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# Australia as an arbitration-friendly country: The tension between party autonomy and finality

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# AUSTRALIA AS AN ARBITRATION-FRIENDLY COUNTRY: THE TENSION BETWEEN PARTY AUTONOMY AND FINALITY

*Louise Parsons\* & Jack Leonard\*\**

## ABSTRACT

*The landmark decision of the High Court of Australia in the recent case of *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia [2013] HCA 5* reinforced the importance of the principle of party autonomy in international commercial arbitration in Australia. The case was highly acclaimed as a case that confirmed Australia as an “arbitration-friendly” country. This article examines the tension between the interest in finality and enforcement of arbitral awards, and the interest in a quality award. The first interest would generally argue against contractual expansion of judicial review clauses in the arbitration agreement; by contrast the second interest would support a contractual mechanism for the review of arbitral awards and contractually expanded judicial review clauses. By enforcing*

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*contractually expanded judicial review clauses, the interests of the “winner” (with an interest in finality and enforcement) and the shared interests of both parties in a quality award (irrespective of them being winner or loser) will be protected.*

*This article argues that Australia may be arbitration-friendly from the point of view that arbitral awards will be enforced, but that it may only be fully “arbitration-friendly” if there is the possibility to enforce contractually expanded review clauses. A country that protects both the interest in finality and enforcement of arbitral awards **and** the interest in the quality of arbitral awards, and will further give full effect to the meaning of party autonomy in the context of arbitration as a contractual form of dispute resolution, will be a truly arbitration-friendly country.*

**KEYWORDS:** *arbitration, finality, party autonomy, review, Australia, extended review clause*

## I. INTRODUCTION

The recent decision of the High Court of Australia (High Court) in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*<sup>1</sup> [hereinafter *TCL Aircon*], has been applauded as a landmark decision for arbitration in Australia,<sup>2</sup> confirming Australia as an “arbitration-friendly” country.<sup>3</sup> Although the phrase “arbitration-friendly” generally refers to the attributes of a legal system that recognises and protects alternative dispute resolution as a means of resolving disputes outside of the national court system by enforcing arbitral awards, that may not be the only meaning of “arbitration-friendly” that would matter to a prospective party to arbitration.

This article explores the tension between the interest in the finality and enforcement of arbitral awards (which may disallow contractually expanded judicial review clauses) and the interest in the quality and review of arbitral awards (which would support contractually expanded judicial review clauses).

This article analyses the decision in *TCL Aircon* from the perspective of the parties entering into an international arbitration agreement that will be subject to Australian law. It considers whether it would be possible under Australian law for the parties to avoid by agreement the immediate enforceability of the arbitral award, and instead have an enforceable contractually expanded review clause that allows for review of the decision of the arbitral tribunal in certain circumstances. It should be noted that the High Court of Australia in *TCL Aircon* emphasised the importance of party autonomy, although the court did not specifically consider review under Art 34 of the Model Law.<sup>4</sup> If contractually expanded review clauses were not to be enforced in Australia, the phrase “arbitration-friendly” would mean “friendly” to the winner only. This article will then consider the relationship between finality and enforcement of arbitral awards on the one hand, and the interest of parties in quality and review of awards on the other hand.

It is proposed that to be truly “arbitration-friendly” Australia as a jurisdiction should allow contractually expanded review clauses in international arbitration agreements. Such a position is not inconsistent with the decision in *TCL Aircon* and is also not inconsistent with the

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<sup>1</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v. The Judges of the Federal Court of Australia* S178/2012, [2013] HCA 5 (Austl.) [hereinafter *TCL Aircon*].

<sup>2</sup> Articles reporting on this case have been enthusiastic. See *infra* note 37 and accompanying discussion.

<sup>3</sup> *Id.*

<sup>4</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 [hereinafter the Model Law].

provisions of the Model Law and the *International Arbitration Act 1974* (Cth). Australia may be more “arbitration-friendly” if parties were allowed full autonomy to specify the binding nature of their arbitral award.

## **II. RECENT CHANGES TO THE LEGISLATIVE FRAMEWORK FOR INTERNATIONAL ARBITRATION IN AUSTRALIA**

The past five years witnessed significant effort in improving Australia’s reputation and standing as a desired or even preferred destination for international arbitration. The changes to the *International Arbitration Act 1974* (Cth) and the legislative framework for arbitration in Australia in 2010 incorporating the 2006 amendments to the Model Law into the Australian law in respect of international arbitration, was received positively.<sup>5</sup> Notably, following the 2010 amendments, parties selecting Australian law for their international arbitration cannot contract out of the Model Law. The decision of the High Court of Australia in *TCL Aircon* on a matter involving international commercial arbitration in Australia was in the spotlight because the High Court of Australia had to decide on a challenge to the constitutional validity of the *International Arbitration Act 1974* (Cth) and the finality and enforceability of arbitral awards handed down under Australian law. An adverse decision would have been detrimental to international commercial arbitration in Australia. As this is the most recent and most important decision of the High Court of Australia on international arbitration, it is useful to commence this paper with a discussion of this decision of the High Court of Australia - *TCL Aircon*.<sup>6</sup>

## **III. THE LANDMARK DECISION OF THE HIGH COURT OF AUSTRALIA IN *TCL AIR CONDITIONER (ZHONGSHAN) CO LTD V THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA* [2013] HCA 5**

### ***A. The Dispute between TCL Air Conditioner (Zhongshan) Co Ltd and Castel Electronics***

The High Court decision in *TCL Aircon*<sup>7</sup> in 2013 formed only part of the history of the dispute between the parties. In addition to the High Court proceedings, multiple proceedings were initiated by TCL Air Conditioner (Zhongshan) Co Ltd (TCL) against Castel Electronics (Castel) in the

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<sup>5</sup> See generally e.g., James Whittaker et al., *Australia*, in THE INTERNATIONAL ARBITRATION REVIEW 35 (James H Carter ed., 3rd. ed., 2012).

<sup>6</sup> See generally *TCL Aircon*.

<sup>7</sup> *Id.*

Federal Court of Australia, as well as in the Victorian Supreme Court;<sup>8</sup> these were in addition to the original arbitral proceedings.

Castel, an Australian-based company, commenced arbitral proceedings against TCL, a company based in China, in Melbourne, Victoria, on 25 July 2008 in accordance with the arbitration clause contained in the General Distribution Agreement entered into between the parties.<sup>9</sup>

Under the General Distribution Agreement, TCL granted Castel exclusive distribution rights of TCL-manufactured air conditioners in Australia. Castel alleged that TCL had breached this contract by selling what was referred to as “Other Equipment Manufacturer” (hereinafter OEM) products in this exclusive jurisdiction.<sup>10</sup> TCL manufactured products under different brand names and distributed these in Australia. The three-member Tribunal rendered two awards. The first one was on 23 December 2010, ordering TCL to pay Castel \$2,874,870 for breach of contract. The second award was rendered on 27 January 2011 for \$732,500 in costs.<sup>11</sup> TCL defaulted on payment of the awards and Castel instituted proceedings in the Federal Court to seek enforcement of the arbitral awards.<sup>12</sup>

### ***B. Federal Court Proceedings***

At the same time, TCL initiated Federal Court action to set aside the awards of the arbitral tribunal for a violation of public policy.<sup>13</sup> TCL’s claim was that the Tribunal had failed to correctly assess Castel’s loss from TCL’s sale of OEM products in Australia. In the arbitration, the parties’ expert witnesses had proposed vastly different substitution ratios between TCL branded products, distributed by Castel, and OEM products, sold by TCL. Castel’s expert witness suggested that the substitution rate between the two systems was 100%; TCL’s expert opined that this figure was 7.4%. The Tribunal found that both of these expert opinions were unreliable and instead relied on lay evidence to conclude that Castel’s lost sales amounted to 22.5% of the OEM products sold in Australia. The final award of damages was calculated based on this figure. TCL argued in the Federal Court that in rejecting the expert evidence brought by Castel, the Tribunal

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<sup>8</sup> See generally *TCL Airconditioner (Zhongshan) Co Ltd v. Castel Electronics Pty Ltd*, [2009] VSC 553 (Austl.); *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd*, [2013] FCA 131 (Austl.); *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd (No 2)*, [2012] FCA 1214 (Austl.); *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd (No 3)*, [2012] FCA 1282 (Austl.).

<sup>9</sup> *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd (No 2)*, [2012] FCA 1214, ¶ 67 (Austl.).

<sup>10</sup> *Id.* ¶ 1.

<sup>11</sup> *Id.* ¶ 2. This value was actually the net payment after Castel made payments to TCL arising from counter-claims.

<sup>12</sup> *Id.* ¶ 3.

<sup>13</sup> *Id.*

was bound to accept the expert evidence of TCL. TCL claimed that the Tribunal instead plucked the figure “from the air”,<sup>14</sup> relying on no evidence. TCL contended that this violated two rules of natural justice,<sup>15</sup> namely the no evidence rule,<sup>16</sup> and the hearing rule.<sup>17</sup> The decision of Murphy J was that there had been no breach of natural justice. He also set out general principles relating to the public policy exception to enforcement of arbitral awards in the IAA.<sup>18</sup>

### *C. The Matter before the High Court of Australia*

Prior to the decision of the Federal Court, TCL commenced proceedings in the original jurisdiction of the High Court, challenging the constitutional validity of the IAA.

TCL argued that the inability of the Federal Court under Articles 35 and 36 of the Model Law<sup>19</sup> to refuse to enforce an arbitral award on the grounds of an error of law on the face of the award was a breach of Chapter III of the Constitution.<sup>20</sup> TCL contended that the Federal Court could not be required knowingly to perpetrate legal error as this undermined the institutional integrity of the Court. Further, TCL argued that the IAA “impermissibly confers the judicial power of the Commonwealth on the arbitral tribunal that made the award, by giving the arbitral tribunal the last word on the law applied in deciding the dispute submitted to arbitration”.<sup>21</sup> TCL also argued that “the undermining of the institutional integrity of the Federal Court was compounded further by the fact that the arbitral award that was to be enforced by the Federal Court, in spite of any legal error that may appear on its face, was one that Article 28 of the Model Law, or an implied term of the arbitration agreement, requires to be correct in law.”<sup>22</sup>

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<sup>14</sup> *Id.* ¶ 135.

<sup>15</sup> It was argued that it therefore fell within the public policy exception at Article 34(2)(b)(ii).

<sup>16</sup> *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd* (No 2), [2012] FCA 1214, ¶ 136 (Austl.).

<sup>17</sup> *Id.* ¶ 157.

<sup>18</sup> *Id.* ¶ 186; *See also* Albert Monichino & Alex Fawke, *International Arbitration in Australia: 2012/2013 in Review*, 24 AUSTRALASIAN DISP. RESOL. J. 208, 211 (2013). Where enforcement and the seat of arbitration are in the same state then the meaning of “public policy” under Article 34 is taken to be the same as under Art 36. Further, s 19(b) of the IAA should be construed to read that any breach of natural justice will be contrary to Articles 34 and 36 of the Model Law. The court should only use its discretion to set aside an award where fundamental notions of justice or fairness have been offended.

<sup>19</sup> The IAA Amendment Act incorporated the 2006 amendments to the Model Law, and the judges in the case of *TCL Aircon* referred to the Model Law and the IAA interchangeably.

<sup>20</sup> Commonwealth of Australia Constitution Act, July 9, 1900.

<sup>21</sup> *TCL Aircon*, ¶ 4.

<sup>22</sup> *Id.*



The High Court unanimously<sup>23</sup> rejected the constitutional challenge and held that:

(1) The IAA did not confer judicial power on the arbitral tribunal, and that there is a clear distinction between judicial power and arbitral power. Judicial power is conferred by law and exercised coercively whilst an arbitral tribunal derives its authority from the voluntary agreement between the parties.<sup>24</sup> Therefore the making of an award by an arbitral tribunal pursuant to the Model Law<sup>25</sup> (or the IAA which incorporates the Model Law)<sup>26</sup> does not amount to an exercise of the judicial power of the Commonwealth;<sup>27</sup>

(2) There was no impairment of the institutional integrity of the court by the court enforcing awards with potential errors of law. The integrity of the court was protected by the existence of grounds for refusing enforcement of an arbitral award under Articles 36 of the Model Law. The High Court did not see the ability to review errors of law as a requirement for institutional integrity;<sup>28</sup>

(3) Awards made by arbitral tribunals are final and binding. The plurality held that “an award made by an arbitrator pursuant to such authority is final and conclusive”<sup>29</sup> and that the underlying reason for its finality is to be found in party autonomy;<sup>30</sup>

(4) The arbitral award is enforceable under the Model Law because it represents the tribunal’s decision on the disputes voluntarily submitted to arbitration;<sup>31</sup>

(5) Party autonomy is the foundation of arbitration as well as finality in arbitration;<sup>32</sup> and

(6) Article 28 of the Model Law does not require the award to be correct in law.<sup>33</sup>

In the examination of the tension between the importance of finality and enforcement of arbitral awards, and the interest in quality and review of awards in Australia, this article focuses on three important points confirmed by the decision in *TCL Aircon*: **first**, that the Australian Federal arbitration legislation<sup>34</sup> is not unconstitutional<sup>35</sup> and **second**, that as arbitral

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<sup>23</sup> *Id.* ¶¶ 40, 111.

<sup>24</sup> *Id.* ¶¶ 27-32, 75-77, 106-07.

<sup>25</sup> See generally the Model Law.

<sup>26</sup> International Arbitration Act, 1974, (Cth) sch. 2 (Austl.) [hereinafter IAA].

<sup>27</sup> *TCL Aircon*, ¶¶ 27-32, 75-77, 106-107.

<sup>28</sup> *Id.* ¶¶ 32-34, 103-105.

<sup>29</sup> *Id.* ¶¶ 81-99, 105.

<sup>30</sup> *Id.* ¶¶ 13, 15, 17.

<sup>31</sup> *Id.* ¶¶ 17, 51-53.

<sup>32</sup> *Id.* ¶¶ 11-16, 45, 78, 109.

<sup>33</sup> *Id.* ¶¶ 14, 16, 53, 73-74; Monichino & Fawke, *supra* note 18, at 212.

<sup>34</sup> See generally IAA.

<sup>35</sup> *TCL Aircon*, ¶¶ 40, 111. Any legislation contrary to the Australian Constitution will be void.

awards will not be refused enforcement on the ground that the award contains an error in law, Australian law respects party autonomy and finality in arbitral awards.<sup>36</sup> The second of these two points will be discussed first. The **third** important point, that there is no duty on an arbitrator to make a decision that is correct in law, will be examined thereafter.

#### ***D. Confirmation of the Finality and Enforcement of Arbitral Awards Evokes a Positive Reaction to the Decision in TCL Aircon***

The decision in *TCL Aircon* that supported finality and enforcement of arbitral awards under Australian law has been applauded as a landmark decision for arbitration in Australia,<sup>37</sup> confirming Australia as an “arbitration-friendly” country.<sup>38</sup> The positive reaction stems mostly from

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<sup>36</sup> *Id.*, ¶ 111.

<sup>37</sup> Articles reporting on this case have been enthusiastic. See for example the following, mostly from prominent Australian and international law firms and the arbitration community: *A Plus for Australian Arbitration: TCL Air Conditioner (Zhongshan) Co Ltd v The Judges Of The Federal Court Of Australia [2013] HCA 5*, TIMEBASE (Mar. 20, 2013, 9:19 AM) <http://www.timebase.com.au/news/2013/AT213-article.html>; Mark D. Chapple et al., *International arbitration in Australia is safe: the High Court of Australia confirms the validity of the International Arbitration Act*, BAKER & MCKENZIE (Mar. 14, 2013), <http://www.lexology.com/library/detail.aspx?g=d8d743f3-9b45-4c02-b9cc-cf4b9306d2a3>; Deborah Tomkinson & Tomoyuki Hachigo, *Not arbitrary in the least: Arbitral Awards and the TCL judgment*, 87(11) L. INST. J. (2013), <http://acica.org.au/assets/media/Resources/LIV-November-2013-Tomkinson-Hachigo.pdf>; Khory McCormick & I-Ching Tseng, *A win for international trade – High Court dismisses challenge to International Arbitration Act*, MINTERELLISON (Mar. 15, 2013), <http://www.minterellison.com/publications/a-win-for-international-trade-high-court-dismisses-challenge-to-international-arbitration-act/>; Peter Ward et al., *High Court upholds Australia's international arbitration laws*, ASHURST (July 2013), [http://www.ashurst.com/publication-item.aspx?id\\_Content=9313](http://www.ashurst.com/publication-item.aspx?id_Content=9313); *International arbitration in Australia is safe: the High Court of Australia confirms the validity of the International Arbitration Act*, BAKER & MCKENZIE (Mar. 14, 2013), <http://bakerxchange.com/rv/ff000e96d5272a1d72da1c709649af9deec79adb>; *High Court of Australia dismisses challenge to legislation incorporating the UNCITRAL Model Law*, HERBERT SMITH FREEHILLS (Mar. 13, 2013, 2:27 AM), <http://hsfnotes.com/arbitration/2013/03/13/high-court-of-australia-dismisses-challenge-to-legislation-incorporating-the-uncitral-model-law/>; *Court delivers landmark judgment for Australian arbitration*, CLAYTON UTZ (Mar. 13, 2013), [http://www.claytonutz.com/publications/news/201303/13/court\\_delivers\\_landmark\\_judgment\\_for\\_australian\\_arbitration.page](http://www.claytonutz.com/publications/news/201303/13/court_delivers_landmark_judgment_for_australian_arbitration.page).

<sup>38</sup> See for example: *Focus: courts uphold arbitration laws in Australia*, ALLENS (Mar. 21, 2013), <http://www.allens.com.au/pubs/arb/foarb21mar13.htm>; Albert Monichino, *Insight: International arbitration: sheep, wolves and vegetarianism – a view from Down Under*, INTERNATIONAL BAR ASSOCIATION, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=072c5f50-9676-460f-8ac2-ecc36347f8a9> (last visited Nov. 9, 2014); Albert Monichino & Luke Nottage, *Blowing hot and cold on the International Arbitration Act*, 51 L. SOC'Y J., 56 (May, 2013), available at <http://barristers.com.au/wp-content/uploads/2013/05/Blowing-Hot-Cold-on-The-International-Arbitration-Act.pdf>; Albert Monichino, *Australia: Today's decision of the apex court*, GLOBAL ARB. REV. (Mar. 13, 2013), [http://www.vicbar.com.au/GetFile.aspx?file=InBriefFiles%2FMonichino\\_case\\_note\\_apex\\_court.pdf](http://www.vicbar.com.au/GetFile.aspx?file=InBriefFiles%2FMonichino_case_note_apex_court.pdf); *High Court confirms recognition and enforcement in Australia of arbitral awards*, MORAY & AGNEW (Aug. 14, 2013), <http://commercial.moray.com.au/publication/high-court-confirms-recognition-and-enforcement-in-australia-of-arbitral-awards/>.

the first two points referred to above – namely (1) the confirmation of the constitutionality of the IAA, and (2) the respect for and observation of finality in arbitral awards on the basis of the acceptance of the doctrine of party autonomy in arbitration. The potential impact of the decision of the High Court in *TCL Aircon* clearly extended beyond the immediate rights and interests of the parties directly involved in the case, because a decision by the High Court that rendered the IAA unconstitutional, would have undone years of work and would likely have been detrimental to Australia's standing in the international commercial arbitration world. The importance of this decision was reflected in the significant number of parties that sought leave to intervene and to appear as *amici curiae*. Apart from submissions of the Attorneys-General for the Commonwealth, Queensland, South Australia, Victoria, Western Australia and New South Wales, joint submissions were lodged by ACICA<sup>39</sup>, IAMA<sup>40</sup> and CIArb Australia<sup>41</sup> (hereinafter the Arbitral Bodies<sup>42</sup>) who did so “in support of, and to uphold the framework for, international arbitration including the enforcement of arbitral awards in Australia”.<sup>43</sup>

The interest of the Arbitral Bodies in this case is not unprecedented. Previously, the Arbitral Bodies, together with the Australian International Dispute Centre, were granted leave to act as *amici curiae* in the case of *Westport Insurance Corporation v Gordian Runoff Ltd (Westport)*.<sup>44</sup> In that case, the rationale for intervening was to provide submissions “from a specialised viewpoint, [and] an industry perspective or [to act] in the public interest”.<sup>45</sup> Similarly, in the case of *TCL Aircon*, the Arbitral Bodies were “in a position to assist the Court on relevant matters of vital importance to international arbitration in Australia”,<sup>46</sup> just as they did in *Westport*.

The Arbitral Bodies' interest in *TCL Aircon* was comparable to that in *Westport* because the case had the potential “to substantially affect the interests of ACICA”,<sup>47</sup> and by implication the other two arbitral bodies. The intervention of arbitral bodies as *amici curiae* in court cases concerning international arbitration legislation is not a novel occurrence. For example, the Arbitral Bodies cited not only other Australian cases

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<sup>39</sup> Australian Centre for International Commercial Arbitration [hereinafter ACICA].

<sup>40</sup> Institute of Mediators & Arbitrators Australia [hereinafter IAMA].

<sup>41</sup> Chartered Institute of Arbitrators Australia [hereinafter CIArb Australia].

<sup>42</sup> ACICA, IAMA and CIArb Australia refer to themselves as the “Arbitral Bodies” in their submissions as *amici curiae* in Joint Submissions as Amici Curiae by ACICA, IAMA and CIArb Australia, Oct. 26, 2012.

<sup>43</sup> Joint Submissions as *Amici Curiae* by ACICA, IAMA and CIArb Australia, at 3, Oct. 26, 2012.

<sup>44</sup> *Westport Insurance Corporation v. Gordian Runoff Limited*, [2011] HCA 37 (Austl.).

<sup>45</sup> Joint Submissions as *Amici Curiae* by ACICA, AIDC, IAMA and CIArb Australia, at 5, Jan. 25, 2011.

<sup>46</sup> ACICA *et al.*, *supra* note 43, at 5.

<sup>47</sup> *Id.*

(such as *Westport*) but also international cases<sup>48</sup> in which arbitral bodies intervened as *amici curiae*. The intervention of the Arbitral Bodies in *TCL Aircon* seems of particular importance given that if the plaintiff were to succeed, the IAA would effectively be declared unconstitutional, and Australia would resort back to the previous, pre-Model Law, legislative position.

Although the High Court did not specifically set out any “public policy” reasons for the decision, the submissions of the *amici curiae* highlighted the importance of international commercial arbitration in Australia.

The significance of the decision in the case of *TCL Aircon* is further reflected in the positive reaction of legal practitioners and the arbitral institutions to the *TCL Aircon* decision. This reaction should be seen against the background of the amendments to Australian arbitration laws in 2010 referred to above. The changes to Australian arbitration law in 2010 were promoted by the lobbying of the arbitral institutions.<sup>49</sup> The amendments to the IAA in 2010 were at least to some extent motivated by the desire to promote Australia as a hub for international arbitration in the Asia-Pacific region – especially as Hong Kong and Singapore were both growing rapidly as destinations for international commercial arbitration.<sup>50</sup> For both clients and legal professionals advising clients, as well as the Arbitral Bodies and the individual arbitrators in Australia that may have had a financial interest in Australia as a seat of arbitration, much was at stake with the outcome of *TCL Aircon*. Similar considerations also informed the lobbying by the institutions involved in arbitration in Australia at the time of the legislative amendments in 2010.<sup>51</sup> Singapore and Hong Kong are popular destinations for international arbitration and provide direct competition for Australia in the region.<sup>52</sup>

The International Arbitration Amendment Act<sup>53</sup> provided a boost to international arbitration in Australia when it was passed and it has

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<sup>48</sup> *Id.*

<sup>49</sup> See generally Peter Megens & Adam Peters, *International Arbitration Amendment Act 2010 (Cth) – Towards a New Brand of Australian International Arbitration*, 2 W. AUSTRALIAN JURIST 149 (2011). For a list of all the submissions received by the Attorney-General in the process of amending the IAA, see REFORMS TO THE INTERNATIONAL ARBITRATION ACT 1974, ATTORNEY-GENERAL'S DEPARTMENT ARCHIVE, <http://www.ag.gov.au/consultations/pages/ReformstotheInternationalArbitrationAct1974.aspx> (last visited Nov. 9, 2014).

<sup>50</sup> See generally Monichino & Nottage, *supra* note 38. See also INTERNATIONAL ARBITRATION IN AUSTRALIA 1 (Luke Nottage & Richard Garnett eds., 2010).

<sup>51</sup> See generally Standing Committee of Attorneys General, *Reform of the uniform Commercial Arbitration Acts – section 27D mediation clause* (2011), [http://www.lccsc.gov.au/agdbasev7wr/scj/documents/pdf/issuespaper\\_consultation\\_s27d\\_caa.pdf](http://www.lccsc.gov.au/agdbasev7wr/scj/documents/pdf/issuespaper_consultation_s27d_caa.pdf).

<sup>52</sup> Singapore appears to be the leading seat for international arbitration in Asia. See *Choice of the Seat of Arbitration, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, WHITE & CASE, <http://arbitrationpractices.whitecase.com/news/newsdetail.aspx?news=3787> (last visited Nov. 9, 2014).

<sup>53</sup> International Arbitration Amendment Act, 2010 (Cth) (Austl.).

improved Australia's standing as a desirable destination for international arbitration.<sup>54</sup> The importance of the role of the IAA has been acknowledged by the High Court because of the role it plays (together with the Convention on the Recognition and Enforcement of Arbitral Awards<sup>55</sup> and the Model Law) through the facilitation of "the use of arbitration agreements and the curial recognition and enforcement of arbitral awards made in relation to international trade and commerce".<sup>56</sup> The High Court in *TCL Aircon* further emphasised the importance of arbitration in international commerce referring to the importance of the New York Convention<sup>57</sup> and the Model Law<sup>58</sup> that deal with "one of the most important aspects of international commerce – the resolution of disputes between commercial parties in an international or multinational context".<sup>59</sup> Further, the High Court confirmed that "[a]n ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce".<sup>60</sup>

There are multiple benefits derived from Australia being a popular destination for arbitration and for Australian law to be selected as the law of the arbitration agreement.<sup>61</sup> As arbitration is a fee-based service, the benefits extend to all those professionally involved with arbitration but also others such as hospitality services providers, airlines and the like.<sup>62</sup> The impact is augmented in light of the fact that alternative dispute resolution is, according to a recent survey, the preferred method of dispute resolution in international commercial contracts in many industries.<sup>63</sup>

Consequently, the reaction to and electronic media publications following *TCL Aircon* celebrated the decision for its support of arbitration and the acceptance by the highest court in Australia of the final and binding

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<sup>54</sup> See generally Benjamin Hayward, *Pro-arbitration Policy in the Australian Courts the End of Eisenwerk?*, 41 (2) FED. L. REV. 299 (2013). See for example also the positive reaction of China to Australia's bid to promote itself as a destination for arbitration following the 2010 amendments: *China Welcomes Oz as Arbitration Destination*, LAWYER'S WEEKLY (July 19, 2010), <http://www.lawyersweekly.com.au/news/china-welcomes-oz-as-arbitration-destination>.

<sup>55</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968) (*opened for signature* June 10, 1958) [hereinafter New York Convention].

<sup>56</sup> *TCL Aircon*, ¶ 41.

<sup>57</sup> See generally New York Convention.

<sup>58</sup> See generally the Model Law.

<sup>59</sup> *TCL Aircon*, ¶ 10.

<sup>60</sup> *Id.*

<sup>61</sup> Hayward, *supra* note 54, at 301. Arbitration is a business.

<sup>62</sup> See generally e.g., Michael McIlwrath & General Electric Company, *Can Arbitration Keep Up? Singapore Ratchets Up Forum Competition*, KLUWER ARBITRATION BLOG (Oct. 31, 2013), <http://kluwerarbitrationblog.com/blog/2013/10/31/can-arbitration-keep-up-singapore-forum-competition/>.

<sup>63</sup> See generally *Corporate Choices in International Arbitration Industry Perspectives*, PWC (2013), <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>.

nature of arbitral awards. Judging by these publications, what “arbitration-friendly” seems to indicate is that Australia will enforce arbitral awards – thereby clearly supporting finality and enforcement in arbitration.

This means that for the party in whose favour the dispute is resolved, Australia will certainly be “arbitration-friendly”. From this point of view, Australia as a country can accordingly be designated as ‘arbitration-friendly’ because it supports the interest of parties in finality and the enforcement of arbitral awards and because both the Australian legislative framework and Australia’s highest court support the doctrine of party autonomy in international arbitration. This is something that parties entering into an arbitration agreement may consider.

#### **IV. CAN AUSTRALIA BE “ARBITRATION-FRIENDLY” IF THERE IS NO RECOURSE AGAINST AN INCORRECT AWARD AND NO PROTECTION FOR THE QUALITY OF ARBITRAL AWARDS?**

The third important point that the High Court made in *TCL Aircon* was that there is no duty on an arbitrator to render an award that is correct in fact or law.<sup>64</sup> The High Court, at the same time, also confirmed that arbitral awards in Australia are final and not subject to appeal, and that there is no implied term in the arbitration agreement that the arbitrator should make a finding that is correct at law.<sup>65</sup> The High Court pointed out that the principle that there is no obligation to make a correct award underpins the operation of the Model Law and therefore the IAA, and that this principle has been an important premise of the Model Law as is reflected in the working papers of the UNCITRAL working group for the preparation of the Model Law.<sup>66</sup>

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<sup>64</sup> See for example the article with a somewhat sensationalist title: *Arbitration in Australia: an arbitrator’s right to be wrong*, KING & WOOD MALLESONS (Mar. 13 2013), <http://www.mallesons.com/publications/marketAlerts/2013/Pages/Arbitration-in-Australia-an-arbitrators-right-to-be-wrong.aspx>. *TCL Aircon*, ¶ 17. Of course, arbitral awards that include errors of law may create a range of problems for the parties involved.

<sup>65</sup> *TCL Aircon*, ¶ 16: “The consequence is that no term limiting an arbitral tribunal to a correct application of law is to be implied by force of Australian law in an arbitration agreement within the scope of the Model Law”.

<sup>66</sup> *Id.* ¶ 14:

The working papers of the UNCITRAL working group for the preparation of the UNCITRAL Model Law contain nothing to suggest that the requirement of Art 28 for an arbitral tribunal to decide “in accordance with” the substantive rules of law chosen by the parties was intended to encompass a requirement that the arbitral tribunal apply those laws in a manner that a competent court would determine to be correct.

Potential contracting parties agreeing on arbitration as their method of dispute resolution under Australian law may however find it somewhat disconcerting that an arbitrator is not prohibited from making errors of fact and law. The situation may be exacerbated by the fact that even if an arbitral decision is wrong, there is no recourse against the award. Such a state of affairs could be potentially grossly unfair towards the party who loses in arbitration as a consequence of an error made by the tribunal. Therefore, although parties agree to be bound by a decision made by a private arbitral tribunal, and therefore inherently accept that ‘justice may not be served’ in the case of an incorrect award, the commercial reality of parties may dictate that such a situation is not acceptable to one or both of them.

This position can create some difficulties for parties to an arbitration agreement because, as confirmed by the High Court in *TCL Aircon*, they “confer upon the arbitrator an authority **conclusively** to determine [the disputes between] them”(emphasis added),<sup>67</sup> coupled with “the general rule that an award made by an arbitrator pursuant to such authority is final and conclusive”.<sup>68</sup> It is therefore conceivable that one or both of the parties may wish to have the decision of the arbitrator reviewed if the arbitrator’s finding is wrong in law or fact. The finality of an arbitral award could therefore be to the detriment of one (or both) of the parties to arbitration.

From the perspective of a party who may be prejudiced by an incorrect arbitral award, Australia would therefore **not** appear to be particularly “arbitration-friendly”.

The *TCL Aircon* decision however did not consider what the position would be where an arbitration agreement contains an express term that the arbitrator should apply the law correctly. It also did not address a situation where the arbitration agreement contained an express provision that an award that was incorrect in fact or law could be subjected to appeal or review, or would only be provisionally binding.

## V. THE RELATIONSHIP BETWEEN THE INTEREST IN FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS AND THE PRINCIPLE OF PARTY AUTONOMY – A THEORETICAL PERSPECTIVE

Although the High Court in *TCL Aircon* confirmed that the principle of party autonomy fundamentally underpins arbitration, the key question is however whether an Australian court will enforce a contractually expanded review clause incorporated in an arbitration agreement that is subject to

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<sup>67</sup> *Dobbs v. National Bank of Australasia Ltd* (1935) 53 CLR 643, 653 (Austl.).as quoted in *TCL Aircon*, ¶ 77.

<sup>68</sup> *TCL Aircon*, ¶ 78.

Australian law, or will allow for situations where the arbitral award is not immediately binding.

The High Court in *TCL Aircon* did not consider a situation where the arbitration agreement explicitly provides the parties with a right to have the award reviewed, if the award is wrong in fact or law, and thereby to avoid immediate enforcement. The *TCL Aircon* case does not address the potential effect of a contractually expanded right of review in an arbitration agreement and it is also not clear whether respect for party autonomy by Australian courts will extend to the enforcement of a contractually expanded review clause.

The judges in *TCL Aircon* however reiterated that the finality of arbitration is a consequence of party autonomy. Arbitral awards are final and binding because the parties choose the awards to be final and binding on them. (This is the exercise of a form of private power.<sup>69</sup>) The logical extension of the premise that parties are free to choose to be finally bound by arbitral awards is that parties therefore should also be free **not** to be finally bound by arbitral decisions. Put differently, if the finality of arbitral awards is found in private power, then equally parties should be able to determine that arbitral awards may not be final. The interest in finality and enforcement of arbitral awards as well as the interest in review and the quality of awards may appear to be in conflict but both stem from the same principle – the right of the parties to within limits determine the parameters of their arbitration.

Ultimately, as explained by the High Court of Australia in *TCL Aircon*, an arbitral award is simply a further creature of contract, and assumes the form of a further agreement between the parties:

[T]he arbitrator's making of an award in exercise of such authority both extinguishes the original cause of action and imposes new obligations on the parties in substitution for the rights and liabilities which were the subject of the dispute referred to arbitration. The former rights of the parties are discharged by an accord and satisfaction. The accord is the agreement to submit disputes to arbitration; the satisfaction is the making of an award in fulfilment of the agreement to arbitrate.<sup>70</sup>

The following question arises: If the reason that an arbitral award is treated as final is that it is underpinned by the consent of the parties, then would denying parties the opportunity to agree to review or appeal an

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<sup>69</sup> See e.g., *TCL Aircon*, ¶7, Submissions of the Commonwealth Attorney-General (Intervening).

<sup>70</sup> *Dobbs v. National Bank of Australasia Ltd* (1935) 53 CLR 643, 653 (Austl.).



award not deny the very fundamental principle on which arbitration is based – the principle of party autonomy? A potential inherent contradiction could potentially exist between the parties’ interest in finality and enforcement, and the parties’ interest in obtaining a quality award, and protecting the quality of the award through a review process. Both interests serve important purposes for the parties and a balance needs to be struck.

It is useful at this point to consider the restraints on finality of arbitral awards in Australia through the operation of the IAA, which adopts the Model Law and New York Convention, with the latter in particular having a pro-enforcement policy. The relevant provisions of the IAA<sup>71</sup> appear to impose statutory limitations on the enforcement of arbitral awards and therefore appear to place limitations on party autonomy. As acknowledged by the High Court,

[t]he design is followed through in Article 36 of the Model Law in providing, in common with Article V of the New York Convention, for recognition or enforcement of an arbitral award to be refused at the request of a party against whom the arbitral award is invoked, if and to the extent that the party can furnish proof to the competent court of one or more specified grounds of refusal.<sup>72</sup>

The Model Law therefore limits and regulates the powers of the courts in respect of arbitral awards. The High Court summarized the grounds provided by the Model Law as applied in Australia as follows:

Those grounds include: that the arbitration agreement is not valid under its governing law; that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; and that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. Whether one or more of those grounds is established is an objective question to be determined by the competent court on the evidence and submissions before it, unaffected by the competence of an arbitral tribunal to rule on its own jurisdiction under Article 16 of the Model Law. Arbitration in this way remains “the manifestation of parties’ choice to submit present or future issues between them to arbitration” in that, without

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<sup>71</sup> The Model Law, arts. 5, 34, 36.

<sup>72</sup> *TCL Aircon*, ¶ 12.

“specific authority” to do so, arbitrators “cannot by their own decision . . . create or extend the authority conferred upon them.”<sup>73</sup>

The listed grounds for non-enforcement of arbitral awards given to the courts appear to be exclusive. In *TCL Aircon* the High Court expressed that the ambit of s 36 was as follows: “Article 36(1) provides for **the only grounds** on which recognition or enforcement of an award may be refused by a competent court” (emphasis added).<sup>74</sup> The judges further stated that “Article 5 limits the power of a court to intervene in matters governed by the Model Law to those categories of curial intervention provided for in the Model Law”.<sup>75</sup> An agreement between the parties to an arbitration agreement to include a right of review or appeal, or otherwise avoid finality of the award, may create a conflict between the following applicable principles:

- (1) the principle that the court will give effect to the agreement of the parties; and
- (2) the principle that the court would only refuse enforcement of an award on grounds that fall within Article 36 of the Model Law – an incorrect finding on fact or law (which would likely be the basis on which review/appeal is sought) do not fall within the grounds for review in Article 36 of the Model Law.

The question is whether it is possible in Australia, or should be possible in Australia, to guard the parties’ interest in a correct award and allow for contractually expanded judicial review clauses.

The High Court in *TCL Aircon* interpreted Article 34 of the Model Law as having the same limitations as Article 36. The High Court stated:

Article 34(1), relied upon by TCL in its separate proceedings in the Federal Court to set aside the awards, provides that “[r]ecourse to a court against an arbitral award may be made only by an application for setting aside” the award and only on the grounds set out in Article 34(2), which substantially mirror those in Article 36(1) limiting the grounds upon which a court may refuse to recognise or enforce a foreign award.<sup>76</sup>

The effect of these points is not fully addressed by the High Court in *TCL Aircon*.

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<sup>73</sup> *Id.*

<sup>74</sup> *TCL Aircon*, ¶ 53.

<sup>75</sup> *Id.*

<sup>76</sup> *TCL Aircon*, ¶ 76.

A recent decision of the Federal Court of Australia, *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* [2014] FCA 414, however confirmed that a court has no jurisdiction to review an arbitral tribunal's finding on fact even if the award is wrong on the facts. The court held:

A dissatisfied party to an arbitral award is not given a right of appeal to challenge a tribunal's findings of fact, and a court which is asked to set aside an award must be vigilant not to treat a challenge to an arbitral award on the grounds of it being in conflict with the rules of natural justice like an appeal challenging the facts found by a first instance tribunal from which an appeal may lie. It is not for the court to examine the facts of the case afresh and to revisit in full the questions that were before the Tribunal .... The court's task in applications of the kind brought by [the plaintiff] is not to consider the correctness of the facts found by the Tribunal but to determine whether the Tribunal in finding the facts (whether correctly or incorrectly) did so in breach of the rules of natural justice.<sup>77</sup>

On the facts of this case, however, the arbitration agreement did not include a contractually expanded judicial review clause.

It is important not to lose sight of the fact that arbitration as a process functions within the broader legal framework in a country. Ultimately public power – i.e. the limits set by the sovereign – will define the extent of private power.<sup>78</sup> Statute (or sovereign power) allows for the role of party autonomy, and allows for party autonomy as an exercise of private power to limit the exercise of sovereign (public) power, within certain limits.

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<sup>77</sup> *Emerald Grain Australia Pty Ltd v. Agrocorp International Pte Ltd* (2014) FCA 414, ¶ 10 (Austl.). The court cited the following cases in support: *Uganda Telecom Ltd v. Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, at 439, ¶ 132 (Austl.); *Traxys Europe SA v. Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535, at 557, ¶ 96 (Austl.).

<sup>78</sup> Richard Posner, in the case of *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 709 (7th Cir. 1994) – “Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedure they want to govern the arbitration of their disputes”, as referred to by Katherine A Helm, *See generally* Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?* 61(4) DISP. RESOL. 1 (2006 – 2007).

## VI. THE RELATIONSHIP BETWEEN THE INTEREST IN THE QUALITY OF ARBITRAL AWARDS AND CONTRACTUALLY EXPANDED REVIEW CLAUSES AND THE PRINCIPLE OF PARTY AUTONOMY

Notwithstanding the absence of a specific pronouncement by the High Court of Australia on the problems associated with an incorrect award, the principles reinforced by the High Court – namely the importance of party autonomy and the principles of contract in the arbitral process – indicate that protection against an award that is incorrect could be provided by the parties themselves as such an approach would not be inconsistent with the fundamental principles accepted by the High Court of Australia. While there are limitations on courts in relation to the grounds on which arbitral awards can be refused enforcement under Article 36 of the Model Law, there are no direct limits in the Model Law (and the IAA) on parties and on what they may choose to include in the drafting of the arbitration agreement (subject to the general limitations imposed by public policy, civil procedure, the laws of the country and the rules of natural justice).

In fact, the analysis of party autonomy in *TCL Aircon* confirming the role of party autonomy in arbitration leads to the logical conclusion that the parties would also in principle be able to contractually regulate the binding nature of the arbitral award, or the rights of the parties on the receipt of the award.

Parties are not specifically prohibited by the Model Law from drafting specific clauses protecting the parties against incorrect awards, and nothing in the *TCL Aircon* decision seems to indicate that the parties may in principle not use their contracting autonomy to protect themselves against an incorrect award. In Germany, for example, the German Supreme Court gave effect to an arbitration clause that created arbitral awards that were not immediately binding on the parties.

### A. *A Provisionally Binding Arbitral Award: Claimant v Defendant, Bundesgerichtshof [Supreme Court], III ZB 07/06, 1 March 2007*

The arbitration agreement in this contract that came before the German Supreme Court specified that:

[t]he outcome of the arbitration can be recognized by both parties as conclusive, final and binding on both parties. If one of the parties is dissatisfied with the outcome of the arbitration, it shall commence a court action within a month from the date of

the arbitral decision. If this time limit expires, the arbitral decision shall be final and binding on both parties. . . .<sup>79</sup>

In interpreting whether this clause violated the German Civil Procedure Code (*Zivilprozessordnung*)<sup>80</sup>, which incorporates the Model Law with the 2006 amendments,<sup>81</sup> the Court placed a high degree of importance on party autonomy. “The arbitral award receives its binding force (see Sec. 1055 ZPO) from the parties’ consensus to refer a certain dispute to a decision [taken] in arbitral proceedings”.<sup>82</sup> This focus led the Court to conclude that due to the contractual nature of arbitration, parties should be free to specify any conditions on the binding nature of their arbitral award.

The reasoning of the German Supreme Court is similar to that of the High Court as expressed in *TCL Aircon*, where the principle of party autonomy was strongly supported.<sup>83</sup> In similar circumstances, where the finality of an arbitral award is not subjected to later review, but is potentially suspended for a period in which parties can pursue other dispute resolutions avenues, an Australian court could conceivably reach the same conclusion as the German Supreme Court. The reason is that both Australia and Germany have adopted the Model Law in their domestic legislation,<sup>84</sup> and the Model Law is interpreted in both jurisdictions by taking into consideration its international origin and the need to promote uniformity.<sup>85</sup> This approach would alter the balance between party autonomy and finality more in favour of party autonomy. International precedent is persuasive in domestic decisions relating to international commercial arbitration where the Model Law is involved.<sup>86</sup> Accordingly the door in Australia to the enforcement of at least some type of contractually expanded review clause, or a clause with a similar effect, may not be completely closed. In fact, it is probable that an Australian court could come to the same conclusion – namely that party autonomy allows parties to suspend the effectiveness of an arbitral award for an agreed period of time in which parties may resort to litigation - if faced with the need to interpret a similar clause.

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<sup>79</sup> Bundesgerichtshof [Supreme Court], III ZB 07/06, in YEARBOOK OF COM. ARB.: VOL. XXXIII 231, 232 (Albert Jan Van Den Berg ed., 2008).

<sup>80</sup> Zivilprozessordnung [ZPO] [CODE OF CIVIL PROCEDURE], Bundesgesetzblatt [BGBl.] I (Ger.) [hereinafter ZPO].

<sup>81</sup> *Id.*

<sup>82</sup> Van Den Berg, *supra* note 79, at 234.

<sup>83</sup> *TCL Aircon*, ¶ 15.

<sup>84</sup> See generally the Model Law; ZPO; *International Arbitration Act 1974* (Cth), sch. 2 (Austl.).

<sup>85</sup> *TCL Aircon*, ¶ 7; the Model Law art. 2A(1). See generally Luke Nottage, *International Commercial Arbitration in Australia: What's New and What's Next?*, 30 (5) J. INT'L ARB. 465 (2013). Nottage emphasizes the need for Australia to adopt an “international” approach to interpretation of the IAA.

<sup>86</sup> The purpose of the Model Law was harmonization. See JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL ARBITRATION* 27-28 (2003).

If Australia were to adopt this approach to the Model Law, then it would enable parties to customise their arbitral and potential review process as they see fit and give effect to their interest in the quality of the arbitral award.

## **VII. POTENTIAL BENEFITS OF ALLOWING CONTRACTUALLY EXPANDED REVIEW**

The issue is whether in Australia the focus on finality and enforcement will be prejudicial to the interest of the parties in a quality award and review, or whether Australia will support both. The Model Law has been interpreted as containing exhaustive grounds for the setting aside or denial of the enforcement of an award at Article 34 and 36 respectively. Further, Art 5 of the Model Law indicates that courts should not intervene in matters governed by the Model Law except where provided for by the Model Law.<sup>87</sup> A reading of these articles together would suggest that a court in a Model Law jurisdiction cannot intervene in the event of an error of law on the face of an award as it would be contrary to the Model Law. However, the Model Law's restrictions are aimed at courts, not the parties in the drafting of their arbitration agreement, and the public interest in both finality and quality of arbitral awards may and should be protected. The ability for parties to protect both interests exists.

One of the key problems that could however arise if arbitral awards can be only provisionally binding, or if they are subject to some form of review or appeal, is whether the dispute resolution process followed can still be construed to be arbitration. To a large extent arbitration has been deemed to be the private determination of disputes by an independent third party or parties in a manner that is binding on the parties to the dispute. Perhaps the correct question, however, is whether arbitration as a dispute resolution procedure should be constrained to a specific procedure and under a specific name. A number of more recent forms of alternative dispute resolution, such as "med-arbs" or "arb-med-arbs", fall outside of the traditional concepts of "mediation" and "arbitration". To be bound to arbitrary or perhaps out-dated definitions of a specific dispute resolution process appears to be somewhat dogmatic, and not in keeping with developments in private dispute resolution processes. However, in order to assist parties who wish to agree to a more nuanced form of arbitration and include a contractually agreed review mechanism in their arbitration agreement, an institutional form of appeal does appear to be attractive. The relevant arbitral institution would ideally offer such a process, and a

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<sup>87</sup> The Model Law art. 5.

contractually expanded review clause should be provided as an option in the institutional rules.

There are both potential benefits and disadvantages to allowing judicial review of arbitral awards and observing contractually expanded judicial review clauses (including clauses suspending the immediate operation of arbitral awards).

Judicial review of arbitral awards has historically been limited, as it can undermine some of the most important benefits of arbitration, such as efficiency in dispute resolution and the avoidance of long and expensive litigation.<sup>88</sup> Adding a fourth tier (on top of the typical alternative dispute resolution process of conciliation, mediation and arbitration) could in fact constitute a “point of inferiority”.<sup>89</sup> One disadvantage is the loss of efficiency, which, along with speed, is often cited as some of the key benefits of arbitration. In judicial review, “speed and cheapness are not manifest in the process”.<sup>90</sup> Further, when proceedings continue in court, the benefit of confidentiality is lost.<sup>91</sup> Some other benefits of arbitration may also be forfeited, including the ability of the arbitrators to come up with creative solutions, and the whole process may become more court-like with arbitrators required to write findings in the style of judgments.<sup>92</sup>

There are however also advantages. The most compelling argument in favour of allowing judicial review of arbitral awards and enforcing contractually expanded judicial review is the parties’ interest in fairness.<sup>93</sup> A “maverick arbitrator may render an egregious decision that is completely at odds with the law, or unjustified by the factual evidence, and nonetheless unreviewable”.<sup>94</sup> The “hybrid procedure”<sup>95</sup> of arbitration with the possibility of judicial review would prevent such a situation. Further, from a broader perspective, if judicial review is permitted, parties who are uncomfortable with the thought of binding but potentially incorrect decisions may be more likely to embark on a process of arbitration, if the decision can be reviewed, rather than avoid arbitration altogether and increasing the burden on state courts.<sup>96</sup> Apart from the parties’ interest in fairness, there is also a public policy interest in observing the law. The law

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<sup>88</sup> Margaret Moses, *Party Agreements to Expand Judicial Review of Arbitral Awards*, 20 (3) J. INT’L ARB. 315, 315 (2003).

<sup>89</sup> *Westport Insurance Corporation v. Gordian Runoff Ltd*, [2011] HCA 37, ¶ 111 (Austl.).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Moses, *supra* note 88, at 315.

<sup>93</sup> See e.g., Hossein Abedian, *Judicial Review of Arbitral Awards in International Arbitration – A Case for an Efficient System of Judicial Review*, 28 (6) J. INT’L ARB. 553, 553(2011).

<sup>94</sup> Moses, *supra* note 88, at 315.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

of the land does, and should, carry “significant weight”.<sup>97</sup> In addition to the clear benefit to the parties in protecting their interest in the correctness of the arbitral award, there is an undeniable broader public interest in protecting the quality of arbitral awards.

Although arbitration is generally also considered to be a less expensive method of dispute resolution,<sup>98</sup> and would therefore be the preferred option of parties,<sup>99</sup> the economic argument in favour of finality in arbitration does have its limits.

[T]he parties have the freedom to choose between arbitrators and courts. If they have this freedom, they will simply choose the superior forum. And if the superior forum is actually some combination of arbitration and courts – such as . . . some minimal or substantial level of review of arbitration awards – they will choose that combination as well.<sup>100</sup>

It is acknowledged that one of the two most popular destinations for international commercial arbitration in the Asia Pacific region, Singapore, explicitly does not allow judicial review of arbitral awards. In addition, the rules of the Singapore International Arbitration Centre provide for final and binding awards, **and** that the parties irrevocably waive their right to “any form of appeal, review or recourse to any state court or other judicial authority insofar as such waiver may be validly made”.<sup>101</sup> It is unclear whether the strict approach on the finality of arbitral awards in Singapore has any causal connection to it being a preferred destination for international arbitration, as “finality” of awards does not appear to be one of the key considerations for the choice of the arbitral seat.<sup>102</sup>

It should nevertheless be considered whether a hybrid procedure of arbitration with the option of judicial review (1) is needed, (2) will serve a “valuable purpose”,<sup>103</sup> and (3) whether it would “impact adversely on arbitration generally”.<sup>104</sup>

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<sup>97</sup> Tomás Kennedy-Grant, *The New Zealand Experience of the UNCITRAL Model Law: A Review of the Position as at 31 December 2007*, 4 (1) ASIAN INT’L ARB. J. 1, 3 (2008).

<sup>98</sup> Eric A. Posner, *Should International Arbitration Awards Be Reviewable?*, *present at the Annual Meeting of the American Society of International Law* (Apr. 5-8, 2000).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> SIAC Arbitration Rules rule 28.9. Jennifer Kirby, *Finality and Arbitral Rules: Saying An Award is Final Does Not Necessarily Make It So*, 29 (1) J. INT’L ARB. 119, 119-120 (2012).

<sup>102</sup> WHITE & CASE, *supra* note 52.

<sup>103</sup> Moses, *supra* note 88, at 315.

<sup>104</sup> *Id.*



There is scholarly opinion<sup>105</sup> that not all contracts and contracting parties are equal and that a one-size-fits-all approach to rejecting review of arbitral decisions may not be desirable. In fact, such an approach itself may be contrary to public policy. Further, the review of arbitral decisions is not generally legally unacceptable.<sup>106</sup> Consideration has also been given for the creation of specific arbitral appeal/review panels,<sup>107</sup> and countries such as Australia allow appeals of domestic arbitral awards.<sup>108</sup>

Certain countries allow a right of review, such as the United Kingdom, which allows for appeal on a question of law,<sup>109</sup> and New Zealand, which has a special option to include the right of review. The New Zealand model of international arbitration offers a flexible approach, and is set out briefly below as an example of a flexible legislative framework that accommodates judicial review of arbitral awards.

The position in New Zealand, a Model Law jurisdiction, can therefore also serve as an important comparator for Australia. The *New Zealand Arbitration Act*<sup>110</sup> provides in Schedule 2 Clause 5 the possibility for parties to an international arbitration to contractually opt in to court review of arbitral awards containing errors of law. Clause 5(1) states that:

Notwithstanding anything in Articles 5 or 34 of the First Schedule, any party may appeal to the High Court on any question of law arising out of an award –

- (a) if the parties have so agreed before the making of that award;
- or
- (b) with the consent of every other party given after the making of that award; or
- (c) with the leave of the High Court.<sup>111</sup>

Clause 5(2) creates a statutory threshold for granting leave for appeal:

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<sup>105</sup> See generally Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOTIATION L. REV. 171 (2003).

<sup>106</sup> See Arbitration Act, 1996, art. 69 (Eng.) and Arbitration Act, 1996, sch. 2 c. 5 (N.Z.).

<sup>107</sup> See generally Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 INT'L L. & POL. 1109 (2012).

<sup>108</sup> An appeal to the Supreme Court is possible on any question of law (section 38(2) of the Uniform Acts) with either the consent of all parties or where the court grants special leave (section 38(4) of the Uniform Acts), s 34A of the Commercial Arbitration Act 2010 (NSW), Commercial Arbitration Act 2013 (QLD), Commercial Arbitration Act 2011 (Vic), Commercial Arbitration (National Uniform Legislation) Act 2011 (NT), Commercial Arbitration Act 2011 (SA), Commercial Arbitration Act 2012 (WA).

<sup>109</sup> See Arbitration Act, 1996, art. 69 (Eng.). The United Kingdom has however not adopted the Model Law.

<sup>110</sup> See generally Arbitration Act, 1996 (N. Z.) This act was amended in 2007 to include the opportunity for review of arbitral awards.

<sup>111</sup> *Id.* sch. 2, c. 5.

“The High Court shall not grant leave under subclause (1)(c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties”.<sup>112</sup>

The advantage of this opt-in system is that it provides the uniformity of the Model Law as the default position, but provides parties with the ability to customise their agreement if they so require.

This position would seem more “arbitration-friendly” – both from the perspective of contracting parties, as well as from a legal theoretical perspective, by giving a broader scope to party autonomy.

The benefit of the approach of the *New Zealand Arbitration Act* is that it avoids the ‘one size fits all approach’ of the current Australian IAA. In fact, not all contracting and arbitrating parties are the same, and the “binary approach” to contractually expanded review of arbitral awards has been criticised,<sup>113</sup> with support being expressed in favour of “a continuum” and “a more textured approach”.<sup>114</sup> Further, the possibility of review or appeal of arbitral awards is not completely foreign to the notion of arbitration. Apart from the provision for review in Article 36 of the Model Law, some commentators have expressed support for an arbitral appeals process (i.e. where the review or appeal is conducted by a further arbitral institution.)<sup>115</sup>

### VIII. CONTRACTUALLY EXPANDED JUDICIAL REVIEW – A POSSIBILITY IN AUSTRALIA?

The process of making Australia a competitive centre for international commercial arbitration is likely not complete.<sup>116</sup> Australia is disadvantaged by its geographical separation,<sup>117</sup> and in order to be a popular or even preferred destination for international commercial arbitration, Australia would likely have to do more.<sup>118</sup> The fact that a constitutional challenge to

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<sup>112</sup> *Id.* sch. 2, c. 5(2).

<sup>113</sup> Goldman, *supra* note 105, at 174. He specifically notes that “[v]irtually all of the discussion to date has assumed that the answer to the question of enforceability is either yes or no.” This article rejects this binary approach. Rather, this article assumes that the circumstances in which such clauses appear represent a continuum and accordingly adopts a more textured analysis.

<sup>114</sup> *Id.*, at 201. It should be noted however that Goldman’s comments are made mostly in the context of domestic arbitration in the United States, and that he acknowledges the difficulties of the issues at hand. It is therefore his view that contractually expanded review clauses should only be enforced if they are specifically agreed to by the arbitral parties, and not if they are included in standard form contracts.

<sup>115</sup> Cate, *supra* note 107, at 1128. See generally Erin E Gleason, *International Arbitral Appeals: What Are We So Afraid of?*, 7 (2) PEPP. DISP. RESOL. L. J. 269 (2007).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Nottage proposes that arbitration in Australia should be more tailored to the needs of the parties, and that the whole culture of arbitration would have to change in Australia. Nottage, *supra* note 85, at 465-66.

the validity of the IAA failed, may on its own not assuage parties' concerns about arbitrating in Australia (given that incorrect decisions will bind parties and that they may have not recourse against such decisions). It may also not persuade parties to choose Australia as a seat of arbitration or choose Australian law as the governing law of the arbitration agreement. Apart from the suggestions that have been made to increase Australia's popularity as a destination for international commercial arbitration,<sup>119</sup> consideration should also be given to the needs of the type of parties who, in the words of Keane JA, are "well-resourced and well-advised" and "who engage in international trade on a global scale".<sup>120</sup> These parties can be expected to "customise their agreements to their particular needs, both in terms of the allocation of the risks of their venture, and in their choice of dispute resolution mechanisms".<sup>121</sup> Contractually expanded judicial review clauses in arbitration agreements could serve such parties well – and provided that such clauses are drafted in a manner that could render the clause enforceable under the IAA, or the IAA is amended to accommodate contractually expanded judicial review in the same manner as the New Zealand Arbitration Act, parties could add a potential fourth tier to their adjudication process.<sup>122</sup> These could be important considerations for parties considering contractually expanded judicial review. There is however no information available on the case loads of ACICA, or any details or specifics of international arbitration in Australia.

In the absence of legislation that specifically allows for contractually expanded review of arbitral awards in Australia, the question of the enforcement of an arbitration agreement providing for review of an arbitral award would depend on curial interpretation. Legislative reform may be required to provide certainty.

## IX. CONCLUSION

This article has argued that Australia may be arbitration-friendly from the point of view that arbitral awards will be enforced, but that it may only be fully "arbitration-friendly" if there is the possibility to enforce contractually expanded review clauses. A country that protects both the interest in finality and enforcement of arbitral awards **and** the interest in the quality of arbitral awards, and will further give full effect to the meaning of

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<sup>119</sup> *Id.*

<sup>120</sup> PA Keane, The prospects for international arbitration in Australia, *present at AMTAC* (by video-conference, Sept. 25, 2012), <http://www.fedcourt.gov.au/publications/judges-speeches/speeches-former-judges/chief-justice-keane/keane-cj-20120925>.

<sup>121</sup> *Id.*

<sup>122</sup> The first three tiers being conciliation (or some form of negotiation), mediation and arbitration.

party autonomy in the context of arbitration as a contractual form of dispute resolution, will be a truly arbitration-friendly country.

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