118].

79 It follows that when an arbitral award is enforced by curial process, the obligations sought to be enforced are those which are created by the award in substitution for the rights and liabilities which were the subject of the dispute referred to arbitration. A party may sue on an award as a cause of action or, in some cases, as in this case, seek enforcement of the award pursuant to the IA Act.

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115 *Dobbs* (1935) 53 CLR 643 at 652-653, citing *Kill v Hollister* (1746) 1 Wils KB 129 [95 ER 532]; *Thompson v Charnock* (1799) 8 TR 139 [101 ER 1310]; *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478.

116 (1935) 53 CLR 643 at 653.

117 *Dobbs* (1935) 53 CLR 643 at 653. See also *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 284; *CFMEU* (2001) 203 CLR 645 at 658 [31].

118 *Dobbs* (1935) 53 CLR 643 at 653. See also *McDermott v Black* (1940) 63 CLR 161 at 183-185; [1940] HCA 4; *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257 at 267.

80 The proposition identified as underpinning TCL's submissions assumes, wrongly, that the rights and liabilities which are in dispute in an arbitration continue despite the making of an award. That is, it assumes, wrongly, that the courts will not give effect to the discharge of those pre-existing rights and liabilities by the accord and satisfaction which is effected by a reference to arbitration and the making of an award.

Finality and legality in arbitral awards

81 It is the consensual foundation of arbitration which underpins the general rule, settled since the middle of the nineteenth century, that an award is final and conclusive and cannot be challenged either at law or in equity on the ground that the arbitrator has committed an error of fact or of law[119].

82 Since at least the late seventeenth century (and Statute 9 Will III c 15 for "determining Differences by Arbitration")[120], the English law of arbitration provided statutory means for the direct enforcement of arbitral awards. The courts could enforce an arbitral award unless arbitrators "misbehaved themselves" or the award or arbitration "was procured by corruption or other undue means"[121]. The making of a legal error was not identified as a form of misbehaviour. Furthermore, the sole statutory ground upon which an arbitration (and inferentially an award) could be "set aside" was that the arbitration had been "procured by corruption or undue means"[122]. The "mischief"[123] to which the statute was directed was that procedures available for enlisting the court's aid in enforcing arbitration agreements were cumbersome and they did not always provide a complete remedy[124]. There was no statutory right to invoke curial process in respect of legal error. But for the statutory exceptions mentioned, an

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119 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 439.

120 Commonly, "the first Arbitration Act".

121 9 Will III c 15, s 1.

122 9 Will III c 15, s 2.

123 *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

124 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 432-435.

award could be enforced as final and conclusive, regardless of any legal infirmity in the reasoning which underpinned it.

83 Notwithstanding these limited statutory exceptions to the finality of an arbitral award, it appears that by the turn of the eighteenth century, the Court of King's Bench had recognised a further exception: a supervisory jurisdiction to quash or set aside an award for error apparent on the face of the award[125].

84 Speaking in 1978 of that common law jurisdiction, and of successive legislation from the mid-nineteenth century providing statutory means for review of awards, which might have been expected to render that jurisdiction obsolete, Lord Diplock said: "[t]he rival claims of finality and legality in arbitral awards have been debated in [England] for well over two hundred years"[126].

85 The following year, in giving the advice of the Privy Council in *Max Cooper & Sons Pty Ltd v University of New South Wales* ("*Max Cooper*")[127], Lord Diplock pointed out[128] that:

> "One of the principal attractions of arbitration as a means of resolving disputes arising out of business transactions is that *finality* can be obtained without publicity or unnecessary formality, by submitting the dispute to a decision maker of the parties' own choice. *From the arbitrator's award there is no appeal as of right; it is only exceptionally that it does not put an end to the dispute*." (emphasis added)

86 As Lord Diplock also pointed out[129], there were at that time three "procedural means whereby the finality of an arbitrator's award may be upset" if it could be demonstrated to a court that the arbitrator's decision resulted from applying faulty legal reasoning to the facts as found. One means of upsetting an award was the abovementioned common law exception to the finality of an

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125 *Kent v Elstob* (1802) 3 East 18 [102 ER 502]; *In re Jones and Carter's Arbitration* [1922] 2 Ch 599.

126 "The Alexander Lecture", (1978) 44(3) *Arbitration* 107 at 107.

127 [1979] 2 NSWLR 257.

128 [1979] 2 NSWLR 257 at 260.

129 [1979] 2 NSWLR 257 at 260-261.

award. Lord Diplock explained the provenance and limitations of that jurisdiction[130]:

> "Before the *Common Law Procedure Act*, 1854 (Imp) the Court of King's Bench exercised over awards of arbitrators a supervisory jurisdiction to set aside the award for errors of law apparent upon its face, analogous to that which it asserted over inferior tribunals by use of the prerogative writ of certiorari. It treated the award itself as corresponding to the 'record' of an inferior tribunal which alone was examinable for the purpose of detecting errors of law. This jurisdiction operated haphazardly, because the ability of the court to exercise it depended upon whether or not the arbitrator had chosen to set out in the award itself the legal reasoning on which he had based it. If he had not, the court was powerless to intervene but, if he had and his legal reasoning so set out in the award itself was erroneous, the court could quash the award."

87 If error on the face of an award was demonstrated and the award quashed, the consequence was that the arbitration had to begin again with a view to yielding an award that revealed no error on its face. The court finding error could not and did not reform the award according to its view of the law. But if no error on the face was demonstrated, the award would stand and be enforced, regardless of whether legal error could be demonstrated by some means other than being apparent on the face of the award.

88 The other two procedural means whereby the finality of an arbitrator's award might be upset were statutory: statement of the whole or part of the award in the form of a special case for the opinion of the court[131], or statement in the form of a special case for the opinion of the court of any question of law arising in the reference[132].

89 The *Common Law Procedure Act* 1854 (Imp) had provided a new procedure empowering an arbitrator to state an award in the form of a special case, being the first statutory provision for invoking curial process in respect of legal error[133]. It enabled a judgment to be entered on the award in accordance

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130 [1979] 2 NSWLR 257 at 261.

131 See, for example, *Arbitration Act* 1902 (NSW), s 9(a).

132 See, for example, *Arbitration Act* 1902 (NSW), s 19.

133 *Common Law Procedure Act* 1854 (Imp), s 5.

with the opinion of the court instead of the court quashing the award in which case the arbitration had to begin again. However, the new procedure was optional: it was at the discretion of the arbitrator and parties could, by their arbitration agreement, exclude the power.

90 Lord Diplock recorded[134] that the preservation of the common law jurisdiction to set aside awards for error, despite the institution of the new statutory means of review under the *Common Law Procedure Act*, was seen by some as a matter for regret[135].

91 As to statutory means for review of an award, the *Arbitration Act* 1889 (UK) provided a discretion to a court to compel an arbitrator to state, in the form of a special case for its opinion, a question of law arising in the course of the reference[136]. Parties could not contract out of the special case procedure. Australian arbitration legislation followed this lead[137].

92 Generally speaking, Australian arbitration law, both before and after Federation, was closely modelled on English legislation and followed common law developments[138]. In 1904, Griffith CJ[139] referred both to the general rule that an arbitral award was final and conclusive and to the common law exception to finality: "The law is clearly settled ... that when a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the *sole and final* judge of all questions both of law or of fact" unless error is apparent on the face of the award (emphasis added). If the award "on the face of it is good" it ought to stand[140].

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134 *Max Cooper* [1979] 2 NSWLR 257 at 261.

135 *Hodgkinson v Fernie* (1857) 3 CB (NS) 189 at 202, 205 [140 ER 712 at 717, 718].

136 *Arbitration Act* 1889 (UK), s 19.

137 See, for example, *Arbitration Act* 1902 (NSW), s 19; *Arbitration Act* 1895 (WA), s 21.

138 Law Reform Commission of New South Wales, *Report on Commercial Arbitration*, Report No 27, (1976) at 43-44 [1.16], 172-178 [9.6.1]-[9.6.12].

139 *Goode v Bechtel* (1904) 2 CLR 121 at 126; [1904] HCA 27.

140 (1904) 2 CLR 121 at 126.

93 Under the special case procedure it was possible for a party to apply to the court to obtain a curial determination of a question of law arising in the reference. But, if an arbitrator was not compelled to state a question of law for the opinion of the court, it remained open to the arbitrator to refrain from giving any reasons for decision or to provide a statement of reasons that was not to form part of the award. And in either of those cases, there could be no error of law appearing on the face of the award.

94 Further, an authority given to an arbitrator to decide a specific question of law could not, in general, be interfered with, since the authority was validly exercised even though the award showed on its face that the decision was erroneous; but an authority to decide given more generally could result in an award which could be set aside for error provided the court was not required to go behind the award[141].

95 It follows that the curial supervision of the legal correctness of arbitral awards depended upon matters of chance and caprice, such as the precise terms of reference; whether the parties to the reference refrained from seeking judicial intervention; and upon the way in which the arbitrator chose to render the award. Further, the development and continued application[142] of elaborate rules governing whether an error appeared on the face of the award, coupled with the refusal to permit the admission of evidence extrinsic to the face of the award to demonstrate legal error, reveals that the courts neither had, nor asserted, any general or broad supervision over the correctness of the legal reasoning underpinning an arbitral award.

96 The power of an Australian court to set aside an award, governed by State or Territory law, for error apparent on the face of the award remained unaffected

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141 *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 at 581 per Knox CJ and Gavan Duffy J, 585-586 per Isaacs J, 590 per Rich J, 590-591 per Starke J; [1927] HCA 26, referring to *Kelantan Government v Duff Development Co* [1923] AC 395; see also *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 284 per Kitto J; *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 262-263; [1972] HCA 4.

142 See, for example, *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 at 586; *Gold Coast City Council v Canterbury Pipe Lines (Aust) Pty Ltd* (1968) 118 CLR 58; [1968] HCA 3; *Manufacturers' Mutual Insurance Ltd v Queensland Government Railways* (1968) 118 CLR 314; [1968] HCA 52; *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253.

until well into the twentieth century. That occurred notwithstanding misgivings about the retention of the power[143] which echoed regrets expressed in England when statutory means of review for legal error were first instituted[144].

97 It was that sequence of developments which led Lord Diplock in *Max Cooper* to describe the survival of the common law jurisdiction to review for legal error in New South Wales (as at 1979), and in England until the passing of the *Arbitration Act* 1979 (UK), as "an anomaly of legal history"[145]. For the sake of completeness, it can be noted that the abolition of the common law jurisdiction in the *Arbitration Act* 1979 (UK), referred to by Lord Diplock, was described by Lord Steyn in *Vitol SA v Norelf Ltd*[146] as follows:

> "The primary purpose of the Act of 1979 was to reduce the extent of the court's supervisory jurisdiction over arbitration awards. It did so by substituting for the special case procedure a limited system of filtered appeals on questions of law."

98 Provisions denying the Supreme Court of New South Wales "jurisdiction to set aside or remit an award on the ground of error of ... law on the face of the award"[147] and replacing that jurisdiction with a statutory means of review for legal error were considered by this Court in *Westport Insurance Corporation v Gordian Runoff Ltd*[148].

99 For present purposes, it is sufficient to note that the common law jurisdiction to set aside an award for error of law apparent on the face of the award was an exception to the general rule that parties must abide by their agreement to accept an arbitrator's determination.

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143 *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 258 per Barwick CJ, 266-267 per Windeyer J.

144 See [90] above.

145 [1979] 2 NSWLR 257 at 261; see also *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 978.

146 [1996] AC 800 at 814.

147 *Commercial Arbitration Act* 1984 (NSW), s 38(1).

148 (2011) 244 CLR 239.

No impairment of institutional integrity

100 The first objection of TCL, concerning the institutional integrity of the Federal Court, invoked the constitutional principle enunciated in *Kable v Director of Public Prosecutions (NSW)* ("*Kable*")[149] in connection with the Supreme Court of a State. The legislation considered in *Kable* was found to be repugnant to, or incompatible with, the institutional integrity of the Supreme Court of New South Wales because of the nature of the task that the legislation required the Court to perform. The plurality in *Forge v Australian Securities and Investments Commission*[150] explained that the principle recognised in *Kable*[151] "is one which hinges upon maintenance of the defining characteristics of a 'court'". The plurality continued[152]:

> "[I]f the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies."

101 The defining characteristic of a court upon which TCL fastened was judicial independence, which was said to be "distorted" by the absence of scope for substantive review of an award for error of law when the Federal Court determines the enforceability of an award under the IA Act. The submission fails to take into account the consensual foundation of private arbitration. This failure underpinned TCL's misunderstanding of the relationship between private arbitration and courts.

102 If it is right to apply directly to a court created by the federal Parliament the doctrines enunciated in *Kable* with respect to State courts, there is no distortion of the institutional integrity of the Federal Court.

103 A court undertaking the task of enforcing an award pursuant to the IA Act has power to refuse to enforce an award, or under Art 34 to set aside an award, in a multiplicity of circumstances, including the circumstance that an "award is in

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149 (1996) 189 CLR 51; [1996] HCA 24.

150 (2006) 228 CLR 45 at 76 [63]; [2006] HCA 44.

151 (1996) 189 CLR 51; see also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46 and *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 164 [32]; [2004] HCA 31.

152 (2006) 228 CLR 45 at 76 [63].

conflict with the public policy of [Australia]"[153]. Those provisions are protective of the institutional integrity of courts in the Australian judicial system which are called upon to exercise jurisdiction under the IA Act.

104 As explained above, the enlistment of judicial power in enforcing an arbitral award occurs at a point in time when the obligations sought to be enforced are those which are created by an award. It has also been shown that as a matter of history, the common law jurisdiction to set aside an award for error on the face of the award was an exception to the general rule concerning the finality of awards, and that it operated in haphazard and anomalous ways. Those circumstances make it plain that the absence of a specific power to review an award for error of law does not distort judicial independence when a court determines the enforceability of an award. Nor can the presence of such jurisdiction be said to be a defining characteristic of a court. It is also plain that the absence of a supervisory jurisdiction to correct errors of law by arbitrators raises no separation of powers issue. The doctrine of the separation of powers is directed to ensuring an independent and impartial judicial branch of government to enforce lawful limits on the exercise of public power.

105 Finally, judicial independence mandates independence from the legislature and the executive. Judicial independence does not compel the federal legislature to balance the "rival claims of finality and legality in arbitral awards"[154] in any particular way. The Federal Court's determination of the enforceability of an award, upon criteria which do not include a specific power to review an award for error, serves the legitimate legislative policy[155] of encouraging efficiency and impartiality in arbitration and finality in arbitral awards. The problem with the legislation considered in each of *Kable*[156] and *Totani*[157] was that the relevant State courts were enlisted or co-opted by the executive to perform a task which did not engage the courts' independent judicial power to quell controversies[158].

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153 Article 34(2)(b)(ii).

154 Lord Diplock, "The Alexander Lecture", (1978) 44(3) *Arbitration* 107 at 107.

155 *International Arbitration Act* 1974 (Cth), s 39(2).

156 (1996) 189 CLR 51 at 98-99, 106-108, 116-122, 133-134.

157 (2010) 242 CLR 1 at 52 [82], 66 [142], 88-89 [226], 157 [428], 172-173 [479]-[481].

158 (2010) 242 CLR 1 at 63 [131] per Gummow J.

There is no analogy between those cases and the long understood relationship between private arbitration and the courts in which the courts enforce an arbitral award, which is the determination of the parties' original controversy. Historical considerations can support a conclusion "that the power to take [a particular] action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it"[159]. As observed by Gummow J in *Totani*[160], the enforcement of an arbitral award resembles the enforcement of a foreign judgment by a local court. A consensual submission to a statutory review jurisdiction is similar[161]. In each case enforcement depends on an anterior decision or determination which was not made in the exercise of federal judicial power.

No delegation of judicial power

106 The submission by TCL that the judicial power of the Commonwealth was delegated under the IA Act to arbitral tribunals in contravention of the requirements of Ch III of the Constitution invoked the principle established in *R v Kirby; Ex parte Boilermakers' Society of Australia*[162]. That submission also reflected a failure to acknowledge the consensual foundation of private arbitration which governs the relationship between private arbitration and the courts.

107 Contrary to TCL's submission, 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[163].

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159 *R v Davison* (1954) 90 CLR 353 at 382 per Kitto J; [1954] HCA 46.

160 (2010) 242 CLR 1 at 64 [136].

161 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110-111 [43]-[44]; [1999] HCA 28.

162 (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; [1956] HCA 10.

163 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ.

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. This Court explained in *CFMEU*[164]:

> "Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it."

That passage illuminates the distinction between the power exercised by an arbitrator and the impermissible delegation of the judicial power of the Commonwealth considered in *Brandy v Human Rights and Equal Opportunity Commission*[165].

109 Whilst an arbitrator's powers and authority are no doubt supplemented by such statutory provisions in the IA Act as apply to a relevant agreement, that supplementation does not detract from the consensual foundation of arbitration.

110 These conclusions stand unaffected no matter what may be the ambit of permitted judicial review of an arbitral award. If, as was the case for so many years, there could be judicial review for error apparent on the face of the award, the award would nonetheless be the ultimate product of the parties' agreement to submit their differences or dispute to arbitration.

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164 (2001) 203 CLR 645 at 658 [31].

165 (1995) 183 CLR 245; [1995] HCA 10. Cf *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110-111 [42]-[43].

Conclusions

111 Correctly understood, the task of the Federal Court to determine the enforceability of arbitral awards, by reference to criteria[166] which do not include a specific power to review an award for error, is not repugnant to or incompatible with the institutional integrity of that Court. An arbitral award made in the exercise of a power of private arbitration does not involve any impermissible delegation of federal judicial power. In giving the force of law in Australia to Arts 5, 8, 34, 35 and 36 of the Model Law, s 16(1) of the IA Act does not contravene Ch III of the Constitution.

Orders

112 The application of TCL must be refused with costs.

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166 Resulting from the combined operation of Arts 5, 34, 35 and 36 of the Model Law.