FEDERAL COURT OF AUSTRALIA

Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd

[2012] FCA 21

Citation:	Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd [2012] FCA 21
Parties:	**CASTEL ELECTRONICS PTY LTD ACN 074 561 087 v TCL AIR CONDITIONER (ZHONGSHAN) CO LTD**
File number(s):	VID 218 of 2011 VID 224 of 2011 VID 317 of 2011
Judge:	**MURPHY J**
Date of judgment:	23 January 2012
Catchwords:	**ARBITRATION** – International Arbitration - Jurisdiction of Federal Court to enforce non-foreign Model Law awards under the International Arbitration Act 1974 (Cth) – Effect of s 39B(1A)(c) of the Judiciary Act 1903 (Cth) – Meaning of "matter" and "arising under" **STATUTORY INTERPRETATION** – Principles on retrospectivity
Legislation:	*Commercial Arbitration Act 2011* (Vic) *Commercial Arbitration Act 1984* (Vic) *Federal Court of Australia Act 1976* (Cth) *International Arbitration Act 1974* (Cth) *Judiciary Act 1903* (Cth)
Cases cited:	*Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 *Felton v Mulligan* (1971) 124 CLR 367 *Fencott v Muller* (1983) 152 CLR 570 *Hooper v Kirella* (1999 96 FCR 1 *Maxwell v Murphy* (1957) 96 CLR 261 *Minister for Home and Territories v Smith* (1924) 35 CLR 120 *National Union of Workers v Davids Distribution Pty Ltd* (1999) 91 FCR 513 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 *Transport Workers Union of Australia v Lee* (1998) 84 FCR 60

	Trustees Executors and Agency Co Ltd v Gleeson (1959) 102 CLR 334
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Category:	Catchwords
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IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 218 of 2011**

BETWEEN: **CASTEL ELECTRONICS PTY LTD ACN 074 561 087**
Applicant

AND: **TCL AIR CONDITIONER (ZHONGSHAN) CO LTD**
Respondent

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 224 of 2011**
VID 317 of 2011

BETWEEN: **TCL AIR CONDITIONER (ZHONGSHAN) CO LTD**
Applicant

AND: **CASTEL ELECTRONICS PTY LTD ACN 074 561 087**
Respondent

JUDGE: **MURPHY J**
DATE: **23 JANUARY 2012**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

INTRODUCTION

1 The dispute in these proceedings arises out of a distribution agreement between Castel Electronics Pty Ltd, an electrical goods distribution company registered in Australia, and TCL Air Conditioner (Zhongshan) Co Ltd, an air conditioner manufacturing company registered in the People's Republic of China. Under a General Distributorship Agreement ("the distribution agreement") made in December 2003 and later extended and varied, TCL granted Castel the exclusive right to sell TCL air conditioners in Australia. Castel claimed that TCL breached the agreement by, amongst other things, manufacturing and supplying air conditioners to other Australian distributors which were not branded "TCL", to be sold in

competition to those distributed by Castel. It also claimed that TCL supplied faulty and defective air conditioners to it.

2 The distribution agreement contained a clause referring disputes to arbitration in Australia. Castel commenced the arbitration process in July 2008. TCL denied the claims made and made a counter-claim. The arbitral tribunal of Dr G Griffith AO QC, the Hon A Goldberg AO QC and Mr P Riordan SC conducted a 10 day hearing in Melbourne in September 2010. On 23 December 2010 the tribunal made an award which in total required TCL to pay to Castel $2,874,870 net, and on 27 January 2011 the tribunal made a costs award of $732,500 against TCL. TCL has failed to pay the awards.

3 The proceedings before the Court are:

(a) An application by Castel in VID 218 of 2011 for enforcement of the arbitral awards in reliance on the *International Arbitration Act 1974* (Cth) ("the IA Act"). This application is opposed by TCL on grounds that the application is defective and that the Court has no jurisdiction to enforce the awards. If jurisdiction is found to exist, TCL contends that the awards should not be enforced as to do so would be contrary to public policy because of a breach of the rules of natural justice in the arbitral hearing; and

(b) Applications by TCL in VID 224 and 317 of 2011 to set aside the arbitral awards in reliance on the IA Act as contrary to public policy on the same grounds as in its opposition to their enforcement.

4 These reasons relate only to the question of the jurisdiction of the Court to enforce the awards. I have determined that the Court has jurisdiction to do so. I will set a date for hearing of the applications to set the awards aside, together with the balance of the application to enforce them.

THE INTERNATIONAL ARBITRATION ACT AND MODEL LAW

Short legislative history

5 The IA Act commenced as the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth) and gave effect to the 1958 New York Convention on the Recognition and Enforcement of International Arbitral Awards. As a result Australian courts became obliged to recognise and enforce foreign arbitration agreements and foreign arbitral awards.

6 In 1989 the IA Act was given its current name by the *International Arbitration Amendment Act 1989* (Cth) ("the 1989 amendment"). More importantly, this amendment gave force of law in Australia to the *Model Law on International Commercial Arbitration* ("the Model Law") adopted by the *United Nations Commission on International Trade Law* ("UNCITRAL") by enacting it in s 16 of the Act and incorporating it as Schedule 2. The adoption of the Model Law provisions into the national law of participating countries is intended to unify and harmonise the law between nations in this field. In arbitrations conducted in one of the many recognised Model Law jurisdictions business people from around the world are therefore less likely to be surprised by differences in local arbitration law.

7 In 2009 in the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth) ("the 2009 amendment") the Federal Court was expressly given concurrent jurisdiction with State and Territory courts under specified provisions in Parts III and IV of the IA Act.

8 In July 2010 the *International Arbitration Amendment Act 2010* (Cth) was enacted and came into force ("the 2010 amendment"). This adopted some changes made by UNCITRAL to the Model Law in 2006. It also provides that the IA Act covered the field so that no law of a State or Territory applied to an arbitration to which the Model Law applied.

Application of the IA Act and Model Law to this arbitration

9 Section 16(1) of the IA Act provides that, subject to Part III of the Act, the Model Law has the force of law in Australia.

10 Article 1 of the Model Law provides that it applies to "international commercial arbitrations" as defined in that article. The arbitration the subject of these proceedings was an "international arbitration" as defined in Art 1, being between parties that have their places of business in different countries - an Australian resident and a Chinese resident. The arbitration also concerned "commercial" subject matter as defined.

11 That the IA Act including the Model Law applies to this arbitration and the resultant awards is common ground between the parties. Indeed, Castel relies on the Act and Model Law in seeking to enforce the awards, as does TCL in applying to set the awards aside.

The distinction between a "foreign award" and a "non-foreign award"

12 An agreement to arbitrate between international parties can, and often does, specify the country in which the arbitration is to take place. In this matter the distribution agreement required that any arbitration be conducted in Australia, but it is still an international commercial arbitration governed by the IA Act.

13 The IA Act describes an arbitral award made in a Model Law arbitration conducted overseas as a "foreign award". "Foreign award" is defined in s 39(3) of the IA Act, by reference back to s 3(1), as:

> an arbitral award **made**, in pursuance of an arbitration agreement, **in a country other than Australia**, being an arbitral award in relation to which the Convention applies. (Emphasis added)

The IA Act employs this terminology to designate foreign awards as a subset of awards in international Model Law arbitrations. It is common ground that, while the arbitral awards the subject of these proceedings are awards to which the Model Law applies, having been made in Australia they are not foreign awards.

14 TCL sometimes describes an arbitral award made in a Model Law arbitration in Australia as a "domestic award". I prefer the description "non-foreign award" as I consider that the description "domestic award" is apt to confuse such an award with an arbitral award with no international dimension. An award made in Australia between international parties under the Model Law is not "domestic" in the same way as an award made in an arbitration between Australian parties governed by the uniform State or Territory Commercial Arbitration Acts.

The meaning of "arbitral award" in the IA Act and Model Law

15 The ordinary meaning of "arbitral award" in the IA Act and Model Law is clear, although the term is not defined. It means no more than an award made by an arbitral tribunal in an international commercial arbitration, and it therefore includes both foreign and non-foreign awards. Foreign awards and non-foreign awards are each types of arbitral award covered by the IA Act and Model Law. There is nothing in the Model Law and the IA Act which indicates that the meaning of "arbitral award" does not include both types of award. That the meaning of "arbitral award" includes both foreign and non-foreign awards is apparent from, amongst other provisions, Arts 35 and 36 of the Model Law and ss 2D, 3(1), 23D(6) and 39 of the Act.

Court functions under the Model Law

16 Most of the provisions of the Model Law relate to the rules for the commencement and conduct of international commercial arbitrations, delineating the rights and obligations of the parties under the arbitral law and the powers of the arbitral tribunal. The provisions of the Model Law do not supply the substantive law applicable in arbitrations. The Model Law does though contain provisions that provide a role for the courts of the enacting state to perform limited supervisory, interim and enforcement functions in relation to arbitrations and arbitral awards. Article 5 of the Model Law expressly prohibits court intervention outside of these express functions.

17 The provisions of the Model Law that set out the role of courts of the enacting state include the following:

(a) Chapter III contains provisions for courts to intervene in the constitution of the arbitral tribunal in limited circumstances (Arts 11(3), (4) and (5), 13(3) and 14(1));

(b) Chapter IV allows for parties to seek review by a court as to whether the tribunal has jurisdiction to conduct the arbitration (Art 16(3));

(c) Chapter IV A contains provisions for courts to recognise and enforce interim measures ordered by an arbitral tribunal (Art 17H), grounds on which the court may refuse to do so (Art 17I), and provision for courts to directly order interim measures with respect to an arbitration (Art 17J);

(d) Chapter V concerns the conduct of arbitral proceedings, and gives courts discretionary power to provide assistance to the tribunal in the taking of evidence (Art 27);

(e) Chapter VII gives jurisdiction to courts to set aside an arbitral award on limited grounds (Art 34);

(f) Chapter VIII deals with the recognition and enforcement of arbitral awards (Art 35) and provides limited grounds upon which the court can refuse to enforce an award (Art 36).

THE JURISDICTION OF THE FEDERAL COURT UNDER THE IA ACT

18 The Model Law was drafted by UNCITRAL as a model form of legislation capable of being enacted into the law of any participating country. It could not, and does not, specify

which court or courts in each participating country can exercise the functions required by it, or the court procedures for enforcement in each such country. These are matters to be dealt with in the legislation of the enacting country.

The specific vesting of jurisdiction in the Federal Court and other courts

19 The IA Act contains various provisions specifically vesting jurisdiction in the Federal Court, and in State and Territory courts, to perform court functions relating to the Model Law. These are:

(a) Section 18(3) in Part III of the Act, relating to the court functions referred to in Art 6 of the Model Law, namely:

(i) Article 13(3) – a challenge to an arbitrator;

(ii) Article 14 - termination of the mandate of an arbitrator;

(iii) Article 16(3) - ruling on the jurisdiction of an arbitral tribunal; and

(iv) Article 34(2) - setting aside an arbitral award.

(b) Section 22A in Part III of the Act, relating to the court functions specified in ss 23, 23A, 23F and 23G, namely:

(i) Section 23 – issuing a subpoena to attend or produce documents to an arbitral tribunal;

(ii) Section 23A -making an order for persons to attend before the court for examination or to produce documents;

(iii) Section 23F -making an order prohibiting a party from disclosing confidential information in relation to arbitral proceedings; and

(iv) Section 23G -making an order allowing a party to disclose confidential information in relation to arbitral proceedings.

20 Importantly, subs 8(2) and (3) in Part II of the Act relating to recognition and enforcement of foreign awards, specifically vest jurisdiction in the Federal Court and in State and Territory courts to enforce such awards.

Articles 34, 35 and 36 of the Model Law and s 39 of the IA Act

21 Article 34 provides for setting aside an arbitral award. It provides in part:

> (1) Recourse to a court against an arbitral award may be made only by an application or 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:
> …
> [Here the article sets out various matters including the incapacity of a party, invalidity of the arbitration agreement, insufficiency of notice of appointment of an arbitrator or of an arbitration, the inability of a party to otherwise present its case, that the award contains decisions on matters beyond the scope of the arbitration, and that the composition of the tribunal or the arbitral procedure was not in accordance with the agreement]; or
>
> (b) The court finds that:
> …
> (ii) the award is in conflict with the public policy of this State.
> …

As I set out at [19], the Federal Court and State and Territory courts are specifically vested with jurisdiction to set aside awards under Art 34 by s 18(3) of the Act.

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

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

23 Article 36 provides:

> (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:
> …
> [Here the article sets out the same criteria as in Art 34(2)(a) together with the additional criteria that the award has not yet become binding 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]:
>
> (b) if the court finds that:
> …
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

24 TCL argues that Art 35 does not relate to enforcement of non-foreign awards, that is awards made in a Model Law arbitration in Australia. I do not accept this.

25 Articles 35 and 36 were drafted by UNCITRAL so as to relate to the enforcement of both foreign and non-foreign awards. This is clear from the words "irrespective of the country in which it was made" in each article. It is also plain from Art 1(2) which provides that Arts 35 and 36 apply to both types of arbitration. Article 1(2) states:

> The provisions of this Law, except articles 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

26 This analysis of Arts 35 and 36 is supported by the learned author Dr Peter Binder in the text *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions,* third edition, London 2010 at para 1-027. The author explains this by reference to the underlying importance to the Model Law's objects of consistency in recognition and enforcement of awards made in an international commercial arbitration, wherever it was actually held.

27 UNCITRAL documents also make clear that the drafters intended a common approach to the enforcement of foreign and non-foreign awards. The Model Law seeks to enable enforcement to be sought by the successful party in whichever country that party considers appropriate. The *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006,* Vienna, 2008, para 50 ("*Explanatory Note*") provides:

> The eighth and last chapter of the Model Law deals with the recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should closely follow the New York Convention.

28 Section 17 of the IA Act provides that UNCITRAL documents may be used for the purposes of interpreting the Model Law. TCL complains that the *Explanatory Note* is a note prepared for information purposes by the UNCITRAL Secretariat rather than an official commentary, and therefore not a UNCITRAL document within the meaning of s 17. I am inclined to the view that the *Explanatory Note* is an official UNCITRAL document although it is unnecessary for me to resolve this question. This is so because its contents are confirmed by another UNICTRAL document which is undoubtedly official: see A/CN. 9/264, Report of the Secretary-General, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration,* March 25, 1985 ("*Analytical Commentary*"). It provides at Art 35 para 3 as follows:

> To draw the line between such "international" awards and "non-international", i.e. truly domestic awards (instead of distinguishing on territorial grounds between foreign and domestic awards), would further the policy of reducing the relevance of the place of arbitration and thereby widen the choice and enhance the vitality of international commercial arbitration. This idea of uniform treatment of all international awards was the major decisive reason which any State may wish to consider when assessing the acceptability of this chapter of the Model Law.

29 Dr Binder also deals with this issue in his text and states at para 8-007 that:

> The first paragraph of art.35 is more or less the key provision as regards the recognition and enforcement of arbitral awards in the Model Law. Not only does it equate all kinds of arbitral awards, but it also obliges the competent court to recognise and enforce a valid arbitral award. By adopting this paragraph the state expresses its unlimited support for the enforcement of awards rendered locally and abroad, thereby equating them with "ordinary" court decisions in that country.

30 However, different participating countries have adopted the Model Law to differing extents: see *Model Law Comparison Charts* paras 12-001 and 12-002 in Dr Binder's text. In Australia, the operation of Art 35 of the Model Law is excluded from applying to the enforcement of foreign awards. In the 1989 amendment - when the Model Law was given effect in Australian law - s 20 of the IA Act was also introduced. Section 20 provides that when Part II of the Act - titled Enforcement of Foreign Awards - applies to an award, Arts 35 and 36 do not.

31 Importantly, s 20 says nothing about non-foreign awards, and does not provide that Art 35 does not apply to enforcement of non-foreign awards.

32 Other provisions of the IA Act, particularly s 39, also provide for a court role in enforcement of non-foreign awards. Section 39 provides in part:

> 39 Matters to which court must have regard
>
> (1) This section applies where:
> (a) a court is considering:
> (i) exercising a power under section 8 to enforce a foreign award; or
> ….
> (iii) exercising a power under Article 35 of the Model Law, as in force under subsection 16(1) of this Act, to recognise or enforce an arbitral award;
> ….

33 Subsection 39(1)(a)(i) refers to a court exercising a power to enforce a foreign award under s 8 of the IA Act. Subsection 39(1)(a)(iii) refers to a court exercising a power to enforce an arbitral award under Art 35 of the Model Law. Given subs (1)(a)(i), this subsection can only be a reference to a court exercising a power to enforce a non-foreign

award. Otherwise the subsection is otiose. Further, given that Art 35 does not apply to enforcement of non-foreign awards because of s 20, subs (1)(a)(iii) only makes sense if it is a reference to enforcement of non-foreign awards.

No specific vesting of jurisdiction in relation to enforcement of non-foreign awards

34 While subs 8(2) and (3) the IA Act specifically vest jurisdiction in the Federal Court and the State and Territory courts to enforce foreign awards, no provision of the Act specifically vests jurisdiction in any court to enforce a non-foreign award. What is a "competent court" to enforce a non-foreign award under Arts 35 and 36 is not specified. The failure of the Act to do so is central to the dispute in this proceeding.

35 Castel contends that the Court should construe Art 35 and s 39(1)(a)(iii) as indicating that the Federal Court is a "competent court" for the enforcement of non-foreign awards. However, while it is clear that some court must be "competent" to enforce non-foreign awards - as if not s 39(1)(a)(iii) of the Act and Arts 35 and 36 of the Model Law are redundant - the Act does not expressly provide that the Federal Court has such jurisdiction.

36 TCL relies on the absence of specification of the Federal Court as a "competent court" to enforce non-foreign Model Law awards, in support of its contention that the Court has no such jurisdiction. It says that the Supreme Court of Victoria has inherent jurisdiction to enforce such awards made in Australia, and also jurisdiction under the uniform *Commercial Arbitration Act 1984 (*Vic*)*. It contends that the Federal Court is not specified as a "competent court" because the IA Act contemplates that State and Territory courts have this jurisdiction, and because the competence of courts for enforcement of awards is normally linked to the residence of the debtor (China not Australia in this case) or the location of property or assets (not Australia in this case).

37 In opposition to TCL's argument, Castel contends that s 21 of the IA Act means that the Model Law covers the field. In reliance on this provision Castel submits that the jurisdiction of any court to perform the various court roles set out in the Act and the Model Law, is entirely dependent on a conferral of federal jurisdiction by the Act. It says that the Supreme Court of Victoria has no inherent jurisdiction to enforce such awards, and no jurisdiction under the *Commercial Arbitration Act 1984* (Vic) . Castel argues that if, as TCL contends, the Federal Court does not have jurisdiction under the IA Act to enforce a non-foreign award made under it, then neither does any State and Territory court. It contends that it is unlikely that Parliament intended that no Australian court could enforce a non-foreign

award made in a Model Law arbitration. TCL does not accept that the IA Act covers the field in relation to enforcement.

38 However, whether or not the State and Territory courts have jurisdiction to enforce non-foreign awards made in Australia under the Model Law, and whether any such jurisdiction is inherent or is derived from the *Commercial Arbitration Acts,* cannot be determinative of whether the Federal Court has jurisdiction to do so. It is unnecessary that I make any finding as to the jurisdiction of the State and Territory courts, and I do not do so.

General conferral of federal jurisdiction under the *Judiciary Act 1903* (Cth)

39 By s 39B(1A)(c) of the Judiciary Act, enacted in 1997, the Federal Court was conferred with jurisdiction in any matter arising under a federal law. The section provides:

> The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any **matter**:
> …
> (c) **arising under any laws made by the Parliament**, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.
> (Emphasis added)

This section operates as a general conferral of a broad supplementary jurisdiction on the Federal Court unless expressly or impliedly proscribed: *Hooper v Kirella* (1999) 96 FCR 1, at [69]; *Transport Workers Union of Australia v Lee* (1998) 84 FCR 60 at [67]; *National Union of Workers v Davids Distribution Pty Ltd* (1999) 91 FCR 513 at [21]-[22].

40 The explanatory memorandum to the *Law and Justice Legislation Amendment Bill 1997* (Cth) explained that:

> 118. The additional jurisdiction of the Federal Court is concurrent with the federal jurisdiction of the State and Territory courts in civil matters. The jurisdiction gives the Federal Court a greater role in the administration of federal laws, **by ensuring the Court is able to deal with all matters that are of an essentially federal nature**.
> (Emphasis added)

41 In s 8 of the IA Act the Federal Court has been specifically vested with jurisdiction to enforce foreign awards. The question is whether s 39B(1A)(c) of the Judiciary Act confers jurisdiction on this Court such that it is a "competent court" to enforce non-foreign awards made under the Model Law, and in particular whether there is a matter arising under a law of the federal Parliament.

Is there a "matter" in this case?

42 It is established that the word "matter" in s 39B(1A)(c) of the Judiciary Act adopts the meaning and content given it in ss 75, 76 and 77 of the Constitution. "Matter" in this context means the underlying justiciable controversy or dispute between the parties, made up of the substratum of facts, claims and defences representing or amounting to the dispute, of which the federal issue forms part. It means more than the legal proceeding between the parties, and is identifiable independently of such proceedings: *Fencott v Muller* (1983) 152 CLR 570, 603-608 ("*Fencott*"); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 583-88 ("*Wakim*"). What is a single justiciable controversy depends on what the parties have done, the relationships between them and the laws which attach rights or liabilities to their conduct and relationships: *Fencott* at 608; *Wakim* at 585-6.

43 TCL contends that there is no "matter". It says that there cannot be a "matter" within the meaning of s 39B(1A)(c) unless there is some immediate right, duty or liability to be established by a determination of the Court. It argues that the subject matter of this dispute was determined by the arbitral tribunal in making the awards made. In TCL's submission, the issue as to whether the award should be enforced by the Court does not involve a dispute between the parties for determination by the Court because if the award is not set aside it is binding. It says that unless the recognition of the award is challenged when enforcement is sought, the binding award is enforceable. It says that as there is no "matter" the question of whether it "arises under" a federal law does not fall for consideration.

44 I do not accept the contention that the underlying controversy between the parties does not require a determination by the Court of their rights, duties and liabilities. The dispute relates to whether the arbitral awards can be enforced in the Court in reliance on Art 35 of the Model Law, whether enforcement should be refused or allowed under Art 36 on public policy grounds, and whether the awards should be set aside or allowed under Art 34 on similar public policy grounds. It involves whether Castel has the right to have the awards treated as orders of the Court and enforced, whether TCL is liable to meet such awards, and whether TCL is entitled to set the awards aside.

45 TCL also says that the applications to set aside the awards and the application for enforcement are not part of the same controversy. It argues that the setting aside applications are to be determined before enforcement under Arts 35 and 36 arises, and that the application for enforcement was premature because it was made before expiry of the time under Art 34

for TCL to make an application to set aside the award. I do not accept this contention. The existence of a federal "matter" is not defined by the proceedings. It exists before the proceedings are instituted and is defined by what the parties have done, their relationships and the applicable laws.

46 In my view, Castel's claim of entitlement to enforce the awards has a common substratum of claims and defences with both TCL's defence to that claim and TCL's application to set aside the awards. In particular, Castel's application to enforce the awards is met by TCL's defence that the arbitration breached the rules of natural justice and to enforce the awards would accordingly be contrary to public policy. Castel says that the arbitration did not breach the rules of natural justice and the awards are not contrary to public policy. TCL's claim of entitlement to set aside the awards relies on the same public policy grounds, which Castel meets by repeating its contention that the awards are not contrary to public policy.

47 The factual substratum is also common. TCL has filed four lever arch binders of material comprising the evidence before the arbitral tribunal. It relies on this evidence to prove that the arbitral hearing breached the rules of natural justice and that the awards are therefore contrary to public policy. It relies on this evidence both in opposing enforcement of the awards under Art 35 and in seeking that they be set aside under Art 34. Castel relies on the same evidence for its contention that the rules of natural justice were not breached. The Court will be required to undertake a detailed examination of the same evidence in determining both the enforcement and setting aside applications.

48 One touchstone as to whether two proceedings in fact relate to a single justiciable controversy is whether it is possible that if the proceedings were tried in different courts there could be conflicting findings made on the issues common to them: *Wakim* per Gummow and Hayne at [141]. Applying that test to this matter, a court hearing Castel's application under Art 35 to enforce the awards may reject TCL's argument under Art 36 that it was not accorded natural justice in the arbitration and that enforcement would therefore be contrary to public policy. Apart from any issue of estoppel, a different court hearing TCL's application under Art 34 to set aside the awards because the rules of natural justice were breached, may reach a different finding and determine that the awards should be set aside as contrary to public policy.

49 I consider it clear that there is a single justiciable controversy in these proceedings, which is a "matter" within the meaning of s 39B(1A)(c)of the *Judiciary Act.*

Does the matter "arise under" a federal law?

50 In order to attract jurisdiction under s 39B(1A)(c) the "matter" must be one "arising under" a federal law. This requires that there be a sufficient nexus between the "matter" and the federal law under which it is said to arise. The test for whether a matter arises under a federal law is broad. In *Felton v Mulligan* (1971) 124 CLR 367 at 416, Gibbs J (as he then was) held that:

> …a matter arises under a law made by the Parliament when a right, title, privilege or immunity is claimed under that law. A right, title, privilege or immunity may be claimed under a law, either because the law is the source of the right, title, privilege or immunity or because the right, title, privilege or immunity can only be enforced by virtue of the law.

Similarly in *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 262-263, [32] Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ held:

> If a party on either side of the record relies upon a right, immunity or defence derived from a federal law, there is a matter arising under s 76(ii) of the *Constitution.*

51 TCL argues that the IA Act and Model Law does not deal with enforcement of non-foreign awards, and that the jurisdiction of the Court in relation to enforcement does not relate to Arts 35 and 36. It says that although the Model Law deals with both foreign and non-foreign awards it does not identify or prescribe the "competent court" under Art 35. It contends that the Court is not required to determine the parties' rights, duties or liabilities. For the reasons I have already set out, in my view the Act and Model Law does deal with enforcement of non-foreign awards, and the Court is required to determine the parties' rights and liabilities.

52 It is also clear that the parties rely upon rights and defences derived from federal law. Castel claims rights derived from Art 35 of the Model Law to enforce the awards. It opposes TCL's contention that the awards should not be enforced in reliance on Art 36, and it defends TCL's claim to set aside the awards aside in reliance on Art 34. TCL defends the application to enforce the awards in reliance on Art 36, and seeks that the awards be set aside in reliance on Art 34. These articles have force as federal law by virtue of s 16 of the Act.

53 It is also important to note that it is uncontroversial that this Court has been specifically vested with jurisdiction by s 18(3) of the Act to determine TCL's application to set aside the awards. That application relates to part of the underlying justiciable controversy.

It is established that once vested with federal jurisdiction to determine part of a controversy or matter, the Court can determine the whole matter: *Fencott at* 603-604 and 606-610; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 292-294.

54 I find that this Court has jurisdiction to enforce both non-foreign and foreign awards made under the IA Act and Model law.

Other issues raised regarding operation of s 39B(1A)(c)

55 TCL contends that a number of indicators illustrate that s 39B(1A)(c) did not confer jurisdiction to enforce non-foreign awards on the Federal Court. These include the 2009 and 2010 amendments to the IA Act. In the 2009 amendment, jurisdiction was specifically vested in the Federal Court to enforce foreign awards (s 8(3)), and to set aside both foreign and non-foreign awards (s 18). In the 2010 amendment the objects of the Act were amended to include the facilitation of enforcement of arbitral awards, and subs 8(2) and (3) were amended. TCL argues that the legislature must be taken to have been aware of s 39B(1A)(c) when it enacted the 2009 and 2010 amendments. It says that the specific vesting of jurisdiction in the Federal Court in relation to enforcement of foreign awards was unnecessary if there had already been a general conferral of federal jurisdiction on the Court by s 39B(1A)(c). However, while such specific vesting of jurisdiction may have been unnecessary, it does not operate to proscribe a general conferral of jurisdiction on this Court by s 39B(1A)(c).

56 TCL also relies on the amendment to the Federal Court Rules on 1 January 2011 which provided only for the enforcement of foreign awards in Order 68 Rule 4, the issue of new Federal Court Rules in 1 August 2011 which provide only for the enforcement of foreign awards in Division 28.5, and the issue of Practice Note ARB 1 *Proceedings under the International Arbitration Act 1974* on 1 August 2011 which provides only for enforcement of foreign awards. TCL argues that the judges of this Court must have been aware of s 39B(1A)(c) when the Rules and the Practice Note were issued. It says that if the Federal Court had received a general conferral of federal jurisdiction which allowed for the enforcement of non-foreign awards by the Court, the Rules and the Practice Note would have reflected that jurisdiction. However, the Rules and Practice Notes –relating as they do to the practice and procedures of the Court - cannot be determinative as to whether or not jurisdiction has been conferred on this Court, and cannot limit its jurisdiction. Insofar as there may be deficiencies in the Federal Court Rules and the Practice Note these can be amended by the judges of the Court.

57 These issues were of concern to me in reaching the decision that I have as to the jurisdiction of the Court. However, in the finish none of them are of great significance in determining whether by s 39B(1A)(c) Parliament has conferred this Court with the relevant jurisdiction. That provision is intended to provide the Federal Court with a general federal jurisdiction. I consider that in this case it operates to confer jurisdiction to enforce non-foreign awards made under the Model Law.

Section 54 of the Federal Court Act

58 As the Federal Court has jurisdiction to enforce both foreign and non-foreign awards made under the Act, s 54(1) of the *Federal Court of Australia Act 1976* (Cth) has effect in this proceeding. It provides:

> The Court may, upon application by a party to an award made in an arbitration (whether carried out under an order made under section 53A or otherwise) in relation to a matter in which the Court has original jurisdiction, make an order in the terms of the award.

The relevant procedure for enforcement of an award is therefore straight forward, once the requirements of Arts 34, 35 and 36 of the Model Law are met.

OTHER CONTENTIONS

59 The parties made various other contentions. My decision that the Federal Court has jurisdiction in this matter does not depend on my conclusions regarding these contentions, but for completeness I will now deal with them.

Section 35(4) of the IA Act and Order 68 r 6 of the Federal Court Rules

60 In Castel's application to enforce the awards it initially purported to rely on s 35(4) of the IA Act, and Order 68 r 6 of the Federal Court Rules. TCL correctly contends that s 35(4) is not applicable because it relates only to awards made under the Investment Convention, and Order 68 r 6 of the Rules relates only to enforcement of such awards. TCL argues that the application is therefore defective and irregular and that the Court has no jurisdiction to enforce the awards. Castel concedes that its previous reliance on these provisions was erroneous. In my view the defects in Castel's application are of no continuing significance because it later changed its approach.

Whether the IA Act covers the field

61 I make no finding as to the jurisdiction of the State and Territory courts in relation to enforcement of non-foreign awards made under the Model Law. My finding of jurisdiction in

the Federal Court is not dependent on whether or not the State and Territory courts have such jurisdiction. However, the submissions dealt at length with whether or not the IA Act covers the field and for the sake of completeness I record my views in that regard.

62 Castel contends that s 21 of the Act, introduced in the 2010 amendment, means that the Model Law covers the field. It provides:

> If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.

63 TCL argues that the Model Law does not cover the field. It relies on s 30 of the IA Act and the former s 21. Both provisions are in Part III and both were introduced in the 1989 amendment. The former s 21 stated:

> If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.

64 This section was on foot in December 2003 when the distribution agreement between Castel and TCL was entered into. It enabled the parties, if they so chose, to "opt out" of the operation of the Model Law by agreement and to use other rules to regulate any settlement or arbitration. They could have agreed to exclude the provisions of the Model Law, including those concerned with setting aside or enforcement of awards. However, it is common ground that the parties did not opt out of the Model Law, and that the Model Law applies to the arbitration.

65 TCL argues that there is no clear indication in the 2010 amendment or the extrinsic history that the current s 21 operates in relation to arbitration agreements entered prior to its enactment. It relies on the general presumption in Australian law against retrospectivity of legislation, subject to clear contrary intention. It cites in support the learned authors Nottage and Garnett, albeit noting the hesitation with which the authors offer their support for this view: L Nottage and R Garnett, *International Arbitration in Australia*, The Federation Press, Sydney 2010, pp 27 and 59-60. While it is unnecessary to me to reach a final view on this issue, I am not inclined to accept TCL's contentions for the reasons I now set out.

66 The common law presumption against retrospectivity was set out by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 270:

> Perhaps there could be no more practical summary of the principle…than the following, - "unless the language used plainly manifest in express terms or by clear implication a contrary intention – (a) A statute divesting vested rights is to be construed as prospective. (b) A statute, merely procedural, is to be construed as retrospective. (c) A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.

67 The Model Law sets out rules for the commencement and conduct of international commercial arbitrations and provides limited supervisory, interim and enforcement functions for the courts. It does not set out the substantive law to be applied. The introduction of the current s 21 did not change the substantive law to be applied to the facts so as to determine the rights and liabilities of parties to a Model Law arbitration. By way of example, under the distribution agreement the substantive contract law of Victoria was chosen by the parties, and this substantive law applies whether the former or the current s 21 applies to the arbitration. Section 21 relates to the capacity to opt in or opt out of the Model Law and is best described as a procedural rather than substantive provision.

68 TCL observes that Article 28 of the Model Law contemplates party choice as to the substantive law that is to be applied to the particular facts of the dispute. It also notes that s 21 concerns the arbitral law - the law governing the conduct of the arbitral proceedings. TCL's observation of this dichotomy also points up the procedural nature of s 21.

69 Finally, it is difficult to see how any of TCL's vested rights could be adversely affected by the amendment to it in 2010. TCL does not contend that no Court has jurisdiction to enforce the non-foreign awards in this matter - only that the Federal Court does not. It contends that the Supreme Court of Victoria has jurisdiction.

70 In *Minister for Home and Territories v Smith* (1924) 35 CLR 120 at 128-129 a statutory amendment vesting jurisdiction in the High Court to enforce certain arbitral awards was held to be procedural in nature, and therefore retrospective in its operation. The amendment was held not to alter any rights, but merely to invest the High Court with original jurisdiction to compel their observance.

71 Dealing as it does with arbitral law, the current s 21 should be construed as procedural and therefore retrospective unless the Act indicates a contrary intention by express terms or by clear implication. I consider that the available indications point to a Parliamentary intention that the current s 21 be given immediate effect upon enactment.

72 TCL relies on s 30 of the IA Act in arguing that an intention that s 21 have a prospective operation is found in the Act. Section 30, enacted by the 1989 amendments, provides:

> This Part does not apply in relation to an international commercial arbitration between parties to an arbitration agreement that was concluded before the commencement of this Part unless the parties have (whether in the agreement or in any other document in writing) otherwise agreed.

73 TCL submits that s 30 contemplates that the 2010 amendment to s 21 be treated as its "commencement" and therefore is expressly intended to operate prospectively. However, if TCL's argument is accepted, the effect of s 30 is that every time a section within Part III is amended, that amended section only applies to arbitration agreements entered after that date. The Part commenced in 1989 when the Model Law was introduced into Australian law. In my view the purpose of s 30 was to ensure that arbitration agreements that had been entered into before the Model Law commenced to operate were not caught by it. If Parliament had intended that the saving provision in Part III effectively restarted each time a section within the Part was amended, it would have said so expressly. It did not. I consider that the "commencement of this Part" referred to in s 30 is intended to mean the commencement of Part III as then enacted by the 1989 Act: see *Trustees Executors and Agency Co Ltd v Gleeson* (1959) 102 CLR 334.

74 Further, to read s 30 as requiring that each time a section within Part III is amended the amended section only applies to arbitration agreements entered into after that date, gives s 30 a far reaching and unexpressed effect. Sections within the Part were amended in the 2009 amendment and the 2010 amendment. In 2010, amendments were made to the Part either by introduction of new provisions or substitution of existing provisions. The amended provisions were ss 15(1), 16(2), 18, 18A, 18B 18C, 19, 21, 22, 23, 23A to 23K, 25(1), 26 to 28, 35(2) and (4). Parliament gave no indication that these amendments were only to operate on arbitration agreements entered after the date of amendment. Indeed, if TCL's reading of s 30 is correct, individual subsections such as 15(1) or 16(2) would commence in 2010 while other subsections of ss 15 and 16 would have commenced on other dates. Such a result would make it very difficult for people affected by the IA Act and Model Law to understand the applicability of its provisions. Parliament said nothing to indicate that it intended this strange result.

75 Both the explanatory memorandum and the Second Reading Speech for the 2010 amendment indicate that, in amending s 21, Parliament was responding to an immediate and significant difficulty which required prompt rectification, rather than be addressed progressively over ensuing years as arbitration agreements were entered into in the future.

76 The explanatory memorandum states:

> Application of the Act and the Model Law
> …
> [Former] section 21 of the Act allows the parties to an arbitration agreement to resolve their dispute under an arbitral law other than the Model Law (as given the force of law by the Act)…This creates significant legal difficulties and confusion concerning the interaction of the different laws….
> …
> 110. The operation of [former] section 21 causes considerable practical and interpretive problems. Firstly, section 21 allows the parties to 'opt out' of using the Model Law but not the Act...Secondly, it is not necessary for the parties to nominate an alternative law under which their dispute is to be resolved. Unless the parties nominate another law under which the arbitration is to occur, it is not clear what law would apply...Thirdly, even where a law is nominated, it will not always be clear that a court will have any power with respect to the arbitration…Finally, should the law of a foreign country be nominated and the arbitration is conducted in Australia it is doubtful that there would be any court which could exercise jurisdiction if required and the agreement may be unenforceable both in Australia and overseas.
> …
> 112. While it is appropriate to give parties the flexibility to determine the procedures they want and the law that is applicable to the dispute, allowing parties to oust the arbitral law creates significant difficulties that cannot be easily remedied without complex litigation. Accordingly, this item repeals section 21. Consequently, while the parties will continue to have freedom to choose both the procedures and the applicable substantive law, they will not be free to oust the Model Law as the applicable arbitral law.
>
> *International Arbitration Amendment Bill 2009, Explanatory Memorandum*, Outline and paras 110 and 112.

77 In his Second Reading Speech the Attorney-General described the former s 21 as "a provision which has long been a source of confusion and concern": *International Arbitration Amendment Bill 2009, Second Reading Speech*, Hon. Robert McClelland, Attorney-General, House of Representatives, 25 November 2009, p 12791.

78 TCL argues that it is the State and Territory Courts that have jurisdiction to enforce non-foreign awards. Firstly, it submits that State and Territory courts have inherent jurisdiction to perform this function although it did not develop its argument as to how it said this was so. Castel rejects this argument. I make no finding as to it as it is unnecessary that I do so.

79 Second, TCL argues that the *Commercial Arbitration Act 1984* (Vic) and its successor the *Commercial Arbitration Act 2011* (Vic), provide jurisdiction for the Supreme Court of Victoria to enforce non-foreign Model Law awards. It is correct that the application provisions of the 1984 Act prior to its replacement in 2011, did not expressly exclude application of the Act to non-foreign Model Law awards. TCL contends that the "competent court" in Art 35 contemplates State and Territory courts having the jurisdiction to enforce non-foreign awards.

80 However, whatever the *Commercial Arbitration Act 1984* (Vic) previously provided, the *Commercial Arbitration Act 2011* (Vic) enacted in November 2011 makes it clear that the Act does not apply to international commercial arbitrations under the Model Law. Section 1 of the 2011 Act provides that it is confined to "domestic commercial arbitration" which is defined as including only arbitrations where the parties have their place of business in Australia, and as not including "*an arbitration to which the Model Law (as given effect to by the International Arbitration Act 1974 of the Commonwealth) applies.*" This means that TCL's submission that the *Commercial Arbitration Act 2011* (Vic) applies to the enforcement of non-foreign Model Law awards cannot be sustained.

81 If TCL's submissions regarding Art 35 are accepted, the enactment of the *Commercial Arbitration Act 2011* (Vic) means that neither the Federal Court nor the Victorian Courts have jurisdiction conferred by statute to enforce non-foreign Model Law awards. The same is true of any State or Territory legislation mirroring this Act, as can be expected with the uniform Commercial Arbitration Acts. It is unnecessary for me to reach a concluded view as to the jurisdiction of the State and Territory Courts to enforce non-foreign Model Law awards and I do not do so. However, I very much doubt that the Federal, State and Territory parliaments intend the result that no court is specified as "competent" to do so.

Conclusion

82 Speaking extra-judicially on 14 September 2011 at a seminar for the NSW Bar Association titled *Federal Court Arbitration List*, Justice Rares stated:

> It is unfortunate that the Parliament did not use a simple device of explicitly conferring jurisdiction generally under the *International Arbitration Act*, on particular courts, but instead used a tortuous, and opaque, set of specific provisions in that Act as well as the *Judiciary Act.* Arbitration should be an efficient and inexpensive means for parties to resolve the dispute. The ability to enforce awards is critical to arbitration. Although Art 35 of the *Model Law* says that the award in a (domestic) international arbitration is enforceable in "the competent court", the

> Parliament chose to give no explicit guidance as to the Courts that were competent in this respect. Parties should not have to sift through a legislative morass and apply constitutional law principles to find a court in which to enforce an award.

I can only agree.

I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Murphy.

Associate:

Dated: 23 January 2012