FEDERAL COURT OF AUSTRALIA

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83

Citation:	TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83
Appeal from:	Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2) [2012] FCA 1214
Parties:	**TCL AIR CONDITIONER (ZHONGSHAN) CO LTD v CASTEL ELECTRONICS PTY LTD**
File numbers:	VID 1042 of 2012 VID 1043 of 2012 VID 1044 of 2012
Judges:	**ALLSOP CJ, MIDDLETON J & FOSTER J**
Date of orders:	26 November 2013
Date of published reasons:	16 July 2014
Catchwords:	**ARBITRATION** – international commercial arbitration – where appellant sought the setting-aside and non-enforcement of an arbitral award under Arts 34 and 36 of the UNCITRAL Model Law on the ground that there had been a breach of the rules of natural justice and hence that the award was contrary to the public policy of Australia under s 19 of the *International Arbitration Act 1974* (Cth) – where the alleged breach of natural justice was a supposed absence of probative evidence for the arbitrators' factual findings – consideration of whether and when such an absence would constitute a breach of natural justice in an international arbitral context – interpretation of "public policy" and "natural justice" in this context – discussion of unfairness as the basic prerequisite for the setting-aside or non-enforcement of international arbitral awards – discussion of the operation of the discretion in Arts 34 and 36. **STATUTORY INTERPRETATION** – where UNCITRAL Model Law was the product of international negotiations under the auspices of the United Nations – whether legislation implementing the Model Law in Australia should be construed in light of reasoned foreign decisions dealing with the Model Law – discussion of the

importance of uniformity of approach.

Legislation:

Constitution s 75(v)
Administrative Appeals Tribunal Act 1975 (Cth) s 44
Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 5(1)(a), (5)(1)(h), 5(3)
International Arbitration Act 1974 (Cth) ss 2D, 16, 19
International Arbitration Amendment Bill 1988 (Cth)
Arbitration Act 1996 (Eng) s 68
Arbitration Act 1996 (NZ) sch 1
Arbitration (Amendment) (No 2) Ordinance (No 64 of 1989) (HK)
Arbitration Ordinance (Cap 609) (HK)
International Arbitration Act (Cap 143A, 2002 Rev Ed) (Sing) s 24
Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (UK) sch 7

Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art V
UNCITRAL Model Law on International Commercial Arbitration (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) Arts 2A, 18, 34, 36

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AJU v AJT [2011] SGCA 41; [2011] 4 SLR 739
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Collins v Minister for Immigration and Ethnic Affairs (1981) 58 FLR 407
Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192: 157 FCR 45
Corvetina Technology Ltd v Clough Engineering Ltd [2004] NSWSC 700; 183 FLR 317
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Cullen v Welsbach Light Co [1907] HCA 3; 4 CLR 990
Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd [1990] 1 AC 295
Downer-Hill Joint Venture v Government of Fiji [2005] 1 NZLR 554
Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; 197 ALR 389
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Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Anor [1978] VR 365
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Trustees of Rotoaira Forest Trust v Attorney-General [1999] 2 NZLR 452

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131; 277 ALR 415
Vetter v Lake Macquarie City Council [2001] HCA 12; 202 CLR 439
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Date of hearing:	26 November 2013
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	169
Counsel for the Appellant:	PB Murdoch QC with AP Trichardt
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Solicitor for the Respondent:	Hunt & Hunt

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 1042 of 2012**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**TCL AIR CONDITIONER (ZHONGSHAN) CO LTD** **Appellant**
AND:	**CASTEL ELECTRONICS PTY LTD** **Respondent**

JUDGES:	**ALLSOP CJ, MIDDLETON J & FOSTER J**
DATE OF ORDER:	**26 NOVEMBER 2013**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.
2. Monies paid into Court to provide security for costs, pursuant to the orders of Tracey J of 26 February 2013, be released to the respondent.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 1043 of 2012**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**TCL AIR CONDITIONER (ZHONGSHAN) CO LTD** **Appellant**
AND:	**CASTEL ELECTRONICS PTY LTD** **Respondent**

JUDGES:	**ALLSOP CJ, MIDDLETON J & FOSTER J**
DATE OF ORDER:	**26 NOVEMBER 2013**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.
2. Monies paid into Court to provide security for costs, pursuant to the orders of Tracey J of 26 February 2013, be released to the respondent.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 1044 of 2012**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**TCL AIR CONDITIONER (ZHONGSHAN) CO LTD** **Appellant**
AND:	**CASTEL ELECTRONICS PTY LTD** **Respondent**

JUDGES:	**ALLSOP CJ, MIDDLETON J & FOSTER J**
DATE OF ORDER:	**26 NOVEMBER 2013**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.
2. Monies paid into Court to provide security for costs, pursuant to the orders of Tracey J of 26 February 2013, be released to the respondent.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION

VID 1042 of 2012
VID 1043 of 2012
VID 1044 of 2012

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**TCL AIR CONDITIONER (ZHONGSHAN) CO LTD** **Appellant**
AND:	**CASTEL ELECTRONICS PTY LTD** **Respondent**
JUDGES:	**ALLSOP CJ, MIDDLETON J & FOSTER J**
DATE:	**16 JULY 2014**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

THE COURT

1 On 26 November 2013, after the oral argument on the appeal, the Court made orders dismissing each of the appeals with costs. These are the reasons for making those orders.

2 The appellant ("**TCL**"), a company organised under the laws of the People's Republic of China, and the respondent ("**Castel**"), an Australian company, were parties to an agreement for the distribution in Australia of air conditioning units manufactured by TCL in China. Castel was the exclusive Australian distributor. The agreement provided for arbitration in the event of any dispute that could not be resolved by mutual agreement. The arbitration agreement was one to which the *International Arbitration Act 1974* (Cth) ("**the IAA**") applied.

3 Disagreements arose between the parties. The dispute between the parties was submitted to arbitration for resolution. On 23 December 2010, after a ten-day hearing, the arbitral panel (Dr Gavan Griffith AO, the Hon Alan Goldberg AO and Mr Peter Riordan SC) delivered an award in Castel's favour in the sum of $2,874,870. On 27 January 2011, the arbitrators handed down a further award of $732,500 in costs.

4 The foundation of the award was the selling by TCL in Australia between 2004 and 2008, in breach of its promise to Castel of exclusivity of rights of distribution of TCL products, of air conditioning units manufactured by TCL, but not bearing the TCL brand. These units were referred to as Other Equipment Manufacture products ("**OEM products**"). The quantum of the award was reached by making an assessment of the financial impact of the importations of OEM products upon Castel's sales.

5 TCL sought to set aside the award under Art 34 of the *UNCITRAL Model Law on International Commercial Arbitration (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)* ("**the Model Law**"), which has the force of law in Australia by s 16 of the IAA. Castel sought to enforce the award under Art 35 of the Model Law. TCL resisted enforcement under Art 36 of the Model Law.

6 The grounds for TCL's two claims (the setting aside of the award under Art 34 and the resistance of enforcement under Art 36) were identical: the asserted failure by the arbitrators to accord TCL procedural fairness such that there had been a breach of the rules of natural justice in connection with the making of the award, and so, it was asserted, the award was in conflict with, or contrary to, the public policy of Australia: see Arts 34(2)(b)(ii) and 36(1)(b)(ii) and ss 16 and 19 of the IAA.

7 The asserted breaches of the rules of natural justice arose from the making by the arbitrators of three central findings of fact. The three findings, referred to by the primary judge as the "14% Starting Point Finding", the "Uplift Finding" and the "Lost Sales Finding" (each of which is explained later) were said to have been made in the absence of probative evidence, and were findings upon which TCL was said to have been denied an opportunity to present evidence and argument.

8 In advancing its argument before the primary judge (and its appeal) TCL submitted that the proper approach was to examine the facts of the case afresh and revisit in full the questions which were before the arbitrators in order to evaluate whether or not probative material supported the factual conclusion.

9 TCL had also argued that the Federal Court had no jurisdiction to entertain the applications before it. In an earlier judgment (*Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21; 287 ALR 297) the primary judge rejected

this argument. TCL then applied in the original jurisdiction of the High Court to prohibit the Federal Court from dealing with the matter on grounds involving lack of jurisdiction and constitutional invalidity of the conferral of jurisdiction on the Court. That application was dismissed: *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; 295 ALR 596. The resolution of this question led to the abandonment of the grounds of appeal from the primary judge's earlier decision upon jurisdiction.

10 In a full and careful judgment published on 2 November 2012 (*Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214), the primary judge rejected TCL's contention as to how the application should be approached; nevertheless, he examined the structure and foundations of the award, the evidence before the arbitrators and the factual findings therein; and rejected TCL's resistance to enforcement of the award. On 19 November 2012, the primary judge published a judgment on costs and made orders enforcing the award and dismissing TCL's application to set it aside. His Honour was correct to make the orders he did.

11 The appeal raised matters of some importance for the operation of the IAA in Australia, and in particular the content of the "rules of natural justice" for the purpose of s 19 of the IAA (and necessarily also for s 8(7A)), and the method of approach to applications of the kind made here by TCL.

The approach of the primary judge

The discussion of the statute and legal principles by the primary judge

12 After introducing the matter and setting out the legislative framework, the primary judge discussed at J[19]-[64] the principles relating to public policy in the IAA, dividing this discussion among the following subjects: whether "public policy" relates to procedural as well as substantive issues: J[19]; whether "public policy" has a similar meaning in the IAA in relation to setting aside an award and in relation to enforcement: J[20]-[28]; the nature of the seriousness of the breach of the rules of natural justice for an award to be in conflict with public policy: J[29]-[33]; the nature of any discretion to set aside or enforce the award, involving questions of the use of decisions of courts in Convention countries and the meaning of "public policy" in the IAA and the Model Law: J[34]-[51]; the extent of the review required of the Court when an award is challenged for breach of the rules of natural justice:

J[52]-[61]; and whether there was a distinction between the requirement for natural justice in connection with the making of the award as against the reasons underpinning it: J[62]-[64].

13 The primary judge's essential conclusions in respect of these issues were:

(a) "Public policy" includes procedural questions as well as substantive law: J[19].

(b) The notion of "public policy" in Arts 34 and 36 is the same: J[23]-[28].

(c) The drafting of s 19(b) of the IAA and its plain words required a conclusion that *any* breach of the rules of natural justice, even minor and unimportant, was sufficient to lead to the conclusion that the award was in conflict with, or contrary to, Australian public policy. His Honour saw some tension in this conclusion with authorities of Convention states' courts that public policy refers to fundamental notions of justice and fairness. Nevertheless, the primary judge saw the words of the IAA as requiring this conclusion. He saw the place of any offence to those fundamental notions as within the operation of the discretion to set aside or enforce: J[29]-[33].

(d) The asserted breach of the rules of natural justice must be of a sufficiently serious character to offend fundamental notions of fairness and justice before the relevant discretion under either Art 34 or Art 36 would be exercised: J[50].

(e) The review by the Court did not involve examining the case afresh and revisiting in full all questions before the arbitrator. Rather, the extent of the enquiry depended on the circumstances in question. In the undertaking of the review, the primary judge chose to conduct a close examination of the facts, and expressed some concern that he may have undertaken too deep and detailed an enquiry: J[58]-[61].

(f) The primary judge rejected the submission of Castel that s 19(b) (and thus s 8(7A)(b)) was confined to a breach of the rules in connection with the (actual) making of the award, in contra-distinction to the reasons: J[63].

14 Subject to the reasons that follow, we generally agree with his Honour's conclusions, but we would not express the matter as the primary judge did in relation to [13(c)] and [13(d)] above. In particular, care needs to be taken in referring to so-called minor or

unimportant breaches of the rules of natural justice. (See also *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* [2014] FCA 414 (Pagone J).)

The dealing with the substantive applications by the primary judge

15 It is convenient to outline the approach of the arbitrators through a discussion of how the primary judge dealt with the award. Reference will continue to be made to the primary judge's reasons in the manner above; reasons of the arbitrators will be prefaced by "A", eg "A[1]".

16 The primary judge first described the arbitration. Relevant to his review and to the argument of the appeal were the following considerations.

17 Both sides were represented at all times by competent and experienced solicitors, junior counsel and senior counsel. During the ten-day hearing, full cross-examination of witnesses, including expert witnesses, took place.

18 There was no complaint before the primary judge about the arbitrators' conclusion that the sales of all OEM products from 1 January 2004 to 31 December 2008 were made in breach of the relevant agreement and that Castel was entitled to damages. The complaints related to the factual findings central to the assessment of Castel's loss and therefore the damages to which it was entitled.

19 There was no complaint before the primary judge about the arbitrators' general approach to the assessment of Castel's loss: (a) the volume of lost sales of TCL-branded products by Castel had TCL not breached the agreement by selling OEM products in Australia; multiplied by (b) the prices at which those additional sales would have been made; less (c) any additional costs that would have been associated with the higher volume of sales. The complaints concerned the calculation of the first of those elements: TCL's lost sales.

20 In support of the claim of lost sales, Castel called three witnesses:

(a) an expert, Mr Peter Acton (a financial and management consultant);

(b) its managing director, Mr Michael Kwong; and

(c) its Queensland manager, Mr Trevor Francis.

21 TCL called three witnesses relevant to the issue of lost sales:

(a) an expert economist, Mr Phillip Williams;

(b) its General Manager, Overseas Business Division, Mr Shi Weiyi; and

(c) its Sales Director, Mr Frank Wang.

22 Important to the question of lost sales was the assessment of the extent to which OEM products were competitive with, or substitutable for, TCL-branded products. Mr Williams, who was not directly familiar with the business of selling air conditioners or with the business of TCL and Castel, gave evidence about this question of substitutability, and horizontal and vertical differentiation of products: J[77].

23 Mr Acton claimed no expertise in substitutability. Relying upon what was said by Messrs Kwong and Francis, he concluded that every OEM product sold represented a loss of a sale to TCL: a 100% substitution ratio. The arbitrators, having reviewed his evidence, placed no weight upon it as expert evidence, but considered that it remained of some assistance as to framework and methodology.

24 It was uncontentious that the relevant market for air conditioners was at 5 levels, the TCL-branded and OEM products occupying space at the bottom of the market. A central part of the controversy was how close to the bottom were the two classes of product and how close were they to each other, and thus how closely mutually substitutable they were.

25 Mr Williams, who was cross-examined at length, accepted that there was little data to quantify the degree of substitutability, but expressed the view that the two types of products were unlikely to be competing with each other. This view was based significantly on an assumption that TCL-branded products were in level 4 and OEM products in level 5, and, importantly, the assumed behaviour of a rational profit-making enterprise in the position of TCL not to position lower profit versions of product (OEM) to be close substitutes for higher profit versions of product (TCL-branded). He saw after-sales service of level 4 Castel TCL-branded products (no after-sales service being offered by TCL or Castel for OEM products) as important for the differentiation between the products.

26 Against this, the arbitrators (at A[196]-[198], recited by the primary judge at J[88]) referred to the evidence of Messrs Kwong and Francis of their inspection of OEM products, their often exact equivalence, examples of actual loss of business accounts, and advertising to the effect that OEM products were manufactured by TCL.

27 The arbitrators addressed substitutability and product differentiation at A[205]-[214] (relevantly set out by the primary judge at J[89]). It is to be recalled that while Mr Williams

was a well-qualified, indeed eminent, market economist, one of the arbitrators was a former President of the Competition Tribunal.

28 At A[206], the arbitrators referred to Castel's claim and Mr Francis' evidence. At A[208], the arbitrators referred to TCL's key evidence. At A[209], the arbitrators referred to evidence of Professor Williams on this evidence. At A[210]-[211], the arbitrators referred to further evidence of Professor Williams on substitutability and differentiation. The arbitrators then made the following findings on this evidence at A[212]-[214]:

> 212 Having considered all of the evidence the Tribunal does not propose, and nor was it invited, to consider model by model whether there was direct substitutability between TCL-branded products and OEM products. It accepts the evidence of Mr Francis as to his observations and the perceptions of customers as conveyed to him. It accepts that for sections of Castel's actual and potential customer base the OEM products were regarded as just as good and led those customers to choose the OEM products instead of the TCL-branded products.
>
> 213 At the lower end of the market where the TCL brand and the OEM brands were competing it appears that functionality rather than form was the important issue. The TCL-branded products and the OEM branded products served in the similar part of the market and offered the same types of units.
>
> 214 The Tribunal cannot find as a fact that every OEM unit sold was directly substitutable for a designated TCL-branded unit. However for the purposes of estimating the loss of sales to Castel brought about by the presence of TCL OEM products we proceed on the basis that the OEM products were sufficiently similar to be a direct competitor of, and replacement for, a line of TCL-branded products, at least insofar as they were perceived in that way by the customer base. It is important to note that Castel did not sell directly to end-users but rather to retailers who bought in bulk and who were well informed about the market and about the available brands.

29 The arbitrators then turned to Mr Williams' expressed view that sales of OEM products were drawn equally from sales of all other level 4 and 5 products, using the relevant market share of each: see J[90]-[91]. The arbitrators then analysed the basis for Mr Williams' view that Castel could have expected to pick up a maximum of 7.4% of the OEM sales as extra sales of TCL-branded products: see J[92]-[99].

30 The complaints of TCL focus upon the method and findings of the arbitrators in coming to the view that Castel's lost sales were not 7.4% of the OEM sales, but 22.5%.

The "no evidence rule"

31 At J[104]-[109], the primary judge set out the so-called "no evidence rule" as a part of the rules of natural justice by reference to *R v Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 QB 456 ("***Moore***") at 487-488 (where Diplock LJ expressed the rules

of natural justice as encompassing first the bias rule; secondly, that the decision must be based on evidence; and thirdly, that the contentions should be fairly listened to; the question of "evidence" being expressed by his Lordship as the requirement, not for the application of the rules of evidence, but for "material which tends logically to show the existence or non-existence" of relevant facts); *Mahon v Air New Zealand* [1984] AC 808 at 820-821 (where Lord Diplock, writing for the Judicial Committee, applied *Moore* and restated the principle therefrom); *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 at 570 [83] (where Wild and Durie JJ, sitting in the High Court, applied *Mahon* in the context of natural justice in the part of the New Zealand legislation equivalent to ss 19(b) and 8(7A)(b) of the IAA); *Collins v Minister for Immigration and Ethnic Affairs* (1981) 58 FLR 407 at 411 (where Fox, Deane and Morling JJ were dealing with whether there was an error of law for the purposes of the *Administrative Appeals Tribunal Act 1975* (Cth), s 44); *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2009] FCA 757; 179 FCR 437 at 503-504 [339] (where Lindgren J was dealing with whether there was an error of law for the purposes of the common law and the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(1)(f)); and *Haider v JP Morgan Holdings Australia Ltd* [2007] NSWCA 158 at [33] (where Basten JA was dealing with a question of law as the basis for a review of a decision under workers compensation legislation).

32 We will say something about this categorisation in due course. It is sufficient to note at this point that Castel did not argue, either before the primary judge or on appeal, that if the arbitrators found relevant facts without the support of probative material, that was not, nor could have been, a breach of the rules of natural justice.

The application of the principle to the three impugned findings

The 14% Starting Point Finding

33 At J[110]-[124], the primary judge considered the attack on the arbitrators' use of 14% as a starting point for their assessment of Castel's lost sales. Having rejected Mr Acton's 100% figure, they commenced with an analysis of Mr Williams' 7.4%.

34 The crucial paragraphs in the award concerning the finding of 22.5% (the 14% Starting Point Finding and the Uplift Finding) were A[231]-[237]. The reasoning of the arbitrators for the 14% Starting Point Finding was contained at A[231]-[234], as follows:

> 231 What the evidence does establish is that there would have been some lost sales and brand damage from OEM sales through competing retailers, but that while

some factors would suggest a significant loss of sales, others would indicate only a minimal effect.

232 Factors which would suggest a minimal effect are:

(a) the TCL brand and the OEM brands were sold in different retailers and in different stores;

(b) if a competing store to one selling TCL products had not sold OEM products it would have stocked TCL products;

(c) TCL was not such an established brand at this lower level of the market that it was at all likely that another retailer would have stocked the TCL brand had it not an OEM brand available;

(d) there was no real brand loyalty to TCL at the end-user level, and accordingly a potential TCL customer in a retail outlet was likely to have bought a non-TCL brand if it was available in one retailer and not have instead sought out the TCL brand stocked by TCL's retailers; and;

(e) there was a high degree of substitutability between the TCL brand and OEM brands on one hand and competing non-TCL and OEM brands on the other, meaning that those who were potential TCL-branded products buyers had a wide selection of Level 4 and Level 5 models to choose from.

233 As against those facts, there is some evidence which would suggest the impact, though not approaching the 1:1 approach of Mr Acton, was much higher than the 7.4% approach of Mr Williams:

(a) Castel sold not directly to end users but to retailers, and accordingly it is the impact of OEM products on retailers rather than the impact on those retailers' customers which must be considered.

(b) Mr Francis gave evidence of a number of occasions on which he was told by former Castel customers that they would be purchasing OEM products which were TCL made, rather than TCL-branded products or that they were observing their own customers making the switch. The Tribunal accepts this evidence to the extent that some purchasers of TCL-manufactured OEM products were making those purchases because they were TCL made, so that in their absence a higher percentage of buyers might have bought the TCL-branded products.

(c) Mr Francis also gave evidence, which we accept, of anger from some Castel customers that they were being under cut by other sellers who had TCL-manufactured OEM units for sale at lower prices than the TCL-branded goods, and that Castel had lost some sales where it could not meet the lower prices.

(d) Mr Kwong gave evidence that Castel's dealership network was being directly targeted by those for whom TCL had manufactured OEM products, such that the impact of TCL-manufactured OEMs fell disproportionately on Castel and its TCL-branded products.

> 234 None of those factors are sufficiently reflected in Mr William's evidence, which was that in the absence of the TCL OEM products Castel could have expected to gain 7.4% of the market share which those TCL OEM products had. He gave this as his best estimate on the basis that those who did not buy a TCL OEM would have bought another brand from Level 4 or level 5. In cross examination he agreed that if TCL manufactured OEM products were only competing with level 5 brands then Castel's share would be doubled to around 14%. Mr Kwong's evidence was that the TCL brand was at the bottom of the Level 4 market and that the TCL-made OEM products were in Level 5. We consider the 14% a better starting point for those reasons.

35 The primary judge (at J[113]) said it was clear that TCL could not establish a no evidence ground on this body of evidence. The primary judge then (at J[114]-[123]) dealt with TCL's arguments as to the asserted misunderstanding of Mr Williams' evidence, the asserted incorrect interpretation of facts and wrong reasoning, and the incorrect reliance on Mr Francis' evidence.

The Uplift Finding

36 The reasoning of the arbitrators for the Uplift Finding is to be found in A[235]-[237], as follows:

> 235 The Tribunal also notes that:
>
> (a) Mr Williams made his assessment on the basis that all other manufacturers in the relevant level would share equally in the redistributed share of the TCL OEM products. He agreed this might not be how things worked. We have noted and accepted the evidence of Mr Francis that at least in some instances large purchasers of TCL branded products decided to switch to what they knew to be a TCL-made OEM product. It is appropriate to allow an increase on Mr Williams's calculations on the basis that the presence in the market of OEM products that were known to be TCL-made had a disproportionate effect on Castel as against sellers of other brands.
>
> (b) Mr Williams based his calculations on data which represented just over 50% of the air conditioner market and which for the most part did not refer to TCL as a brand by name. He made assumptions that TCL is contained in the "Tradebrands" category but could not get an assurance of that from GfK. This affects the reliability of his calculations.
>
> (c) Mr Williams also assumed that the 50% sample in the GfK data is representative of the overall sample as he had no means to do otherwise.
>
> (d) Mr Williams agreed the GfK data was inconsistent with other evidence like the BIS Shrapnel report which would have suggested different rankings for air conditioners than those contained in the GfK data.
>
> (e) The GfK data on which Mr Williams relied was for major retailers only and for that reason may fail to include some OEM brands which were sold through smaller channels.

> (f) Mr Williams agreed that there could be additional TCL OEMs which he had not extracted from the Tradebrands category and which were not being redistributed on his formula.
>
> 236 All of these points affect the accuracy of the material on which Williams relied and therefore the reliability of his conclusions. Each of them warrants, in the Tribunal's view, an uplift from the figure of 14% that he agreed was the base level if OEM products were largely competing with Level 5 products.
>
> 237 On the entirety of the evidence, including the finding that the matter of no competing OEM sales was seen by Castel at of such commercial importance in its GDA and the Variation Agreement with TCL as to mandate a no-competition without consent clause, the Tribunal concludes that the least proportion of the sales assessed to be lost by Castel attributable to the OEM sales made in to the Australian marketplace is 22.5% of total TCL OEM sales.

37 At J[127]-[132], the primary judge examined the evidence of Mr Williams and at J[129] expressed the view that the deficiencies in the information available to Mr Williams compromised the validity of his opinion in a number of respects, set out at J[129(a)-(d)]. The primary judge then (at J[130]) analysed why it was reasonable for the arbitrators to uplift the starting point, before identifying (at J[131]) further evidence of Mr Kwong and Mr Francis which supported the uplift. The primary judge was, by that process of examining the evidence, satisfied that there was rationally probative evidence supporting the Uplift Finding.

The Lost Sales Finding

38 The conclusion of the arbitrators as to the Lost Sales Finding is in A[237], set out above.

39 At J[134]-[156], the primary judge dealt with this overall assessment by the arbitrators. Critical to the argument of TCL, which was rejected by the primary judge, was the proposition that assessment of loss necessarily required expert evidence and that with the rejection of Mr Acton's evidence, only Mr Williams' evidence remained and the arbitrators were not at liberty to substitute their own assessment of Castel's lost sales. This was rejected by the primary judge who found that in circumstances where it was common ground before the arbitrators that the calculation of Castel's lost sales was not capable of precise calculation, and where it was clear that some damage had been suffered, the approach of the arbitrators to make a best estimate in a practical way, having regard to all the evidence (A[229]), was correct and supported by authority, referring to *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422 at 438 (Devlin J); *Callaghan v Williams C Lynch Pty Ltd* [1962] NSWR 871 at 877 (Full Court: Evatt CJ, Herron and Sugerman JJ); *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 57 ALR 167 at 183 (Sheppard, Morling and Wilcox JJ); *JLW (Vic) Pty Ltd v Tsiloglou*

[1994] 1 VR 237 at 241-246 (Brooking J); and noting *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275 at 319 (Pincus J); *Atkinson v Hastings Deering (Queensland) Pty Ltd* (1985) 71 ALR 93 at 103-104 (Pincus J); and *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 at 37 (Gibbs J) and 38 (Aickin J), but cf 26 (Barwick CJ).

40 At J[144]-[150], informed by the authorities to which he had referred, especially the decision of Brooking J in *JLW (Vic)*, the primary judge examined the award and the evidence to conclude that the arbitrators had not engaged in speculation or guesswork.

41 At J[151]-[156], the primary judge rejected the legal contention that the arbitrators, having rejected Mr Acton's evidence, were bound to apply Mr Williams' evidence, referring to various cases, including *Thurston v Todd* (1966) 84 WN (Pt 1) (NSW) 231 at 246, and *Ramsay v Watson* [1961] HCA 65; 108 CLR 642 at 645.

The hearing rule

42 At J[157]-[168], the primary judge made reference to a number of cases in identifying the hearing rule, in particular in the context of arbitral hearings: *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; 113 CLR 475 at 503; *Kioa v West* [1985] HCA 81; 159 CLR 550 at 584; *Fox v PG Wellfair Ltd* [1981] 2 Lloyd's Rep 514 at 521-522; *Interbulk Ltd v Aiden Shipping Co Ltd* (*The Vimeira*) [1984] 2 Lloyd's Rep 66 at 74-75; *Mahon v Air New Zealand* [1984] AC at 821; *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369; *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 at 461-463; *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 at 136; and *Starkey v State of South Australia* [2011] SASC 34 at [74]-[75].

43 Applying these authorities, the primary judge said at J[169] that:

> TCL must establish that in the particular circumstances of this arbitration a reasonable litigant in its shoes would not have foreseen the possibility of reasoning *of the type* that led to the 14% Starting Point Finding, the Uplift Finding and the Lost Sales Finding or a corollary of it, and that it therefore lost the opportunity to present evidence and argument in anticipation of it.

44 At J[170]-[176], the primary judge reviewed the conduct of the arbitration and concluded that the type of reasoning in the three findings was part of the debate at the arbitration.

Enforcement of the award

45 In the light of these conclusions the primary judge was prepared to enforce the award, rejecting various subsidiary arguments of TCL.

The Notices of Appeal

46 There are three notices of appeal. Appeal VID 1042 of 2012 concerned the costs judgment delivered on 19 November 2012. The grounds of appeal assumed the success of appeal VID 1043 of 2012, being the appeal from the dismissal of the application to set aside the award. Appeal VID 1044 of 2012 substantially concerned the attack on the Court's jurisdiction that was the subject of the High Court challenge and was not pressed.

47 The appeal was therefore in substance concerned with the assessment of the grounds of appeal in VID 1043 of 2012, which are discussed below.

Grounds of legal principle and approach

48 The first ground of appeal challenged the primary judge's conclusion that the word "may" in Arts 34 and 36 gave the Court a discretion to set aside or not enforce the award if the award is found to be in conflict with, or contrary to, the public policy of Australia. This ground was not pressed in the light of the recent decision of the Singapore Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125. It was submitted, however, that the discretion should have been exercised by his Honour to set aside and refuse enforcement of the award.

49 Ground 2 challenged the finding referred to at [13(d)] above that the Model Law required a demonstrated offence to fundamental notions of fairness and justice before the relevant discretion in Art 34 or Art 36 could be exercised.

50 Ground 3 challenged the primary judge's reference to the need to balance the efficacy of enforcing international arbitral awards and the public policy of Australia, and stated that the primary judge should have held that any breach of the rules of natural justice as understood in Australian domestic law required the setting aside or refusal of enforcement of an award.

51 Ground 8 was similar to ground 3. It challenged the primary judge's reliance upon the importance of uniformity of decisions with those of other jurisdictions in dealing with

public policy, in circumstances where the legislature had delineated (and constrained) the concept of public policy by reference to the rules of natural justice in Australia.

Grounds concerning the application of the rules of natural justice to the facts here

52 Grounds 4 to 7 took up five pages of the notice of appeal. In effect, these paragraphs were a comprehensive re-agitation of the arguments made before the primary judge as to the inadequacies of the factual findings of the arbitrators. Grounds 4, 5 and 6 concerned the asserted lack of evidence for the three critical findings: the 14% Starting Point Finding, the Uplift Finding and the Lost Sales Finding, respectively. Ground 7 dealt with the hearing rule ground, that, in the light of Mr Acton's conceded lack of expertise, it could not reasonably be anticipated that the arbitrators would make findings as to loss other than ones based on, or in accordance with, Mr Williams' evidence.

53 All of grounds 4 to 7 were without merit. They involved the dressing up of complaints about the factual findings into a claim concerning asserted procedural unfairness. The primary judge (as he himself recognised) went more deeply into the facts than was necessary for the proper and efficient resolution of the matter. That is not said by way of criticism of the primary judge, who undertook a careful, and correct, analysis of the facts. Rather, it is said to make clear that nothing in the IAA is likely to permit a party to an arbitration award to spend three days before a judge arguing about the factual findings made by experienced arbitrators after a ten-day hearing, when the substance of the complaint is the evidential foundation for, and reasoning process towards, facts as found.

The proper approach to ss 8(7A) and 19 in relation to natural justice and public policy

54 It is convenient to state our conclusions immediately in order that the following discussion of the statutory and jurisprudential background be given some greater focus. If the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been conducted regularly and fairly. That danger is acute if natural justice is reduced in its application to black-letter rules, if a mindset appears that these rules can be "broken" in a minor and technical way and if the distinction between factual evaluation of available evidence and a complete absence of supporting material is blurred. All these things occurred in the argument

in this case. Their presence persuaded or required the judge to spend three days reviewing the award that was the product of a ten-day reference. That should not be how such a review takes place. We are not being critical of the primary judge. His reasons are careful, thorough and substantially correct. The application was a disguised attack on the factual findings of the arbitrators dressed up as a complaint about natural justice.

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

56 The illumination and explanation of this approach requires something to be said about the statutory framework, the history of the relevant international instruments, the key notion of "public policy", the essential characterisation of natural justice, and the legal regimes and jurisprudence in other countries, particularly those in this region.

The IAA and public policy

57 The IAA gives effect to Australia's international obligations as a party to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in 1958 by the United Nations Conference on International Commercial Arbitration (**"the New York Convention"**) and also adopts as Australian law the Model Law. The IAA also reflects Australia's acceptance of the United Nations General Assembly's recommendation to give "due consideration" to the Model Law in the interests of international uniformity. Though the Model Law is not a treaty, it was the product of detailed international discussion born of a recognition of the lack of harmony and of consistent modern form of national laws on arbitration: see generally the explanatory note by the UNCITRAL secretariat on the 1985 Model Law at 24-25.

58 The Model Law dealt with many aspects of arbitration and arbitral procedure not touched upon by the New York Convention, which was broadly limited to protecting, recognising and enforcing awards in the field of international commercial arbitration. Thus,

the Model Law deals with such topics as the composition of the arbitral tribunal, the jurisdiction of the arbitral tribunal and its competence, interim measures and preliminary orders, the conduct of arbitral proceedings, the making of the award, the termination of proceedings, and, most importantly for present purposes, the grounds for setting aside the award. The Model Law also deals with subjects covered by the New York Convention: the arbitration agreement, and the recognition and enforcement of awards.

59 It is important to recognise that, while the New York Convention dealt with the subject of recognition and enforcement of the foreign award utilising the limited grounds in Art V for refusal of such, it did not purport to regulate the grounds on which an award could be set aside, though the possibility of such an action was recognised by Art V(1)(e). Article V is in the following terms:

> ARTICLE V
>
> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

60 The Model Law was designed and drafted to be available to be taken up as a form of national law (as has been done in Australia) to govern international commercial arbitration carried on in the country in question, and in other countries.

61 As appears from the *travaux préparatoires* to the Model Law discussed in H M Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers) at p 911ff, the difficult problem of agreeing upon the grounds to set aside an award took up considerable discussion. The debates were substantially concerned with how far the grounds in Art V of the New York Convention (for recognition and enforcement) should be departed from.

62 It is appropriate to say something of the notion of "public policy" as it came to be used in Arts 34 and 36 as finally agreed upon. Those articles are in the following terms:

> *Article 34. Application for setting aside as exclusive recourse against arbitral award*
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iii) 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains

decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

…

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains

> decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
>
> (b) if the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.
>
> (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

63 The similarity between Arts 34(2)(b)(ii) and 36(1)(b)(ii) with Art V(2)(b) of the New York Convention is immediately striking.

64 During the negotiation and discussion leading up to the Model Law, the concept of public policy under the New York Convention was well-known: see A J van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer) at pp 359-382. Whilst the subject of public policy in relation to the New York Convention is a large one, three things of relevance may be presently noted. First, the common law term "public policy" was recognised as broadly equivalent to the civilian notion of "*ordre public*", though the latter could perhaps be seen to have had or have a wider application, sufficiently wide to include principles of procedural justice: van den Berg *op cit* p 359, and Holtzmann and Neuhaus *op cit* p 914. Secondly, the legislative history of Art V(2)(b) of the New York Convention reveals that the phrase was understood to be directed to fundamental principles and was not to be given a broad interpretation that might pick up particular national domestic policy manifestations: van den Berg *op cit* pp 361-362. Thirdly, care needs to be exercised in the use of the expressions of "international" public policy and "domestic" public policy. van den Berg states (at p 361) that the legislative history of Art

V(2)(b) points to "international public policy" being referred to. Yet, of course, the text of Art V(2)(b) is "the public policy of that country". The point being made by van den Berg was that those words do not mandate particular domestic national public policy, rather they denote a concept recognising the international place of the Convention and the need for public policy to be restricted to the state's most basic, fundamental principles of morality and justice in order that there be the fullest commonality of international approach to the question. This usage of "international" public policy is to be distinguished from some truly international or transnational public policy comprising fundamental shared values or rules of natural law of universal application that is discussed by some authors: van den Berg *op cit* p 361. In this regard, the comments of Bokhary PJ and Sir Anthony Mason in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, set out later, are particularly relevant.

65 The negotiation of, and discussion leading to, agreement on Arts 34 and 36 of the Model Law reflected aspects of these features of the New York Convention: see generally Holtzmann and Neuhaus *op cit* p 911ff. The discussion covered the scope of *ordre public* and its extension to procedural justice: Holtzmann and Neuhaus *op cit* p 914. The Report of the Commission included the following at para 297:

> It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.

66 The so-called Mustill report, being the report of the Department of Trade and Industry (UK) entitled "A New Arbitration Act? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law on International Commercial Arbitration" published in [1989] 4 *Arbitration Materials* 5 and chaired by the Rt Hon Lord Justice Mustill, similarly described the discussion and negotiation of Arts 34 and 36, stating at 69-70.

> In its original form, the list of grounds upon which a court was to have jurisdiction to set aside an award was in substantially the same terms as Article V of the New York Convention. The United Kingdom strenuously argued that this was inappropriate, for the following reasons. Both the Convention and the Model Law assume that procedural complaints may be made at two stages. First, active steps may be taken to attack the award in the courts of the country where the award was made. In the Model Law, these are the subject of Article 34. The Convention does not deal with them. Secondly, the losing party may rely upon his complaints as grounds for

> resisting an application for enforcement or recognition. This is the sphere of the New York Convention and Article 36. It was the contention of the United Kingdom that the list of grounds for resisting enforcement set out in the Convention, and carried into Article 36, was formulated in the light of the fact that before any question of enforcement can arise the award will have been exposed to the possibility of an attack in the country where it has been made. The list could therefore properly be cast in narrow terms. This consideration does not at all apply to the grounds upon which such an attack can be made, and these must be wide enough to ensure that the court of the country where the arbitration took place has jurisdiction to deal with any case of procedural misconduct.
>
> This consideration led the United Kingdom to propose that the list should be either replaced by a general formula leaving the jurisdiction very much at large, or reinforced by a sweeping-up provision. The first alternative attracted little support in the Working Group and Commission. The second was to some extent answered by the addition as a ground for recourse of the situation where "the arbitral procedure was not in accordance with … this Law" (Article 34(2)(a)(iv)). This calls up Article 18, with its requirements that the parties shall be treated equally and that each shall have "an opportunity of presenting his case", and undoubtedly covers many instances of procedural injustice. But it does not cover all those cases where an English court would intervene by setting aside or remission. Several delegations maintained that the necessary additional protection is provided by Article 34(2)(b)(ii) which enables the court to intervene where "the award is in conflict with the public policy of this State". Delegates from common law countries pointed out that these countries had not developed any general doctrine of *ordre public* in relation to arbitration procedures; and moreover that the sub-paragraph refers to the award, and not to the procedure leading up to it. It was therefore proposed that some general formula should be added, perhaps on the lines of the kindred provision in Article 52(1)(d) of the ICSID convention "that there has been a serious departure from a fundamental rule of procedure". This proposal foundered because no generally acceptable formula could be devised, but the Commission did agree to include in the official Report a passage recording the substance of the debate, and this was done in paragraphs 277 to 302.

Paragraph 297 was then quoted.

67 Central to the Model Law is Art 18, which is as follows:

> *Article 18. Equal treatment of parties*
>
> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

68 Article 18 expresses a fundamental principle of all arbitration: that it has to be fair. Article 18 was described in the seventh Secretariat Note as a key element of the "Magna Carta of Arbitral Procedure": Holtzmann and Neuhaus *op cit* p 550. From the Report of the Commission at paras 296-302, it is plain that the phrase "public policy" was understood not to be equivalent to the political stance or international policies of the state, but comprised fundamental notions and principles of justice. Further, it was clearly understood that

breaches of Art 18 could constitute a state of affairs contrary to such. There was, however, reluctance to make explicit the fact that a breach of Art 18 was a ground to set aside the award, not because of any expressed view that a breach of that central article should not lead to invalidity of the award (to the contrary it was thought that it could), but the perceived greater importance of aligning Arts 34 and 36, than of aligning Art 34 and a proposed Art 18: Holtzmann and Neuhaus *op cit* pp 914-915 and 1001-1003.

69 There was some suggestion that the phrase "public policy" be amended to "international public policy" or "*ordre public international*", but it was rejected for lack of definite support and a perceived lack of precision. This did not reflect a desire to see a more intrusive concept of domestic public order, but a perception of the potential for discordance with the New York Convention without underlying precision: Holtzmann and Neuhaus *op cit* pp 919, 927-931.

70 The potential lack of complete concordance between the concepts of *ordre public* and public policy, and the place of procedural justice reflected most clearly in the Model Law in Art 18 led some common law jurisdictions to legislate to place the position beyond doubt: that the rules of natural justice were part of the concept of public policy. We will refer to these statutory provisions later.

71 Section 19 of the IAA was introduced in 1989 and s 8(7A) in 2010. Singapore and New Zealand made similar amendments to their international arbitration legislation: see s 24 of the *International Arbitration Act* (Cap 143A, 2002 Rev Ed) (Sing) and Art 34(6) in Schedule 1 of the *Arbitration Act 1996* (NZ), as to which, see below.

72 The terms of para 9 of the Explanatory Memorandum to the *International Arbitration Amendment Bill 1988* (Cth) reflect the above:

> 9. **To avoid confusion** in the use of the term 'public policy' a new section 19 has been inserted into the Principal Act. The term 'public policy' is used in sub-paragraphs 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law. Both articles 34 and 36 have as their object to make certain that the requirements of procedural justice as well as substantive principles of law and justice are complied with in arbitrations. For this reason the new section 19 in the amending legislation **seeks to make it clear** that instances such as corruption, bribery, fraud and breach of the principles of natural justice are contrary to the public policy of Australia. The provision is expressly limited in its operation to the two sub-paragraphs referred to above so as to avoid any possible inference that the term 'public policy' which is referred to in the New York Convention does <u>not</u> contain those elements.
>
> (Emphasis added; underlining in original.)

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

74 Once one recognises that the rules of natural justice were seen by many as within the conception of public policy within Arts 34 and 36, it is necessary to say something further as to the content of the phrase "public policy", so as to understand the statutory context of the phrase "rules of natural justice". We have already referred to the discussion of the negotiation of the New York Convention and the Model Law in van den Berg *op cit* and Holtzmann and Neuhaus *op cit* that assists one to the conclusion that the phrase was understood to be limited to the fundamental principles of justice and morality conformable with, and suited to operation within, the international nature of subject matter — international commercial arbitration, a context very different from the review of public power in administrative law.

75 This approach to confining the scope of public policy has widespread international judicial support. Contrary to the submission of the appellant, it is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as

the New York Convention and the Model Law. It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the IAA permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand. Such is a reflection of the growing recognition of the harmony of what can be seen as the "law of international commerce": *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40 at [31] per Lord Hope of Craighead. Such an approach accords with the objectives of the IAA in s 2D and with the interpretive approach referred to in s 17 of the IAA. It is also an approach required by Art 2A of the Model Law, and by the highest authority when dealing with treaties: *Shipping Corporation of India Ltd v Gamlen Chemical Co Australasia Pty Ltd* [1980] HCA 51; 147 CLR 142 at 159 (Mason and Wilson JJ); *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* [1998] HCA 65; 196 CLR 161 at 186 [70] (McHugh J), 213 [137] (Kirby J); *Siemens Ltd v Schenker International (Australia) Pty Ltd* [2004] HCA 11; 216 CLR 418 at 466-467 [153]-[154] (Kirby J); and *Povey v Qantas Airways Ltd* [2005] HCA 33; 223 CLR 189 at 202 [25] (Gleeson CJ, Gummow, Hayne and Heydon JJ). This approach should not be confined to treaties proper to which there are contracting state parties. Where, as with the Model Law, there has been extensive discussion and negotiation of a model law under the auspices of a United Nations body, such as UNCITRAL, and where the Model Law has been adopted by the General Assembly of the United Nations with recommendation of "due consideration" by member states to advance uniformity of approach, the same appropriate respect for, and, where necessary, sensitivity or deference to, reasoned decisions of other countries, should be shown. This is especially so in the field of international commerce. As Atkin LJ said in *RF Brown & Co Limited v T & J Harrison* (1927) 137 LT 549 at 556 (quoted by Viscount Simonds in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807 at 840) in speaking of international maritime commerce, bills of lading, charterparty exceptions and the Harter Act in a case arising prior to the applicability of the Hague Rules in respect of international carriage of goods by sea in the United Kingdom:

> I think it is very important in commercial interests that there should be uniformity of construction adopted by the courts in dealing with words in statutes dealing with the same subject-matter …

(It is unnecessary to consider any possible relevance of the definition of "treaty" in the *Vienna Convention on the Law of Treaties*, Art 2(1)(a).)

76 A review of the international jurisprudence leads to the conclusion that the interpretation of public policy in Art V of the New York Convention and Arts 34 and 36 of the Model Law is as it was understood at the time of the completion of the preparatory work: it is limited to the fundamental principles of justice and morality of the state, recognising the international dimension of the context: *Parsons Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)* 508 F 2d 969 (2d Cir 1974); *MGM Productions Group Inc v Aeroflot Russian Airlines* 91 Fed Appx 716 (2d Cir 2004); *Hebei Import & Export Corp* [1999] 2 HKC at 215-216 (Bokhary PJ) and 232-233 (Sir Anthony Mason, with whom Li CJ and Ching PJ agreed, in the Hong Kong Court of Final Appeal); *Boardwalk Regency Corp v Maalouf* (1992) 6 OR (3d) 737 at 743 (Ontario Court of Appeal); *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 at 625-626 [41]-[46] and 630 [59] (New Zealand Court of Appeal); *Downer-Hill Joint Venture* [2005] 1 NZLR at 568-570 [76]-[84]; *Quintette Coal Ltd v Nippon Steel Corporation* (1990) 50 BCLR (2d) 207 at 217 (British Columbia Court of Appeal); *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295 at 316 (Sir John Donaldson MR); *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41; [2007] 1 SLR 597 at 619-622 especially 622 [59] (Singapore Court of Appeal); *Attorney General of Canada v S D Myers Inc* [2004] 3 FCR 368 at [55] (Federal Court of Canada).

77 The authorities are not unanimous, though the weight of authority is clearly to give a narrow meaning to public policy in the manner to which we have referred: see the review of other international (including civilian) authorities in N Blackaby and C Partasides with A Redfern and M Hunter, *Redfern and Hunter on International Arbitration* (5th ed 2009) at 656-662.

78 It is unnecessary to enter the debate reflected in the English Court of Appeal in *Soleimany v Soleimany* [1999] QB 785 at 800 and *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] QB 288 at 316-317, a debate discussed by the Court of Appeal of Singapore in *AJU v AJT* [2011] SGCA 41; [2011] 4 SLR 739 at 759-770 [41]-[61].

79 If we may respectfully say so, two powerful expressions of the matter concerning the New York Convention which deserve citation are the comments of Bokhary PJ and Sir Anthony Mason in *Hebei* at 215-216 and 232-233, respectively.

Bokhary PJ:

> In my view, there must be compelling reasons before enforcement of a Convention award can be refused on public policy grounds. This is not to say that the reasons must be so extreme that the award falls to be cursed by bell, book and candle. But the reasons must go beyond the minimum which would justify setting aside a domestic judgment or award. A point to similar effect was made in a comparable context by the United States Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (1985). There the question was whether an antitrust claim was to be referred to arbitration outside the United States. In holding that it was, the majority said this (at 629):
>
> > … concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.
>
> The considerable strength of this demand for comity is apparent from what it was able to overcome, namely the advantages of dealing with antitrust claims by way of litigation in the United States rather than by way of arbitration elsewhere. These advantages are detailed in the dissenting judgment of the minority.
>
> **When a number of states enter into a treaty to enforce each other's arbitral awards, it stands to reason that they would do so in the realisation that they, or some of them, will very likely have very different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it.**
>
> In regard to the refusal of enforcement of Convention awards on public policy grounds, there are references in the cases and texts to what has been called 'international public policy'. Does this mean some standard common to all civilised nations? Or does it mean those elements of a state's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other states are affected? I think that it should be taken to mean the latter.
>
> …
>
> In my judgment, the position is as follows. **Before a Convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention award on public policy grounds, the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection.**
>
> (Emphasis added.)

Sir Anthony Mason:

> In some decisions, notably of courts in civil law jurisdictions, public policy has been equated to international public policy. As already mentioned, art V(2)(b) specifically

> refers to the public policy of the forum. No doubt, in many instances, the relevant public policy of the forum coincides with the public policy of so many other countries that the relevant public policy is accurately described as international public policy. Even in such a case, if the ground is made out, it is because the enforcement of the award is contrary to the public policy of the forum (AJ van den Berg *The New York Arbitration Convention of 1958* p 298).
>
> However, the object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced (*Scherk v Alberto-Culver Co* 417 US 506 (1974); *Imperial Ethiopian Government v Baruch-Foster Corp* 535 F 2d 334 (1976) at 335). In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of art V, notably art V(2)(b) relating to public policy, have been given a narrow construction. **It has been generally accepted that the expression 'contrary to the public policy of that country' in art V(2)(b) means 'contrary to the fundamental conceptions of morality and justice' of the forum.** *(Parsons and Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier RAKTA* 508 F 2d 969 (2d Cir 1974) at 974 (where the Convention expression was equated to 'the forum's most basic notions of morality and justice'); see AJ van den Berg *The New York Arbitration Convention of 1958* p 376; see also *Renusagar Power Co Ltd v General Electric Co* YB Comm Arbn XX (1995) 681 at 697-702)).
>
> (Emphasis added.)

80 The above analysis accords with the views of Foster J in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; 277 ALR 415 at [126]-[133] and *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; 201 FCR 535 at 554-560 [87]-[105], which are correct. To the extent that the notion of public policy has been given a broader interpretation in Australia in cases such as *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700; 183 FLR 317 at 322 [18] and *Re Resort Condominiums International Inc* [1995] 1 Qd R 406, we would respectfully disagree with the approach in such cases.

The rules of natural justice and the so-called "no evidence rule"

81 Castel did not argue before the primary judge or on appeal that the finding of a fact without probative evidence may be an error of law, but was not (or could not be here) a breach of the rules of natural justice. That being the case, it is not appropriate to decide this appeal on any different basis. Nevertheless, certain features of the matter make it appropriate to say something as to the contestability of the unargued premise. The approach of TCL is one which may be seen to undermine the object of facilitating the expeditious and fair enforcement of awards in international commercial arbitration. We have already referred to the submission made before the primary judge that he examine all the facts of the case afresh

and revisit in full the questions which were before the arbitrators: J[53]. Whilst his Honour rejected this approach, the parties nevertheless spent three days before the primary judge arguing about, essentially, findings of fact. On appeal, TCL effectively renewed those submissions. In argument on the appeal, senior counsel for TCL submitted that any conclusion that factual findings went beyond an available evidentiary foundation could be characterised (to the extent of the asserted impermissible overreach of the factual findings) as made without evidence, and without more, a breach of the rules of natural justice. He submitted that if one side submitted that the evidence permitted only facts 1 to 10 to be found, and the other side submitted that the same evidence permitted facts 11 to 15 also to be found (such further facts being central to the result in the award) there would be, without more, a breach of the rules of natural justice if the arbitrator agreed with the second party, but the reviewing court agreed with the first, even though the arbitral process (including the award) had been conducted scrupulously and impeccably fairly. For the reasons that follow, that submission should be rejected as clearly wrong, and as one likely to be productive, if accepted, of the undermining of the IAA and of the efficacy of international commercial arbitration.

82 There is no doubt that at common law it is an error of law to make a finding of fact for which there is no probative evidence: *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at 418 [90]-[91]; *McPhee v S Bennett Ltd* (1934) 52 WN (NSW) 8 at 9; *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 138; *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 at 355. Once there is some evidence that could support a finding, any error can be seen as factual, not legal: *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 155-156. The distinction had its origins in the division of function between judge and jury. It is also now to be recognised that legal unreasonableness in statutory decision-making may also be an error of law, and a jurisdictional error: *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332; and *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26.

83 The question is whether the making of a factual finding without probative evidence is, or may be, a breach of the rules of natural justice in the context of an international commercial arbitration. One can, at the outset, accept without the slightest hesitation, that the making of a factual finding by a tribunal without probative evidence may reveal such a breach. This would be so when the fact was critical, was never the subject of attention by the parties to the dispute, and where the making of the finding occurred without the parties

having an opportunity to deal with it. That is unfairness; the parties have not been given an opportunity to be heard. It does not follow, however, that any wrong factual conclusion that may be seen to lack probative evidence (and so amount to legal error) should necessarily, and without more, be characterised as a breach of the rules of natural justice in this context.

84 The common expression of the fundamental structure of the rules of natural justice or procedural fairness is the so-called "bias rule" and the "hearing rule": that a person may not be a judge in his or her own cause; and that a person should be given a fair hearing: J M Evans, *de Smith's Judicial Review of Administrative Action* (4th ed) at 156; M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed) at 398-399; *Spackman v Plumstead District Board of Works* (1885) 10 App Cas 229 at 240 (Earl of Selborne LC). A notable expression of the matter in an arbitral context is *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Anor* [1978] VR 365 at 396 (Marks J).

85 It is essential to recall, however, as the learned authors (Sir Michael Mustill and Mr Boyd) said in *The Law and Practice of Commercial Arbitration in England* (1982) at p 252, that the expression "natural justice" (and thus the expression "the rules of natural justice") must be approached with caution because the phrase tends to suggest that there exists a package of procedural rules which must always be observed, when, in fact, the requirements of natural justice vary according to the circumstances. This does not deny the ready structure of available rules to guide judgment, but it reminds one that the underlying premise is not one or more black-letter rules, but the notion of fairness: *Kioa v West* 159 CLR at 583; *Wiseman v Borneman* [1971] AC at 308, 309 and 320; *Bushell v Secretary of State for the Environment* [1981] AC 75 at 95.

86 The required content of fairness in any particular case will depend on context: constitutional, statutory and human, on all the circumstances of the case: *Salemi v MacKellar (No 2)* [1977] HCA 26; 137 CLR 396 at 419. The fairness required relates principally to the procedure employed in dealing with the party in question. That may involve the exercise of state or governmental power over the individual, who may be vulnerable and powerless, or a great corporation. The terms of any statute will be critical. The common element is that, generally speaking, the exercise of power should be fair. That exercise will always have a human context. That is why, as Gleeson CJ said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 at 14, fairness

is not an abstract concept, but essentially practical. The concern of the law is to avoid practical injustice. Fairness is normative, evaluative, context-specific and relative.

87 The importance of fair procedure, of the fair exercise of power, of not exercising power in a manner that is practically unjust explains why it can be said that there is nothing technical about the rules of natural justice: *Salemi* at 419 (Gibbs J). Article 18 of the Model Law is not an expression of a technical rule; it is the expression of a fundamental non-derogable requirement of fairness and equality. Articles 12 and 23 (though not non-derogable like Art 18) are similarly fundamental.

88 There are judicial expressions of view that the rules of natural justice are not limited to the two rules referred to above. In a context involving the exercise of state power it has been stated that the failure to respond to a substantial, clearly articulated argument, relying on established fact, was to fail to accord natural justice: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389 at 394 [24] (Gummow and Callinan JJ) and 408 [95] (Hayne J) and that the same characterisation can be ascribed to a decision made other than rationally, not responding to a party's case and not on probative evidence; *Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 16 at [79]-[92] and [108], [118]-[119]. One illustration of these wider conceptions of procedural fairness focussing upon the adjudication of the matter, rather than the process of reaching the adjudication, is the so-called "no evidence rule" – the requirement to base a decision upon probative evidence.

89 The roots of the so-called "no evidence rule" in England are to be found in the judgments of Willmer LJ and Diplock LJ in *Moore* at 476 and 487-488. The rule was expressed in terms identical to the traditional error of law test of finding of facts in the absence of relevant probative material. No authority for the characterisation or categorisation of this "rule" as part of natural justice was cited by either of their Lordships. In 1984, speaking for the Judicial Committee of the Privy Council in a New Zealand appeal in *Mahon v Air New Zealand* [1984] AC 808, Lord Diplock stated that the first relevant rule of natural justice was that the decision must be based on evidence that has some probative value. Not surprisingly, the characterisation has been accepted without question by New Zealand courts: *Downer-Hill Joint Venture* [2005] 1 NZLR at 570 [83].

90 In Australia, there is no authoritative adoption of this necessary characterisation of an otherwise available ground of error of law. It should perhaps be noted by way of preliminary

comment that one important consequence of this characterisation or categorisation would be the placement of the error within the concept of jurisdictional error, and thus within the ambit of the *Commonwealth Constitution*, s 75(v): see *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; 206 CLR 57. Whilst there are older authorities to the effect that the lack of probative evidence to support a finding of fact or a decision is an error of law but is not a matter of jurisdiction: *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 151 (Lord Sumner); *R v Ludlow; Ex parte Barnsley Corporation* [1947] KB 634 at 639 (Lord Goddard CJ); and *Armah v Government of Ghana* [1968] AC 192 at 234B (Lord Reid), the importance of the possible characterisation of the exercise of public or state power without probative material as jurisdictional (and the **potential** deep unfairness in such an exercise of public power) can be seen in *Attorney-General v Ryan* [1980] AC 718 at 732.

91 In *R v Corporation of the Town of Glenelg; Ex parte Pier House Pty Ltd* [1968] SASR 246 ("***Glenelg***") the Full Court of the South Australian Supreme Court was concerned with the review of a local council's decision under the *Local Government Act 1934-66* (SA) to prohibit the building of a private hospital on the grounds that it was "unsuitable" or likely to be detrimental to the health, welfare and comfort of neighbourhood inhabitants. The attack on the decision was an asserted failure to accord natural justice by making a conclusion as to unsuitability in the absence of sufficient evidence to support a bone fide opinion on such grounds. Bray CJ (with whom Travers J agreed on this point) expressed the view that some findings of fact without probative evidence may (not, it should be noted, necessarily did) amount to a breach of the rules of natural justice. At 260, Bray CJ said.

> And I think there may be cases where the lack of any evidence at all to support the decision can mean that the decision has been arrived at in violation of the rules of natural justice. I know that it is now settled that where a tribunal acts within its jurisdiction the court cannot go behind the record for the purpose of granting certiorari for error in law on the grounds that there is no evidence to support the decision (*R. v. Nat Bell Liquors Ltd* [(1922) 2 A.C. 128]; *Davies v. Price* [(1958) 1 All E.R. 671.]; *R. v. Agricultural Land Tribunal* [(1960) 2 All E.R. 518.]. And I would agree that this rule cannot be evaded by alleging the lack of evidence as a violation of the rules of natural justice instead. But I think it is necessary to draw a distinction between various types of acting without evidence. There is a distinction between coming to the conclusion that there is no evidence on which a reasonable man could act, a question on which the members of appellate courts frequently differ, and coming to the conclusion that there is no evidence on which a reasonable man could honestly think that he could act. There are cases of acting without evidence so extreme as to afford evidence of lack of bona fides, or, if you like, of bias, meaning by those expressions not necessarily some evil or sinister or wilfully improper motive, but a determination, it may be with the highest motives, to decide the issue by some test other than the one prescribed or thought to be prescribed by law. I think there is authority for the view that in such a case the court will hold that the rules of

natural justice have been violated.

92 Some years later, in *R v District Council of Berri; Ex parte Eudunda Farmers Cooperative Society Ltd* (1982) 31 SASR 342 Zelling J at 345 said in *obiter* that *Glenelg* stated the grounds of natural justice too widely. He stated at 345: "[T]here are in my opinion only two [rules of natural justice]: bias and failure to hear the other side".

93 In *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 688-690, Deane J (with whom Evatt J agreed) drew on the United States jurisprudence in relation to due process in the 5th and 14th Amendments and in relation to fundamental concepts in law, as well as the decision of the English Court of Appeal in *Moore*, to reach the conclusion (at 689) that:

> [I]t is an ordinary requirement of natural justice that a person bound to act judicially "base his decision" upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined.

94 The context of Deane J's remarks and their relative character can be seen in a number of places in his judgment. At 688, when discussing the approach of the United States Supreme Court to fundamental standards of fairness inherent in due process, Deane J noted that such standards extend, "at least when issues of the gravity of deportation of an established resident are concerned, to exclude decision on the basis of suspicion and speculation". At 689, after referring to Diplock LJ in *Moore*, he once again directed his comments to "proceedings before a statutory tribunal involving an issue of the gravity of deportation of an established resident" and in respect thereof said it would be surprising and illogical if the rules of natural justice were restricted to the procedural steps leading to a decision. He said (at 689):

> There would be little point in the requirements of natural justice aimed at ensuring a fair hearing … if, in the outcome, the decision maker remained free to make an **arbitrary decision**. If decision, in such a case, were to be based on mere suspicion or speculation, the rules of procedure aimed at governing the process of making findings of material fact would involve no more than a **futile illusion of fairness**.
>
> (Emphasis added).

95 Deane J then agreed with Diplock LJ as to the conclusion set out at [93] above, but immediately qualified it by stating that the requirements of natural justice vary according to the nature of the inquiry, and "that conclusion" (being that of Diplock LJ with which he

agreed and which is set out at [93] above) "may not be of universal validity in that it may not, for example, apply in respect of some domestic forums". He then stated, however, that "[i]t [the conclusion referred to above] is however of general validity in the case of a statutory tribunal which is bound to act judicially."

96 Thus, while Deane J expressly approved Diplock LJ's views in *Moore*, it was in the context of public power concerned with a grave question. Further, he equated the breach of the "no evidence rule" with the making of an arbitrary decision that made the apparently fair conduct of the hearing an "illusion of fairness"; and he recognised that the proposition involved in the "no evidence rule" was not of universal validity, but was dependent on context and circumstances.

97 In *Bond* 170 CLR at 355-356, Mason CJ (with whose reasons Brennan J agreed at 365 and Toohey and Gaudron JJ generally agreed at 387) discussed the nature of error of law in the finding of facts in the absence of probative material, and the difference between that and the error of fact in the demonstrable making of wrong factual findings even by illogical reasoning. At 356-357 Mason CJ also referred to the expression of opinion of Diplock LJ and Deane J in *Moore*, *Mahon*, and *Pochi* and said: "The approach adopted in these cases has not so far been accepted by this Court."

98 This comment of the Chief Justice may have been directed to the question of taxonomical characterisation of making a finding of fact without evidence, as well as the question as to whether the "no evidence rule" was one based on no evidence or no **sufficient** probative evidence, also involving questions of logical supportive reasoning. It is to be read, in our view, as at least extending to the former.

99 In *Bond* at 365-369 Deane J restated the views that he had expressed in *Pochi*. At 366 he said:

> These days, it is customary and convenient in this country to avoid references to "acting judicially" or "natural justice" and to speak of the "requirements of procedural fairness" when referring to the fairness and detachment required of a person entrusted with statutory power or authority to make an administrative decision which may adversely and directly affect the rights, interest, status or legitimate expectations of another in his, her or its individual capacity. That evolution of terminology should not, however, be permitted to constrict the content of such an obligation to a mere requirement to observe some surface formalities. A duty to act judicially (or to accord procedural fairness or natural justice) extends to the actual decision-making procedure or process, that is to say, to the manner in which and the steps by which the decision is made. As I pointed out in *Minister for Immigration and Ethnic Affairs v. Pochi*, it would be both surprising and illogical if such a duty

> involved mere surface formalities and left the decision-maker free to make a completely arbitrary decision. If the actual decision could be based on considerations which were irrelevant or irrational or on findings or inferences of fact which were not supported by some probative material or logical grounds, the common law's insistence upon the observance of such a duty would represent a guarantee of little more than a potentially futile and misleading facade. If the decision were determined by the toss of a coin or some other arbitrary procedure, the "right" to a hearing would be illusory. If the decision could be based on unreasoned prejudice, the audi alteram partem rule would be pointless.
>
> (Citation omitted.)

100 It is again to be observed that the kind of error or vice to which Deane J was directing these comments was the making of decisions in the exercise of public power that were arbitrary and that would make the hearing rule a "potentially futile and misleading façade" or "pointless". This expression of the "no evidence rule" as part of the rules of natural justice includes a necessary quality of unfairness, equivalent to an effective denial of a hearing.

101 In *Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2002] HCA 32; 210 CLR 222, Gleeson CJ at 232 [25] approved the statements of Diplock LJ in *Moore* and Deane J in *Bond.* He emphasised, indeed cautioned, at 232-233 [26]:

> The distinction between judicial review of administrative decision-making upon the ground that there has been an error of law, including a failure to comply with the requirements of procedural fairness, and comprehensive review of the merits of an administrative decision, would be obliterated if every step in a process of reasoning towards a decision were subject to judicial correction. The duty to base a decision on evidence, which is part of a legal requirement of procedural fairness, does not mean that any administrative decision may be quashed on judicial review if the reviewing court can be persuaded to a different view of the facts.
>
> (Citation omitted.)

See also Kirby J at 251-252 [100]-[101].

102 In *Ferguson v Cole* [2002] FCA 1411; 121 FCR 402 at 416 [38], Branson J, after referring to *Bond*, *Mahon* and *Rajamanikkam* considered that it may be that in 2002 the law of Australia was reflected in *Mahon*, though it was unnecessary to decide the question.

103 In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; 198 ALR 59, Gleeson CJ at 62 [9] again endorsed the views of Deane J in *Bond* concerning the content of the duty to act judicially.

104 In *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCAFC 88; 195 FCR 318 the Full

Court (Keane CJ, Lander and Foster JJ) cited *Mahon* at 820-821. This, however, was in the specific context of the requirement that persons at risk of adverse findings be given an opportunity to be heard on the finding – an aspect of the hearing rule. The Full Court said at 365 [78]:

> … the appellant's entitlement to procedural fairness is measured by the need to ensure that it has an opportunity to place such material before the second respondent as might deter him from making a decision to place the appellant under special administration. [The Court then, **in this regard**, referred to *Mahon*.]

105 A number of matters can be said arising out of the above cases and discussion. First, the above cases deal with the exercise of public or state power. The context of international commercial arbitration is the exercise of private power through an arrangement and a tribunal to which the parties have consented under a regime wherein errors of fact or law are not legitimate bases for curial intervention: *TCL* [2013] HCA 5; 295 ALR 596 at 617 [81].

106 Secondly, until the High Court decides otherwise, this Court should respect the binding character of what was said by Mason CJ in *Bond*. To the extent that cases such as *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 may be seen to encompass in the conception of legal unreasonableness notions referred to by Deane J in *Bond*, that does not require the conclusion that the characterisation of Diplock LJ in *Moore* or Deane J in *Pochi* be adopted. As Gageler J said in *Li* at 371 [92], procedural fairness is closely linked with reasonableness.

107 Thirdly, Deane J in *Pochi* saw what Diplock LJ said in *Moore* as necessary to avoid the procedural aspects of natural justice being reduced to a charade. There was, in everything Deane J said, the necessary presence of **unfairness** in the impugned decision.

108 Fourthly, the essence of natural justice is fairness – it is its root as a legal conception and it lies at the heart of its operation. Unless there is unfairness, true practical injustice, there can be no breach of any rule of natural justice. That recognition is vital in the distinction made by Gleeson CJ in *Rajamanikkam* 210 CLR at 232-233 [26] between a conclusion that a decision was not made on evidence and a contest about the proper view of the evidence and the facts; and in the distinction made by Bray CJ in *Glenelg* at 260. That recognition is also central to an appreciation of what Deane J said in *Pochi* and *Bond*, and indeed what Bray CJ said in *Glenelg*: that in some circumstances the absence of any evidential or material foundation for a decision will betray a decision that had a "futile

illusion of fairness" (Deane J in *Pochi* at 689) or a decision come to without bona fides or with bias or by reference to a test foreign to that proscribed by law (Bray CJ in *Glenelg* at 260).

109 Fifthly, the relevant context of the placement of the rules of natural justice is international commercial arbitration. The Model Law and the IAA embody a framework of law for the regulation of arbitration. The avowed intent of both is to facilitate the use and efficacy of international commercial arbitration: see Resolution 40/72 of the United Nations General Assembly (11 December 1985), Art 5 of the Model Law and s 2D of the IAA. Basal to the working of the New York Convention, Art V and the Model Law, Arts 34 and 36 was the absence of any ground for the review or setting aside or denial of recognition or enforcement of awards because of errors by the arbitrator in factual findings or in the application of legal principle (as viewed by national courts). The system enshrined in the Model Law was designed to place independence, autonomy and authority into the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties. The a-national independence of the international arbitral legal order thus created required at least two things from national court systems for its efficacy: first, a recognition that interference by national courts, beyond the matters identified in the Model Law as grounds for setting aside or non-enforcement would undermine the system; and secondly, the swift and efficient judicial enforcement and recognition of contracts and awards. The appropriate balance between swift enforcement and legitimate testing of grounds under Arts 34 and 36 is critical to maintain; essential to it is courts acting prudently, sparingly and responsibly, but decisively when grounds under Arts 34 and 36 are revealed. An important part of that balance is the protection by the courts of the fundamental norms of fairness and equality embodied in the rules of natural justice within the concept of public policy.

110 This balance reflected in international and Australian policy does not carry with it any necessary implied criticism of national courts. Parties in international commerce may choose arbitral dispute resolution for many reasons: *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192: 157 FCR 45 at 95-96 [192]-[193]; that chosen international legal order depends crucially upon reliable curial enforcement and a respect by the courts for the choice and autonomy of the parties and for the delicate balance of the system. A demand for fairness and equality is at the heart of the supervisory balance, as is a recognition that this is not reflected in mechanical technical local rules. The real question is

whether an international commercial party has been treated unfairly or has suffered real practical injustice in the dispute and litigation context in which it finds itself. Formalism in the application of the so-called rules is not the essence of the matter: fairness and equality are. How unfairness is revealed or demonstrated in any particular case will depend on the circumstances. The requirement of a fair hearing in an international commercial arbitration has been discussed in many cases. Reference need only be made to the cases cited by the primary judge and referred to at [42] above. As Goff LJ said in *The Vimeira* [1984] 2 Lloyd's Rep at 74-75, the question is whether the hearing was fair. For a recent example of the relationship between fairness and expedition, see *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; 304 ALR 468.

111 The above leads one to the conclusion that Arts 34 and 36 should be seen as requiring the demonstration of real practical injustice or real unfairness in the conduct of the reference or in the making of the award. The rules of natural justice are part of Australian public policy. The assessment as to whether those rules have been breached by reference to established principle is not a matter of formal application of rules disembodied from context, or taken from another statutory or human context. The relevant context is international commercial arbitration. No international arbitration award should be set aside for being contrary to Australian public policy unless fundamental norms of justice and fairness are breached. Each of Art 34 and 36 contains a form of discretion or evaluative decision: "may be set aside" (Art 34), "may be refused only" (Art 36). It is not profitable to seek to differentiate between the engagement of public policy under the Articles and a supposedly separate and a later question whether to exercise the discretion; nor is it profitable, but only likely productive of difficulty or error, to read into Arts 34 and 36 any precise notions of required prejudice or other preconditions to the exercise of any discretion. The provisions (ss 8(7A), 19 and Arts 34 and 36) deal with fundamental conceptions of fairness and justice. It suffices to say that no international award should be set aside unless, by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered by an international commercial party in the conduct and disposition of a dispute in an award. It is likely that real prejudice, actual or potential, would be a consideration in the evaluation of any unfairness or practical injustice.

112 It is unnecessary for present purposes to answer the question whether making a finding of fact without probative evidence should ever be characterised as a breach of the rules of natural justice. It is sufficient to accept without the benefit of argument that it may

be; but in this statutory context, such will form the basis of effective review or non-recognition or non-enforcement for breach of the rules of natural justice only if real unfairness or real practical injustice is suffered thereby. Were such question to be addressed, regard would need to be had to the history of the development of natural justice or procedural fairness; to the question whether it is a safeguard of fairness in process or something more directed to fairness of the outcome; to the question whether natural justice is a defining or informing basis for legal unreasonableness; to the works and approaches of scholars and law reformers such as HWR Wade, *Administrative Law* (2nd ed at pp 194-195, 3rd ed at p 213, 5th ed at p 485, 10th ed at p 435); the Kerr Committee Report in 1973 (*Prerogative Writ Procedures: Report of Committee of Review* (Cth Parliament 1973)) at [43] where the "no evidence ground" was identified as separate from natural justice, as is now reflected in the *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(1)(a),(h) and 5(3); and M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed) at pp 398-405 [7.20]-[7.30]; and, critically, to the influence of context (here, international commercial arbitration) on the fashioning of the proper content and reach of generally expressed rules designed to secure fairness. In this context, it can be readily accepted that, under various legal regimes, courts have been concerned with reviewing arbitral awards made in the absence of probative evidence, especially by reference to the distinction between a trade arbitration before a commercial person chosen for his or her factual experience and an arbitration conducted by someone not chosen with that experience: *Wright v Howson* (1888) 4 TLR 386 at 387; *Mediterranean & Eastern Export Co Ltd v Fortress Fabrics (Manchester) Ltd* [1948] 2 All ER 186 at 187-188; *Fox v PG Wellfair Ltd* [1981] 2 Lloyds Rep 514 at 521-522; *Motrix Supplies Pty Ltd v Bonds and Kirby (Victoria Avenue) Pty Ltd* (Sup Ct of NSW Commercial Division, 12 September 1990, Giles J, BC9002025) at 21.

113 In most, if not all, cases a party who says that it has suffered such unfairness or practical injustice should be able to demonstrate that without the kind of detailed re-examination of the facts that occurred in this case. Applications involving review, enforcement and recognition under Arts 34, 35 and Art 36 (or Art V of the New York Convention) should not be permitted to be used (or hijacked) to undertake, in substance, a rehearing of factual or legal reasoning under the guise of a complaint about a breach of the rules of natural justice based on the "no evidence rule". Unfairness or practical injustice in the conduct of international commercial arbitration should, if it exists, be able to be expressed shortly and, likewise, demonstrated tolerably shortly. It will not be demonstrated as a result

of a detailed factual analysis of evidence regularly and fairly brought forward involving asserted conclusions of facts different to those reached by the arbitrator. If a party can demonstrate that it has been, in essence, denied the opportunity to be heard on an important and material issue as revealed by such a finding made without material, real unfairness or real practical injustice may be shown. That was not the case here.

The law in the region

114 Before turning to the immediate reasons for the dismissal of the appeals here, it is appropriate to say something of the learned and helpful decisions of courts in the region to assist in the recognition of the relevant principle.

115 Before dealing with cases in New Zealand and Singapore, it is necessary to say something of the relevant legislation in the region, and its development. New Zealand, Singapore and Hong Kong have based their legislation on the Model Law.

New Zealand legislation

116 In New Zealand, the Model Law was modified and made the law of New Zealand as a Schedule to the *Arbitration Act 1996* (NZ). Article 34 was amended by adding paras (5) and (6). Paragraph (5) is presently irrelevant; para (6) is in the following terms:

> (6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if –
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred –
> (i) during the arbitral proceedings; or
> (ii) in connection with the making of the award.

117 The only relevant difference between Art 34(6) in the New Zealand Act and s 8(7A) or s 19 is the clarification contained in paras (6)(b)(i) and (ii), which calls to mind the argument of Castel below, rejected by the primary judge, and (perfectly correctly) not agitated on appeal (see [13(f)] above).

118 The origin of the New Zealand legislation was a report of that country's Law Commission, which in October 1991 recommended a new legislative framework for both domestic and international arbitration in New Zealand (Law Commission (NZ), *Arbitration* (Report No 20, 1991), ix). The report recommended the insertion of a new paragraph (6)

similar to that set out above, except that the words of subparagraph (6)(b)(i) were not present in the Commission's draft. The Commission's explanation of its proposal was as follows:

> [403] Paragraph (6) elaborates the meaning of "public policy" for the purposes of setting aside an award under article 34, and follows closely the wording of s 19 of the [*International Arbitration Act 1974* (Cth)]. Although the [*International Arbitration Act 1974* (Cth)] includes this provision as a section of the Act, rather than in the Model Law, a somewhat similar provision was added to article 34(2)(a) of the Model Law as applied in Scotland. We believe that the provision is appropriately placed in that article (and also in article 36 where there is also a reference to "public policy").
>
> [404] We have hesitated before including the reference to "the rules of natural justice" in article 34(6)(b) for two reasons. First, the principal rules of natural justice, an impartial decision-maker, and a proper opportunity to be heard, are clearly embodied in articles 12, 18, and 24. Second, the thrust of the Model Law, and of the draft Act, involves a reduction in judicial involvement in arbitral proceedings, and an expansive approach to judicial review by New Zealand courts would contradict that thrust. Nevertheless, we have concluded that the Australian provision should be followed: the significance of natural justice in arbitral proceedings can be emphasised; and many recent decisions of New Zealand courts show that our judges are sensitive to their relatively limited role in arbitrations.

119 The mention of the Model Law as applied in Scotland in the first paragraph above appears to refer to the insertion of a new subparagraph 34(2)(a)(v) in the version of the Model Law given the force of law in Scotland by s 66(2) of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990* (UK). That new paragraph, which appeared in Schedule 7 of that Act, read as follows:

> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
> …
> (v) the award was procured by fraud, bribery or corruption …

120 The provision (enacted for a jurisdiction with a civilian tradition) made no mention of natural justice.

121 After a bill to implement the recommendations of the Law Commission was introduced in the New Zealand Parliament in 1995, it was referred to the Government Administration Committee. That committee received a submission that the "natural justice" provision, as it was then drafted (referring only to breaches of natural justice "in connection with the making of the award"), was too narrow, "as breaches can occur during the course of the arbitration as well." The Committee agreed with this submission, recommending that Art 34 of Schedule 1 of the bill (which contained the Model Law) "be extended to cover the

entire course of the arbitration". The Parliament accepted the recommendation, and Art 34 passed into law in its present form when the bill was enacted in 1996.

Singapore legislation

122 In Singapore, the Model Law has the force of law by virtue of s 3(1) of the *International Arbitration Act* (Cap 143A, 2002 Rev Ed) (Sing). Section 24 of the same Act deals with the setting aside of arbitral awards on the ground of a breach of the rules of natural justice:

> Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if –
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

123 The Singapore Act is the result of recommendations contained in an August 1993 report of the Singapore Law Reform Committee's Sub-Committee on Review of Arbitration Laws (Law Reform Committee (Singapore), *Sub-Committee on Review of Arbitration Laws: Report* (1993)). The wording proposed by the sub-committee was slightly different to that which was ultimately enacted. The sub-committee expressed its draft clause 24 as follows:

> Without prejudice to Article 34(2) of the Model Law, the High Court may on the application of any party to an arbitration set aside the award of the arbitral tribunal if –
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

124 The only difference is in the clarification of the provision's relationship to paragraphs 34(1) and 34(2) of the Model Law.

125 Section 24, as enacted, states that the grounds for setting aside an award enumerated in the provision are "in addition" to those contained in Art 34(2). This suggests the Singapore Parliament did not see a breach of the rules of natural justice as necessarily contrary to public policy.

126 The sub-committee's report included a section outlining its consideration of the question "whether 'public policy' should be defined, and if so to what extent" (at [26]). The conclusion in the sub-committee's report at [28] was as follows:

> The Committee is of the view that it may be neither wise nor possible to define the scope and extent of "public policy". In the New Zealand draft, a new s 34(6)(b) [*sic*: Art 34(6)(b)] was proposed to explain "public policy" but the Committee does not think that this definition would be helpful, as it is expansive in nature. The use of the term "rules of natural justice", especially, provides a wide discretionary basis for curial intervention in arbitration. Instead, an attempt should be made to prevent certain situations, such as the power of arbitrators to grant civil reliefs based on certain statutes, from being characterised as contrary to "public policy".

127 The sub-committee, after setting out the avenues for curial intervention in the arbitral process under the Model Law (including Art 34), also recommended the express inclusion of references to corruption, fraud and "partiality" (the latter in its commentary, but not in its proposed draft) (at [23]).

128 Whilst it is apparent that the sub-committee and legislature in Singapore did not have the same view as the Parliaments in Australia and New Zealand that the insertion of the rules of natural justice into the concept of public policy was for the avoidance of doubt, it is clear that the Singapore sub-committee report (as did the New Zealand Law Commission report) identified s 19 of the IAA as a source of law for what became s 24 of the Singapore Act. (See Annex VI to the report.)

Hong Kong legislation

129 Implementation of the Model Law in Hong Kong was first recommended in a report of the Law Reform Commission of Hong Kong in September 1987. The proposal made its way into law via the *Arbitration (Amendment) (No 2) Ordinance* (No 64 of 1989) of November 1989, which amended the pre-existing legislative regime.

130 The Commission recommended wholesale adoption of Art 34 of the Model Law without amendment. There was no attempt to clarify the meaning of "public policy" or to specify that an award could be set aside where there had been a breach of natural justice. The Commission's stated approach to adoption of the Model Law was to "give primacy to the international recognisability and acceptability of the law and to leave it as little changed as possible" (Law Reform Commission of Hong Kong, *Report on the Adoption of the UNCITRAL Model Law of Arbitration* (September 1987), 13). Observing that a number of provisions of the Model Law were not, in its opinion, entirely satisfactory, the Commission

nonetheless thought it "far better to leave them as they stand, rather than tinker with them in an attempt to improve them, thereby causing only confusion to those foreign parties who wish to be sure they know what Hong Kong's law for international commercial arbitration is": Law Reform Commission Report at 13.

131 In any event, when it came to natural justice and its role in the setting aside of awards on public policy grounds, it appears the Commission viewed any clarification along the lines of s 19 of the IAA as unnecessary. The Commission's commentary on Art 34 appears in a section of the report dealing with provisions that were recommended to be adopted unchanged: Law Reform Commission Report at 13. As to Art 34(2)(b)(ii), the Commission observed that the phrase "public policy" may appear nebulous to a common lawyer (Law Reform Commission Report at 17). This reflects the view of the Mustill report that common law jurisdictions "had not developed any general doctrine of *ordre public* in relation to arbitration procedures": [1989] 4 *Arbitration Materials* 5 at 70. However, the Commission reassured readers that the expression was already familiar to courts in this context, since it appeared in Art V(2)(b) of the New York Convention. The Commission elaborated in the report at 17:

> The civil law concept of "order publique" (translated in the English language version of the Model Law as "public policy") covers fundamental principles of law and justice in procedural as well as substantive respects. These include corruption, bribery, fraud and other serious cases, as well as the elements of the common law concept of natural justice. **They would also include a violation of Article 18 (equal treatment of parties)**.
>
> (Emphasis added.)

132 Importantly, in light of that last sentence, the Commission's commentary on Art 18 (also recommended to be adopted unchanged) at 16, read as follows:

> This is a particularly significant Article, guaranteeing the rights of the parties to equal treatment. **We think it will allow the courts to intervene under Article 34 in cases where for example there has been a failure to abide by the rules of natural justice**.
>
> (Emphasis added.)

133 In other words, any addition of words of the kind made in the Australian, New Zealand and Singapore Acts would, on the Commission's view, have been otiose. Indeed, even in the section of the Commission's report at 26 dealing with "additional provisions

considered but rejected", there is no mention of anything resembling s 19 of the IAA or later analogues in New Zealand and Singapore legislation.

134 Subsequent to the 1989 enactment of the Model Law in respect of international commercial arbitrations, the Committee on Arbitration Law of the Hong Kong International Arbitration Centre issued a report in 1996 recommending, inter alia, that Hong Kong arbitration legislation be completely redrawn in order to apply the Model Law to both domestic and international arbitrations: *Report of the Hong Kong International Arbitration Centre Committee on Arbitration Law* (1996). That recommendation was examined and endorsed by the Committee on Hong Kong Arbitration Law, which was established in 1998 by the Hong Kong Institute of Arbitrators in co-operation with the Hong Kong International Arbitration Centre. The Committee reported in April 2003: Hong Kong Institute of Arbitrators, *Report of Committee on Hong Kong Arbitration Law* (30 April 2003).

135 In its commentary on provisions of the Model Law, the Committee made the following observation in connection with Art 30 (dealing with settlement of disputes) at 171:

> We recommend that Article 30 is to be adopted unchanged and applies in all cases. We are of the view that, in case an award on agreed terms had been procured by fraud, it should be capable of being set aside under Article 34(2)(b)(ii) in that it is in conflict with the public policy.

136 Again, then, "public policy" was considered as evidently encompassing subject matter that other jurisdictions had seen fit explicitly to enumerate in their legislation.

137 The recommendations of the Committee were put into the form of a draft bill in a consultation paper of the Hong Kong Department of Justice in 2007: Department of Justice (Hong Kong), *Consultation Paper: Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (December 2007). Submissions on that draft were then received. One such submission suggested clarification or specification of the grounds for setting aside an award under draft clause 82(1) (which sought to give the force of law to Art 34 of the Model Law). It was suggested that the provision of the *Arbitration Act 1996* (Eng) dealing with setting aside for "serious irregularity" should be emulated (see *Arbitration Act 1996* (Eng) s 68). The Department of Justice rejected the submission, explaining that it did not want to cause confusion as to whether or not Hong Kong was a Model Law jurisdiction: Department of Justice (Hong Kong), *Summary of Submissions and Comments on the Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (2009), 21.

138 The bill to revise Hong Kong's arbitration regime was introduced in the Legislative Council in June 2009. Having been the subject of report by the Bills Committee, it was enacted as the *Arbitration Ordinance* (Cap 609) (HK) in November 2010, and it came into force on 1 June 2011. Section 81 of the ordinance enacts Art 34 of the Model Law without amendment.

The relevant international case law

139 As already referred to, the influence of *Moore* and *Mahon* in New Zealand is the foundation for the proposition that making findings of fact in the absence of probative evidence is a breach of the rules of natural justice in an arbitral context.

140 The New Zealand decisions of *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 (Fisher J); *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 (Fisher J); *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (Court of Appeal); *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (Wild and Durie JJ); *Gallaway Cook Allan v Carr* [2013] 1 NZLR 826 (Court of Appeal) are not in any way inconsistent with the above expression of principle and approach. The following matters of concordance or agreement should be noted.

141 First, the helpful (if we may respectfully say so) but not determinative, expression of approach by Fisher J in *Trustees of Rotoaira Forest Trust* at 463 in paras (a) – (j) accords with the need for real unfairness or real practical injustice in the litigation context of international commercial arbitration: see, in particular, paras (b), (e), (f), (g), (i) and (j).

142 Secondly, the balance between party autonomy and finality on the one hand, and fairness through natural justice and the fundamental norm of equality on the other, was discussed by Fisher J in *Methanex* at 110-113 [37]-[53]. That was not in aid of the introduction of review by reference to technical rules, but by reference to basal standards of fairness and equality that are internationally recognised.

143 Thirdly, the scope of "public policy" is to be narrowly confined: *Amaltal* at 625-626 [41]-[46], and *Downer-Hill* at 568-571 [76]-[84].

144 Fourthly, the Court in *Downer-Hill* recognised the need for the display of unfairness in a real sense. The judgment of Wild and Durie JJ concerned a successful application to strike out, summarily, an application to set aside an award of the International Court of Arbitration at Paris. The application to set aside the award contained a number of grounds

but relevantly for the present appeal included grounds that resonate with TCL's arguments here (which are dealt with later): the findings of numerous facts asserted to have been unsupported by evidence and/or unreasonably found or against the weight of probative evidence; the finding of facts and dealing with issues in an unforeseen way and in a way not conformable with the underlying contract (see *Downer-Hill* at 559 [23]). The Court accepted the *Mahon* formulation of the "no evidence rule"; the Court required that there be demonstrated a substantial miscarriage of justice: 570 [84], their Honours saying:

> Even assuming that Downer could establish a breach of the [*Mahon*] ground of natural justice, the "public policy" requirement in art 34 imposes a high threshold on Downer. The phrases "compelling reasons" and "a very strong case" are employed in the judgments of the Hong Kong Court of Appeal in *Hebei Import and Export Corporation v Polytek Engineering Co Ltd* [1999] 2 HKC 205 at pp 211 and 215. *Hebei* involved an application to set aside a foreign award. To warrant interference there must be the likelihood that the identified procedural irregularity resulted in a "substantial miscarriage of justice": *Honeybun v Harris* [1995] 1 NZLR 64 at p 76. That entails the impugned finding being fundamental to the reasoning or outcome of the award. The Court of Appeal suggested in *Amaltal* (at para [47]) that the arbitrator's findings of fact should not be reopened unless it was "obvious" that what had occurred was contrary to public policy.

145 The Court in *Downer-Hill* then dealt with the matter at a summary strike-out level. After that review, the Court at 575 [105]-[106] by way of emphasis of approach referred to what Lord Mustill said in the Privy Council in a New Zealand appeal in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* [2000] 3 NZLR 338n at 338-339, as follows:

> [105] We accept Fiji's argument that the Court's role where evidentiary inadequacy is alleged is to ensure that there *was* evidence to support the impugned finding. Or, conversely, that the burden on the party alleging inadequacy is to establish that there was *no* evidence. Downer has not discharged that onus. Mr Johnston concluded his oral submissions by referring us to the following part of Lord Mustill's opinion in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* [2000] 3 NZLR 338 (PC) at pp 338-339:
>
> > **LORD MUSTILL.** [1] Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right. In prospect, this method often seems attractive. In retrospect, this is not always so. Having agreed at the outset to take his disputes away from the Court the losing party may afterwards be tempted to think better of it, and ask the Court to interfere because the arbitrator has misunderstood the issues, believed an unconvincing witness, decided against the weight of the evidence, or otherwise arrived at a wrong conclusion. All developed systems of arbitration law have in principle set their face against accommodating such a change of mind. The parties have made a choice, and must abide by it. This general principle is, however, applied in different ways under different

> systems, according to the nature of the complainant.
>
> [2] Where the criticism is that the arbitrator has made an error of fact, it is an almost invariable rule that the Court will not interfere. Subject to the most limited exceptions, not relevant here, the findings of fact by the arbitrator are impregnable, however flawed they may appear. On occasion, losing parties find this hard to accept, or even understand. The present case is an example.
>
> [3] At the other extreme are complaints that the decision has been reached by methods which are unfair, contrary to natural justice, in breach of due process, or whatever other term is preferred. With very few exceptions all systems of law permit the injured party some means of recourse. They need not be explored, since there are no such allegations here.
>
> [106] Mr Johnston suggested that Downer's application to set aside the award represented exactly the sort of "change of mind" Lord Mustill refers to. We suspect that submission is not far wide of the mark. Having agreed to arbitrate its very substantial claims, and having had them largely rejected by the arbitral tribunal following a lengthy hearing, Downer is essentially seeking to have the Court upset the result, so that it can rerun its claims. As Lord Mustill observes, the Courts have set their face against accommodating that.

146 Fifthly, the Court of Appeal in *Gallaway Cook Allan* [2013] 1 NZLR 826 discussed the nature of the discretion in Art 34. The Court's expression of view is, with respect, a helpful expression of the balance between finality and curial review, to the effect that the circumstances of a case such as *Downer-Hill* demand, for asserted breaches of the rules of natural justice to be made out, demonstrated unfairness or practical injustice in the context of the litigation between the parties before an award will be set aside or not enforced. The Court said at 846 [66]:

> The discretion vested by art 34 is of a wide and apparently unfettered nature. We are satisfied it must be exercised in accordance with the purposes and policy of the Arbitration Act. Two specific purposes are to encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and to facilitate the recognition and enforcement of arbitration agreements and arbitral awards. The principles and philosophy behind the statute are party autonomy within its framework, equal treatment, reduced court intervention and increased powers for the arbitral tribunal. Parliament has clearly stated its intention that parties should be bound to accept the arbitral decision where they have chosen that method of resolution. The recognised benefits of arbitration include speed, economy, choice of forum, anonymity and finality, the last by allowing the parties to limit their rights of appeal even though they cannot contract out of art 34.
>
> (Citations omitted.)

147 The Singapore decisions, likewise, are not, subject to the comments below, inconsistent with the above expression of principle and approach: see *John Holland Pty Ltd*

(fka John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan) [2001] 2 SLR 262 at 271 [18] (Choo Han Teck JC); *PT Asuransi Jasa* [2007] 1 SLR at 619-622 [52]-[60]; *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] SGCA 28; [2007] 3 SLR(R) 86 at 102-120 [28]-[65] (Singapore Court of Appeal); *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] SGCA 1; [2008] 2 SLR(R) 491 at 508-510 [30]-[34] (Singapore Court of Appeal); *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33; [2011] 4 SLR 305 at 317-318 [25]-[27] (Singapore Court of Appeal); *Kempinski Hotels SA v PT Prima International Development* [2011] SGHC 171; [2011] 4 SLR 633 at 656 [65], 664-665 [101]-[102] (Judith Prakash J); *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2012] SGCA 57; [2013] 1 SLR 125 at 139-142 [47]-[54] (Singapore Court of Appeal); *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57 at [52] (Singapore Court of Appeal); *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186 (Chan Seng Onn J).

148 The following matters should be noted.

149 First, there has been no authoritative recognition of the "no evidence rule" as part of the rules of natural justice. In *Kempinski Hotels* at 656 [65], Judith Prakash J said the following:

> As is well known, the concept of natural justice comprises two rules. The first is that the adjudicator must be disinterested and unbiased and the second is that the parties must be given adequate notice and opportunity to be heard (see *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR(R) 86 at [43] …

150 In *Soh Beng Tee* at 109 [43], the Court of Appeal, in its discussion of the hearing rule at 108-115 [42]-[58], cited Marks J in *Gas & Fuel Corporation* [1978] VR 365 (referred to at [84] above), where his Honour expressed the rules of natural justice as comprising the bias rule and the hearing rule.

151 The emphasis of the Court of Appeal in *Pacific Recreation* (see 509 [32] especially) was on the fairness of the hearing, not on the legitimacy of the foundation of the factual findings.

152 In *TMM Division Maritima* at [119]-[120], Chan Seng Onn J noted the primary judge's decision here and remarked that the "no evidence" rule had not yet been accepted in Singapore as part of the rules of natural justice, and referred to a decision of Judith Prakash J

that could be seen to be to the contrary: *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] SGHC 62; [2010] 3 SLR 1.

153 Secondly, in *CRW Joint Operation* VK Rajah JA, delivering the judgment of the Court at 317-318 [25]-[27], expressed the balance between finality and interference in a helpful way, emphasising that whilst courts should not interfere lightly in the arbitral process, due process (and fairness accordingly) was fundamental, and the Court should not hesitate to interfere if a ground under Art 34 were clearly established. Later in the reasons, the Court expressed the view at 342-343 [97] that if the existence of a ground under Art 34 were made out the exercise of discretion would be "virtually automatic". With respect, care needs to be taken when one is dealing with the rules of natural justice. As long as one recognises and emphasises that there is likely to be no breach of such rules unless real unfairness or real practical injustice be demonstrated, the expression of the matter thus will not mislead. There is sometimes, however, a tendency of some to speak of a technical or minor breach of the rules of natural justice: see for instance the primary judge here at J[30]. To the extent that such expression may be acceptable in some contexts, it will be important to recognise that for the discretion under Arts 34 and 36 to be exercised, real unfairness or real practical injustice will need to be demonstrated. Whilst the IAA does not use phraseology of "prejudice" as does the Singapore Act, such a notion inheres in the conceptions of fairness, unfairness, practical justice and practical injustice. Thus, the expression of view by the Court in *Soh Beng Tee* at 120 [65] that "only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied" can be seen to be concordant with a notion that real unfairness or real practical injustice must be demonstrated.

154 Thirdly, the notion of prejudice or unfairness does not involve re-running the arbitration and quantifying the causal effect of the breach of some rule. The task of the Court in assessing prejudice or unfairness or practical injustice is not to require proof of a different result: see generally the discussion in *LW Infrastructure* at 140-142 [50]-[54]. If a party has been denied a hearing on an issue, for instance, it is relevant to enquire whether, in a real and not fanciful way, that could reasonably have made a difference. It should be recalled that the proper framework of analysis for the IAA is the setting aside or non-recognition or enforcement of an international commercial arbitration. In that context, it is essential to demonstrate real unfairness or real practical injustice.

The disposition of these appeals

The asserted breach of the rules of natural justice

155 Grounds 4 to 7 were a disguised factual challenge to the conclusions of the arbitrators. The contents of the argument on appeal illustrate this. The written submissions simply annex a schedule and invite the Court to examine the record of the arbitration. The oral submissions did likewise.

156 The submissions were first directed to the suggestion that there was a higher impact than the 7.4% suggested by Mr Williams. The submissions criticised the "fact interpretation and reasoning functions" of the arbitrators and quarrelled with their interpretation of the contents of Mr Williams' report. The submissions challenged the weight and value of the evidence of Mr Francis about what he had been told by former customers. This evidence was said not to have "probative value" and placement of weight on it was a failure of "the tribunal's fact finding and fact interpretation", thus leading to "its reasoning failure". Arguments about the evidence sometimes identified some of its hearsay character, going to its weight. Such expressions and such analysis cannot demonstrate a breach of any rule of natural justice, nor even an error of law. They reflect complaints about findings of fact and no more.

157 Mr Kwong's evidence was also criticised as limited in its effect and overstated. It was said also to lack probative value. There are judgments and evaluative assessments of the weight of evidence that was directed to the subject matter in question. Again, the submission referred to the "failure of the tribunal's fact finding and fact interpretation function" leading to "its reasoning failure".

158 The same kinds of arguments were directed to 14% being a better starting point. The conclusion of the arbitrators was that the factors in A[233] were not sufficiently mentioned in Mr Williams' report was challenged. This was a debate about the proper evidential evaluation of Mr Williams' report. Once again, the arbitrators' evaluation of Mr Williams' report was said to constitute a failure of "fact interpretation and reasoning function". There were submissions about the weight given to admissions made by Mr Williams in cross-examination. The proposition drawn by the arbitrators from Mr Williams' admissions was said to be inconsistent with other evidence.

159 The criticism of the arbitrators concerning the need for an uplift from 14% was likewise concerned with the evaluation of the evidence. It was submitted that there was no "clear" evidence; it was submitted that the evidence did not warrant a conclusion of an uplift and that the "fact finding and interpretation functions" led to "reasoning failure".

160 The 22.5% finding was criticised at a number of levels. First, too much weight was said to have been given to an unimportant piece of evidence, being the perceived commercial importance to Castel of the non-competition clause. This was an argument about the weight of a commercial consideration in a context where the people who sought to rely on it, especially Mr Kwong, were cross-examined on the provision and on its importance.

161 It was submitted that 22.5% was "pulled from the air". In a case where the parties called expert evidence, the rejection of Mr Acton's evidence required the arbitrators, it was submitted, to determine the case on Mr Williams' evidence. Further, this was said to be reinforced by the lack of available material to permit the arbitrators to "do their best" on sufficient material. Further, it was submitted that there could be no reasonable anticipation by TCL that the arbitrators would approach the matter in this way – that it had been denied a hearing.

162 If the reference had been conducted in such a way that the central approach of the arbitrators did not reflect how the case was conducted and could be reasonably seen as a surprise, it might be open to conclude that the parties (and most particularly, of course, the losing party) had been denied the opportunity of a hearing.

163 That was plainly not the case here. In a contest such as this about the effect of wrongful conduct on a business, expert evidence was obviously relevant and of assistance. The fact that one expert was discounted as unhelpful did not drive the arbitrators to the necessary acceptance of the other. No commercial litigator would have assumed that unless the reference had been run in a way to demand that conclusion. It was not so run. Here there was full cross-examination of Mr Williams. There cannot have been the slightest doubt that his evidence was challenged and that the arbitrators were free to assess all the evidence and reach a result not precisely reflected by either expert. The arena of dispute was between 7.4% and 100%. The approach of Holmes JA in *Thurston v Todd* (1966) 84 WN (Pt 1) (NSW) at 246 (cited by the primary judge) is a sound reflection of that approach.

164 Further, it was plain that the arbitrators were entitled to take all of the evidence and make their own assessment of it. The primary judge referred to the relevant authorities at J[139]-[144]. The principal criticism of this approach was that the facts here required real speculation and a guess about quantification. Emphasis was placed by TCL on *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 and on *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275. The criticism of the primary judge was truly one of the evaluation of the evidence, not one of principle. At one level there is a tension between *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 57 ALR 167 and cases such as *Schindler*. As Pincus J said in *Schindler* 89 ALR at 319, the evidence brought by someone with an onus may be so inadequate in its totality, when the whole context is examined, that there can be said to be no rational foundation for any proper estimate. In other cases, the court is required to make its best estimate on the materials provided. The proper approach will, in any given case, be an evaluative one influenced by such considerations as the nature of the question, including its amenability to precise proof or assessment, the availability and control of evidence, and the onus of proof. Considerations such as the assessment of evidence according to the power of the party to adduce it will be important to such an evaluation: cf *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970; *Cullen v Welsbach Light Co* [1907] HCA 3; 4 CLR 990 at 1013-1014; *Hampton Court Ltd v Crooks* [1957] HCA 28; 97 CLR 367 at 371-372; *Parker v Paton* (1941) 41 SR (NSW) 237 at 243; *Re Alexander; Ex parte Ferguson* (1944) 45 SR (NSW) 64 at 67; *Vetter v Lake Macquarie City Council* [2001] HCA 12; 202 CLR 439 at 454 [36];

165 The primary judge's review of the evidence demonstrated that the arbitrators did not engage in guesswork or speculation. Further, the criticism of the arbitrators and of the primary judge's conclusion reduced to a contest about the evaluation of that evidence. This was particularly clear when it was obvious (and common ground) that Castel's lost sales were not capable of precise calculation and were not a subject peculiarly within Castel's power to prove from its own records or knowledge. The subject depended upon how third parties responded or might respond to conduct which was a breach of contract by TCL.

166 It is unnecessary to embark on any restatement or reconsideration of the proper approach to the assessment of damages in circumstances where precise evidence of loss cannot be exacted. No criticism was made on appeal of the approach of Brooking J in *JLW (Vic)* that, to a degree, guided the primary judge at J[142]-[144] in his statement of principle. It can be accepted that if the Court has before it a question about which the Court could

reasonably expect a party to bring evidence of some precision and no such evidence is brought, and no explanation is given, the Court may be entitled to say the burden of proof has not been discharged: *Ted Brown Quarries* 16 ALR at 37 (Gibbs J); or the Court might say that in the circumstances sufficient evidence has been brought to require the Court to do its best: *Ted Brown Quarries* at 26 (Barwick CJ). The difference will reflect (as it did in *Ted Brown Quarries*) differences of opinion from the evaluation of the evidence and the circumstances of the litigation. That was the task that the arbitrators undertook. TCL's complaint is about that evidential evaluation.

167 The evidence revealed that TCL received a scrupulously fair hearing in a hard fought commercial dispute. Its complaints are about the evaluation of factual material. No rule of natural justice was breached.

Residual aspects of the submissions of the appellant on the appeal

168 The above discussion deals in substance with the arguments put by the appellant. We should, however, finish with a response to one particular submission of the appellant.

169 The appellant argued that even so-called minor or technical breaches of the rules of natural justice would suffice for the setting aside or non-recognition or non-enforcement of an international commercial arbitration award, unless the Court could exclude any possibility of a different result being reached. This was said to flow from the lack of any reference to prejudice in the IAA and the unqualified statement of Parliament in effect that any breach of the rules of natural justice was contrary to Australian public policy. This should be rejected for the reasons that we have given. It confuses and misstates the relevant conception of natural justice as one divorced from unfairness or practical injustice, it disembodies the words of Parliament from their statutory context, and it would impute to Parliament an intention to interfere with arbitral awards in a manner that would undermine fatally the facilitation and encouragement of international commercial arbitration in Australia.

I certify that the preceding one
hundred and sixty-nine (169)
numbered paragraphs are a true copy
of the Reasons for Judgment herein
of the Honourable Chief Justice
Allsop and the Honourable Justices
Middleton and Foster.

Associate:

Dated: 16 July 2014