Ashurst Australia
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Arbitration Update

Disguised factual challenges given short shrift: State Supreme Courts defend arbitral awards

WHAT YOU NEED TO KNOW

- There are limited grounds on which an international or domestic award can be refused recognition or enforcement. Commonly argued grounds include denial of natural justice in connection with the making of the award, and that enforcement of the award would be contrary to public policy.
- Courts will not refuse enforcement on the basis of challenges to factual findings in an award which are disguised as complaints about violations of procedural fairness or natural justice.
- Courts will be loath to set aside an award or refuse enforcement unless there is a demonstrated "real unfairness or real practical injustice".

Natural justice and public policy grounds for refusing enforcement

Much has been reported about the High Court decision in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*[1] which upheld the constitutional validity of the federal arbitration legislation.

A more overlooked aspect of the underlying dispute was the non-constitutional grounds on which enforcement of the arbitral award was resisted. Chiefly at issue in the proceedings before the trial division of the Federal Court[2] was whether there was a violation of natural justice or procedural fairness in the arbitration such that the Court should exercise its discretion to refuse recognition and enforcement of the award on public policy grounds.

On appeal, the Full Federal Court[3] held that:

- "*a disguised attack on the factual findings of the arbitrators dressed up as a complaint about natural justice*" will not be countenanced by the Court; and
- the scope of the public policy exception is to be narrowly confined, and "minor" or "technical" breaches of the rules of natural justice do not, by themselves, warrant the setting aside, non-recognition or non-enforcement of an international arbitration award; and
- *"an international commercial arbitration award will not be set aside or denied recognition or enforcement … unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved*".

This article examines three State Supreme Court decisions which have applied the threshold of real unfairness or real practical injustice laid down by the Full Court in *TCL Air Conditioner.*

[1] (2013) 251 CLR 533.
[2] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 per Murphy J
[3] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 per Allsop CJ, Middleton and Foster JJ ("*TCL Air Conditioning*").

William Hare UAE LLC v Aircraft Support Industries Pty Ltd[4]

The case concerned whether enforcement of a foreign award should be refused on the basis of alleged breaches of natural justice, and whether severance and partial enforcement of the award was permissible.

Applying the 'real unfairness or real practical injustice' test, Justice Darke held that part of the arbitral award ought not be enforced on the basis that that part of the award concerned a claim which had been omitted in the plaintiff's statement of claim and submissions in the arbitration. His Honour considered that given that omission, fairness required the tribunal to give notice of its view to the parties and invite them to address that claim.

Rather than refuse enforcement of the whole award, his Honour considered that severance and partial enforcement was permissible under the *International Arbitration Act 1974* (Cth). His Honour accordingly severed that part of the award which was tainted by a breach of the rules of natural justice, and enforced the balance of the award.

Justice Darke held that part of the relevant arbitral award could be severed and precluded from enforcement on grounds of public policy owing to a breach of the rules of natural justice.

On appeal, Chief Justice Bathurst, President Beazley and Acting Justice Sackville upheld Justice Darke's decision, stating that "*no attempt was made to demonstrate practical unfairness or injustice*". The Court held that, to prove a breach of the rules of natural justice, it was not sufficient to merely assert that an argument was raised before the Arbitrator but not dealt with (particularly in circumstances where the argument was not raised in the pleadings, opening or closing submissions); the appellant needed to make submissions to the Court as to why and how the failure to address the relevant issue caused real unfairness or injustice.

Giedo van der Garde v Sauber Motorsport AG[5]

Heard in just eight days, the first instance, appeal and contempt proceedings in the Supreme Court of Victoria concerned the efforts by a Formula 1 race car driver to enforce an arbitration which was conducted under the Swiss Rules of International Arbitration and heard in London. In essence, van der Garde sought to ensure that his driving team, Sauber, appointed him to be one of the team's two drivers in the Australian F1 Grand Prix. With the race fast approaching, the Court expedited the matter.

The arbitral award granted relief in favour of van der Garde, ordering that Sauber refrain from taking any action that would deprive van der Garde of his entitlement to participate in the 2015 Formula 1 season.

Sauber submitted that the public policy exception was enlivened because:

a) the two other drivers in contention for the team's positions were not given the opportunity to make submissions in the arbitral proceedings;

b) it would be unsafe and logistically difficult to arrange for van der Garde to be one of the team's driver at this late stage, or at all; and

c) enforcement of the Award would be futile as the Award did not oblige Sauber to take a positive step in order to comply.

Both Justice Croft at first instance and the Court of Appeal rejected the public policy arguments raised by Sauber, variously stating that:

a) the absence of the other drivers from the arbitral proceedings was not unusual given the *inter partes* nature of the proceedings;

b) the Formula 1 competition is well regulated in respect of safety and logistics (and, where practical issues arose, the Court was ready to assist); and

c) the question of the futility of the Award was addressed in the arbitral proceedings and an enforcing court should not reconsider the issue.

Accordingly, the Court held that the arbitration award was enforceable as no real unfairness or real practical injustice could be demonstrated.

The Court of Appeal specifically stated that "*an enforcement application does not involve anything in the nature of a merits appeal*" and quoted the Full Federal Court's decision in *TCL Air Conditioner* for the proposition that "*a complaint as to a legal or factual conclusion*" could not be "*dressed up as a complaint about natural justice*".

[4] [2014] NSWSC 1403 and, on appeal, [2015] NSWCA 229.
[5] [2015] VSC 80 and, on appeal, [2015] VSCA 37.

Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd[6]

This case concerned whether a domestic award ought to be set aside on the basis that the award was in conflict with the public policy of New South Wales.

In respect of the rules of natural justice, Colin Joss & Co Pty Ltd submitted that:

a) the Arbitrator acted without any probative evidence of the alleged delays and failures to complete flooring in various rooms of a newly constructed building, which grounded the Award in Cube Furniture Pt Ltd's favour; and

b) a particular submission by Cube Furniture Pty Ltd had first been made in final submissions and the Arbitrator had only made known his view of the onus of proof on that point in the Award itself.

c)

Justice Hammerschlag considered that an arbitral award which is infected with a sufficiently material breach of the rules of natural justice will be in conflict with the public policy of New South Wales. That is, the public policy exception in the *Commercial Arbitration Act 2010* (NSW) is concerned with the negation of fundamental legal rights (not "*mere procedural imperfections*") and that an incorrect factual conclusion made on the basis of a lack of probative evidence (therefore amounting to a legal error) is not, by itself, a breach of the rules of natural justice.

Justice Hammerschlag held that the making of a factual finding by a Tribunal without probative evidence may be a breach of the rules of natural justice if:

a) the fact was critical;

b) the fact was never the subject of attention by the parties to the dispute; and

c) the parties did not have an opportunity to address the relevant fact.

Importantly, his Honour stated that Courts should not consider arbitral awards with an "*overcritical or pedantic eye*", but with "*commonsense and without undue legality*".

Justice Hammerschlag considered that there was ***no*** unfairness or practical injustice, let alone the kind of real unfairness that might give rise to the Court exercising it discretion to set aside the award and, in some respects, the challenges to the award were essentially attacks on factual findings dressed up as a complaint about natural justice.

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[6] [2015] NSWSC 735.

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