IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S178 of 2012

BETWEEN:

TCL AIR CONDITIONER (ZHONGSHAN) CO LTD

Plaintiff

and

10 **THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA**

First Defendant

CASTEL ELECTRONICS PTY LTD

Second Defendant

SECOND DEFENDANT'S SUBMISSIONS

PART I: CERTIFICATION FOR PUBLICATION ON INTERNET

20 1. I certify that this submission is in a form suitable for publication on the Internet.

PART II: STATEMENT OF ISSUES

2. The Second Defendant ("Castel") says that the proceeding raises the following questions :

   a) First, whether the proceeding raises the "matter" which the Plaintiff desires to agitate or is in any event an appropriate vehicle for the issues which the
30 Plaintiff seeks to raise;

   b) Second, whether the *International Arbitration Act 1974* (Cth) ("**IAA**") by its application of the *UNCITRAL Model Law on International Commercial Arbitration* ("**Model Law**") by designating the Federal Court of Australia to facilitate international commercial arbitration (as defined in the Model Law) including the enforcement of awards made under the Model Law in such arbitrations, substantially impairs the institutional integrity of the Federal Court of Australia under Chapter III of the *Commonwealth of Australia Constitution Act 1900* (UK) ("**Constitution**").

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c) Third, whether the IAA, by operation of arts 5, and 34 to 36 of the Model Law, read with s 7 and Part III of the IAA, impermissibly vests the Commonwealth judicial power on arbitral tribunals.

PART III: CERTIFICATION THAT SECOND DEFENDANT HAS CONSIDERED WHETHER ANY NOTICE SHOULD BE GIVEN IN ACCORDANCE WITH SECTION 78 B OF THE *JUDICIARY ACT 1903* (Cth)

3. Castel considers that notice should be given in accordance with s 78 B of the *Judiciary Act 1903* (Cth) and is satisfied that the requisite notice was duly given by the Plaintiff to the respective Attorneys-General[1].

PART IV: STATEMENT OF ANY MATERIAL FACTS SET OUT IN THE PLAINTIFF'S NARRATIVE OF FACTS OR CHRONOLOGY THAT ARE CONTESTED WITH APPROPRIATE REFERENCE TO THE APPLICATION BOOK

4. Castel does not contest any material facts set out in the Plaintiff's narrative of facts.

PART V: A STATEMENT THAT THE PLAINTIFF'S STATEMENT OF APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS IS ACCEPTED OR, IF NOT, A STATEMENT IDENTIFYING THE RESPECT OR RESPECTS IN WHICH IT IS ALLEGED TO BE WRONG OR INCOMPLETE

5. The Plaintiff's statement of applicable constitutional and statutory provisions (as referred to at paragraphs [15] to [36]) is wrong or incomplete as follows.

6. Paragraph 15 omits reference to the *Geneva Protocol on Arbitration Clauses* of 1923 ("**Geneva protocol**") dealing with the international validity of arbitration agreements, and, the *Geneva Convention on the Execution of Foreign Arbitral Awards* of 1927 (**Geneva convention**") dealing with the enforcement in one country of arbitral awards made in another. These historic international instruments are materially relevant to consideration of the development of laws applicable to international commercial arbitration including particularly the Model Law.

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[1] The Attorneys-General of the Commonwealth, New South Wales, Queensland, South Australia, Victoria and Western Australia have given notice of intervention.

7. Paragraph 15 also omits to mention that the IAA gives effect to Australia's obligations under its accession to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 10 June 1958) ("**New York Convention**") which is binding on Australia as a treaty in force which Australia has acceded to in the exercise of its external affairs power[2].

8. Paragraph 16 should be corrected so as to refer to the IAA "enacting" the Model Law as a law of Australia dealing with international commercial arbitrations.

9. Paragraph 20 should state that Division 2 of Part III enacts the Model Law rather than applies the Model Law as the Model Law is not a convention but a draft or model law which countries may enact with or without modification.

10. The Plaintiff's outline omits mention that a harmonised regime based upon the Model Law has been enacted in New South Wales, Northern Territory, Victoria, South Australia, Tasmania and Western Australia since 2010 in replacement of the harmonised *Commercial Arbitration Acts* of 1984[3]. An arbitration is domestic if (a) the parties to the arbitration agreement have their places of business in Australia, and (b) they have agreed that their dispute is to be settled by arbitration, and, (c) it is not an arbitration to which the Model Law (as given effect by the IAA) applies.[4]

PART VI: A STATEMENT OF ARGUMENT IN ANSWER TO THE ARGUMENT OF THE PLAINTIFF

In limine objection.

11. In the Federal Court Castel seeks only to enforce payment under two awards which provide only for the payment of money. The Plaintiff has opposed the recognition and enforcement of the awards on the ground that there was a breach of the rules of natural justice in the making of the principal award, in that there was allegedly no evidence to base the percentage of 22.5% used by the arbitral tribunal in calculating Castel's loss flowing from the Plaintiff's breaches of contract, or that there was (allegedly) inadequate notice of such a mode of calculation by the tribunal. This is a ground for setting aside an award provided by the IAA and the Model Law.

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[2] Australian Treaty Series 1975 No 25.

[3] *Commercial Act 2010* (NSW) No 61; *Commercial Arbitration Act (National Uniform Legislation) Act* (NT); *Commercial Arbitration Act 2011* (SA) No 32; *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2011* (WA).

[4] See s 1(3) of the *Commercial Arbitration Act 2011* (Vic) for example.

12. The Plaintiff did not say in the Federal Court, and does not say in this Court, that there is some error of law (on the face of the awards or otherwise) which is not available to the Plaintiff to impeach the awards because of a provision or provisions of the IAA or the Model Law.

13. Thus Castel seeks traditional judicial relief in relation to the enforcement of money awards which the Plaintiff is entitled by the IAA and the Model Law to oppose, and has opposed, on the only grounds which the Plaintiff desires to raise in opposition to the recognition and enforcement of the awards.

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14. In the premises the grounds on which the Plaintiff seeks to assail the IAA and the Model Law have no connection with the *lis* between the parties in the Federal Court. They are hypothetical issues only, as regards these parties. There is accordingly no "matter" between the parties which may engage the jurisdiction of this Court.

15. If, however, there is a matter, it is no part of the common law method to express opinions about the issues which the Plaintiff desires to agitate, and this case is an inadequate vehicle for their consideration.

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16. The following submissions are made in respect of the Plaintiff's five preliminary points ([38] ff).

Point one: arbitral tribunals are hybrid authorities sourced in private and public power

17. The Plaintiff's proposition that arbitral tribunals are not creatures purely of private agreement but are "hybrid authorities sourced in private and public power" is of uncertain width and dubious relevance to this case.

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18. In this case the arbitrators were appointed in consequence of the private agreement of the parties as to how certain disputes were to be resolved and determined. The source of the jurisdiction of a privately appointed arbitral tribunal does not depend upon the authority of the State; it is found in the general law and derives solely from the agreement of the parties.

19. The source of the authority of a private arbitral tribunal depends upon parties having agreed to submit their disputes to private arbitration, nothing more, nothing less. The tribunal has no power to determine the rights of non-
40 parties by its award[5].

20. The authority of a tribunal, such as the Human Rights and Equal Opportunity

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[5] See *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 (***"Altain"***).

Commission as referred to in *Brandy v Human Rights and Equal Opportunity Commission*[6] ("***Brandy's* case**") derives from statute not from the agreement of the parties.

21. The source of authority of an arbitral tribunal depends upon agreement means that the intervention of the courts is limited to the extent provided by statute or the common law. The prerogative writs, for example, do not lie in respect of a private arbitral tribunal as it is not a creature of statute[7].

22. The parties to any simple contract may resort to the courts to seek remedies and assistance in dealing with their disputes under those contracts. That the courts may intervene in the resolution of such disputes, even by enforcing non-curial dispute resolution procedures[8], does not mean that a private contract dispute resolution process is a hybrid creature of private treaty and statute or that it is "sourced" in "public power".

Point two: many hallmarks of the judicial power

23. Contracting parties may agree that a third person may establish the fact and measure of an existing obligation (under a rent review clause, say) or even create a substitute obligation for a theretofore existing obligation[9]. The parties may agree that the third person acts as an expert or acts as an arbitrator in performing the task. The fact that the like exercise might have been performed by a judge if the parties had not so agreed does not make its performance by the third person the exercise of judicial power. This equates the act and function of the third person under the actual contract with the hypothetical act and function of a judge with respect to the determination of a matter under a contract the parties did not make. It is an argument that an equivalence of outcomes[10] implies a substantial (judicial) identity of process[11] in the production of each outcome. Such reasoning is erroneous.

24. The processes are materially different. One is private, the other public. One is consensual, the other is not. One derives its authority entirely independently of the parties; the other only by their agreement. The processes to be followed in one are lain down by law; the processes in the other are as the parties have agreed. The fact that a standard is applied in

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[6] (1995) 183 CLR 245.

[7] *R v National Joint Council for the Craft of Dental Technicians (Disputes Committee) and others* [1953] 2 WLR 343 at 343 per Goddard CJ.

[8] Such as staged dispute resolution procedures as for instance were provided for in *Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249.

[9] See, for example, the observations of the Privy Council in *F. J. Bloemen Pty Ltd v Gold Coast City* [1973] AC 115 at 125G-126G.

[10] Namely, the resolution of uncertainty through the expression of an authoritative opinion, award or judgment.

[11] Namely, the exercise of judicial power.

the context of an ascertained state of affairs does not spell, without more, the exercise of judicial power. At best it means that the situation is analogous to the exercise of judicial power, though it may not be analogous at all[12].

25. It is erroneous to posit a dichotomy between awards coupled with a promise to abide by the award, and those not so coupled. In the absence of such an express promise, it is an implied term of every agreement to submit disputes to arbitration that any resultant award will be honoured[13]. Characterising any analogy as a hallmark of judicial power is more confusing than revealing.

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Point three: mechanism by which court "enforces" under art 35 of the Model Law

26. There is a fundamental difference in kind between a court ordered arbitration under s 53A of the *Federal Court of Australia Act 1976* (Cth) ("**FCA**") or other statutory arbitration process on the one hand and an international commercial arbitration under an arbitration agreement pursuant to the Model Law. Any rights of review or appeal or to enforce awards in the first category must be created by statute, expressly or by necessary implication. The
20 content of those rights does not assist the Court in answering the two questions posed by the Plaintiff in the case of these private agreement awards.

27. At common law an action could be brought to enforce an arbitral award. The issues in the arbitration could not be agitated afresh, as they had merged in the award. To say that it is a promise to honour the award, as opposed to the award itself, which is enforced at common law is to point to a distinction without a difference. Either way the original issues were not open for re-agitation as such. Accordingly, a law which enables the recognition and
30 enforcement of an award makes no change of significant substance to the rights of the parties to the award inter se, and effects no change of significant substance in the relation between the arbitrator and the court as to the functions of either. It merely speeds the enforcement of the outcome of an agreed dispute resolution process.

28. The analysis does not alter, as regards the rights of the parties to an award inter se, or as regards the relation between the court and the arbitrator, in the case of a statute which permits the recognition and enforcement of an award, but which does not confer a general right of review or appeal in respect of
40 error. It is necessary to consider the position before the enactment of such a measure, in order to be able to compare.

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[12] As for example, when the determination is by an expert as such, or is agreed to be made "ex aequo et bono", according to what seems fair.

[13] *Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd* [1985] 2 All ER 436.

29. At common law, an error of fact or law was not the subject of curial review where it was a matter "expressly confided to the judgment of the arbitrator", in which case the arbitrator's decision was final[14]. In this way the courts respected the choice of contracting parties to have matters of fact and law determined by private tribunal and held them to their bargain. It would have been mere lip-service to have upheld that autonomy only if the tribunal reached the same result as the court would have arrived at, and this was not the common law rule. Other errors at common law were subject to curial review, but only if they were errors of law appearing on the face of the award (within the meaning of that term)[15]. Errors of fact, and errors of law not so appearing, were not subject to curial review. It was accordingly only in a narrow band of case that courts interfered with awards. This was consistent with the common law allowing parties to agree on a private process for the resolution of their disputes, and holding them to the outcome, save where it could be seen that the parties had not subjected themselves to the risk of an error of law of the particular kind, and it appeared expressly.

30. There was no general right of appeal or review at common law in respect of arbitral error (or first instance curial error, general rights of appeal being the creature of statute). The Court of King's Bench exercised over awards of arbitrators a supervisory jurisdiction analogous to that exercised over inferior tribunals in the case of legal error on the face of the record[16]. At common law there was no review of the proceedings of arbitrators for breach of the rules of natural justice, and arbitrators were under no obligation to provide reasons[17]. The IAA introduces requirements, for international commercial arbitrations, that arbitrators give reasons (unless the parties otherwise agree)[18] and that the rules of natural justice be observed[19]. The rules of natural justice require factual findings to be based on logically probative evidence[20], and also require a tribunal to give reasons[21].

31. International commercial arbitrations are governed by a different regime to domestic arbitrations, and to court ordered arbitrations under s 53A of the FCA. The circumstance that s 53AB may subject this last category of arbitration to a full review by the Court is of no assistance in this case, which concerns awards made under a private arbitration agreement. Such awards

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[14] *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570, 586 (Isaacs J); *Kelantan Government v Duff Development Co* [1925] AC 395, 409.
[15] *Max Cooper v University of NSW* [1979] 2 NSWLR 257, 261
[16] As Lord Diplock explained in *Max Cooper v University of NSW* [1979] 2 NSWLR 257, 261.
[17] *Max Cooper v University of NSW* [1979] 2 NSWLR 257, 261.
[18] Model Law art 31(2)
[19] Model Law arts 18, 23, 24 IAA s 19(b).
[20] *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010] FCA 399 at [214].
[21] See Forbes, *Justice in Tribunals*, 2nd Edition, Chapter 13 Are Reasons Part of a Fair Hearing?

have never been the subject of full curial review. Nor is the court assisted, it is submitted, by the observation that awards other than those for the payment of money – the awards in this case – are permitted to be registered and enforced under IAA and the Model Law. Any issue concerning the recognition or enforcement of such an award is for another case.

Point four: limited exceptions to enforceability

32. The proposition that the grounds on which a court may refuse to enforce an award under article 36 of the Model Law are limited and essentially relate only to the fairness of the conduct of the arbitration[22] is apt to mislead.

33. While it is true that article 36 sets out specific grounds, and that courts have construed the concept of "public policy" in other contexts narrowly, its meaning in article 36 is stipulated by s 19 of the IAA to embrace a breach of the rules of natural justice. This is a far wider basis of review than the common law afforded, and its and/or the IAA's requirement for reasons to be given and findings to be based on evidence, reinforce merits-based decision making as a general requirement of arbitration, a matter with which the common law was not concerned.

34. The other grounds expressed in article 36 for not recognising or enforcing an award are not dissimilar to the grounds upon which courts may refuse to enforce foreign judgments at common law[23]. The common law also recognised few grounds for refusing to enforce foreign arbitral awards[24].

35. The correct comparison is with the position at common law. The grounds for curial intervention in international commercial arbitrations under the IAA and the Model Law are more significantly more embracing than those pertaining at common law.

Point five: extinguishment of the court's traditional supervisory role

36. The questions posed by the Plaintiff are not assisted by a consideration of the UK Act of 1698 in any detail. The fact is that Parliament has for a time regulated the circumstances in which an arbitral award may be reviewed. It is also the case that the courts have for centuries not asserted a general jurisdiction to review arbitral awards on the merits.

37. At the time of federation in Australia the colonies had adopted arbitration legislation based on the then English model.

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[22] Paragraph [52] of the Plaintiff's submissions.
[23] See *Nygh's Conflicts of Laws in Australia*, 8th edn, Ch 40 and Mortensen, *Private International Law in Australia*, Ch 5.
[24] *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd* (1927) 43 TLR 541.

38. The observations of the Plaintiff at paragraphs [60] – [62] are generally correct but overlook important intervening developments.

39. In England arbitrations are regulated by the *Arbitration Act 1996* (UK) ("**English Act**"), which, unlike the IAA, deals with both domestic and international arbitration.

40. The right to appeal on a point of law under the English Act can be contracted out of in both forms of arbitration[25]. In respect of international arbitrations the right can be agreed to be excluded in the arbitration agreement. In domestic arbitrations the right may only be excluded by agreement after the commencement of the arbitral proceedings[26].

41. There is therefore no mandatory curial supervisory role of international commercial arbitrations in English law. It is therefore not correct to speak of the "retention" of a supervisory jurisdiction by the English courts, since the referral of questions of law may now be excluded by agreement of the parties.

42. In Australia the position in domestic arbitrations with respect to judicial supervision and review has also changed.

43. The Plaintiff's application raises questions of Australian constitutional law. Little utility is derived in the resolution of these questions by references to changes in the statutory regimes governing domestic and international arbitrations in Australia and the UK in recent centuries. However, it is relevant to observe that the common law afforded no general merits-based jurisdiction for the review of judgments or arbitral awards. It is accordingly incorrect to measure the impact of changes made by the IAA or the Model Law against some historical assumed standard of overall curial review, for legal error or otherwise, as the Plaintiff evidently does.

THE PLAINTIFF'S ARGUMENT IN THE FORM OF TWO OBJECTIONS

First objection: substantial impairment of the institutional integrity of the court

44. The short and immediate answer to this objection is that the courts have never exercised a general jurisdiction to review the merit of awards for the payment of money before enforcing them. Instead, the common law has at

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[25] English Act s 87.
[26] English Act s 87.

all times respected, in form and substance, the right of contracting parties to have their disputes adjudicated upon by persons of their choice independently of the courts. This position accommodates international trade and dealings, and the need for comity between nations and legal systems as to basis upon which international commercial disputes are resolved.

45. Whether functions, powers or duties cast upon a court are incompatible with its institutional integrity as a court depends on "evaluative process which may require consideration of a number of factors"[27]. Such factors include matters such as impairing the court's ability to control its processes, directing the court to how to deal with a matter or removing a key discretion or decision making function of a court.

46. The question is whether the review role conferred on Ch III courts by the Model Law in refusing enforcement of a Model Law award is repugnant to their role as courts exercising federal judicial power.

47. Courts regularly enforce foreign civil obligations where there is a proper basis for so doing without reviewing the merits of those obligations or for error of law. Australian courts enforce foreign judgments on the basis that the foreign judgment creates an obligation. Foreign arbitral awards may also be enforced at common law without a review on the merits[28].

48. The grounds upon which a court at common law would refuse to enforce a foreign judgment were generally limited to the following:

(a) That the foreign court lacked jurisdiction;
(b) That the foreign judgment was not final or conclusive;
(c) That the judgment was not for a fixed sum;
(d) The parties were not identical to the judgment parties;
(e) The foreign judgment was obtained by fraud;
(f) The defendant was denied natural justice;
(g) The enforcement of the judgment would amount to the enforcement of a foreign penal or revenue law; and
(h) The enforcement of the judgment in the forum would be contrary to public policy.

49. None of the foregoing grounds include error of law.

50. The position under the *Foreign Judgments Act 1991* (Cth) is similar[29]. The public policy ground for intervention under this legislation has been construed

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[27] *K-Generation Pty Ltd v Liquor Court* (2009) 252 ALR 471 per French CJ at [90].
[28] *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd* (1927) 43 TLR 541.
[29] See s 7.

narrowly; see *Jenton Overseas Investment Pte Ltd v Townsing*[30] (“***Townsing***”). The courts are slow to invoke public policy as a ground for refusing recognition or enforcement of a foreign judgment[31].

51. If the position were otherwise an Australian court would be placed in the invidious position of reviewing the merits of a judgment or an arbitral award made in a foreign legal system with foreign elements which it is not in a position to do.

52. The dangers of an Australian court applying contractual principles drawn from the Australian legal system to a transaction with foreign elements has recently been observed by the High Court in *Forrest v Australian Securities and Investments Commission*[32].

53. In *Forrest* French CJ, Gummow, Hayne and Kiefel JJ observed that the Full Federal Court erred by assessing whether a framework agreement was enforceable according to Australian law with no reference to the possible impact of international elements involving a Chinese State owned enterprise operating in the Chinese legal system. The framework agreement contained no choice of law clause and various aspects of the framework agreement were connected with China including the place where the agreement was signed.

54. It is no function of an Australian court enforcing a foreign judgment to review the merits of decisions of foreign courts under the applicable law of foreign legal systems, nor should it be the case with foreign arbitral awards.

55. There are therefore proper reasons for restricting the review by courts of the decisions of foreign courts and tribunals (including private arbitrations) which involve a domestic court in a re-hearing of the foreign proceeding or re-deciding the decision on the merits.

56. The limited rights to object to the enforcement of a foreign award under the New York Convention featured in the deliberations of the United Nations Economic and Social Council, the then United Nations body charged with the proposal for the New York Convention.

57. The United Kingdom delegation expressed concern about obstructive appeals against arbitral awards being pursued to defeat award creditors[33].

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[30] (2008) 21 VR 241; 221 FLR 398.
[31] See *Townsing* at p 246.
[32] [2012] HCA 39 at [44] – [47].
[33] Twenty-first session of the United Nations Economic and Social Council, Item 8, 3 April 1956, E/2822/Add.4.

58. A significant criticism of the Geneva Convention in relation to the public policy ground for non-enforcement of awards, made by the United Kingdom, was that under the Geneva Convention the ground was described as "the public policy or the principles of law' of the country in which enforcement was sought. The delegation noted that this provision had been criticised by commercial bodies in the United Kingdom on the ground that the reference to 'principles of law' was occasionally used as a justification for virtually retrying the dispute, and thereby frustrating the purpose of the arbitration agreement. The delegation considered that the reference to principles of law should be omitted. The reference to public policy would enable the courts of the enforcing country to refuse to enforce awards that were fraudulent, oppressive or scandalous.

59. In the New York Convention the reference to "principles of law" was omitted.

60. As already noted, at common law arbitral awards have never been the subject of a general merits based review, and substantial weight has always been given to the policy of holding parties to agreements for the non-curial resolution of their disputes. These considerations are particularly important in the case of international commercial arbitrations.

61. In an international arbitration the seat of the arbitration may have little or no connection with the law applicable to the dispute and the procedure of the arbitration. An arbitral tribunal based in Singapore might be called upon to apply Swiss law in a dispute between a Chinese resident party and an Australian resident party.

62. A final award in an international arbitration may often be enforced in a different country to that in which the award was rendered.

63. In the circumstances, to point to statutory restrictions in the IAA and the Model Law, which parallel substantially restrictions observed at common law, which limit the grounds of opposition to the recognition and enforcement of international arbitral awards, is not to identify respects in which the court's institutional integrity has been relevantly compromised by the statutory provisions.

Second objection: Impermissible conferral of Commonwealth judicial power on arbitral tribunals

64. The second ground of attack in the Plaintiff's submissions contends that the effect of the Model Law provisions is to confer the Commonwealth judicial power on private arbitral tribunals in breach of Ch III of the *Constitution.*

65. The argument depends upon the proposition that in enforcing an arbitral award under the Model Law there is no opportunity for the enforcing court to independently exercise judicial power.

66. The vice is said to be that all the court is doing in that instance is to "rubber stamp" the award of the arbitral tribunal as if it were an order of the court.

67. Reliance is place on *Brandy's case* to support the argument.

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68. *Brandy's* case concerned a jurisdiction and powers conferred upon a statutory body, the Human Rights and Equal Opportunity Commission (HREOC), in Australia under Commonwealth legislation.

69. The vice in *Brandy's case* was that a body created by statute had been conferred with power by the Commonwealth to be used in conjunction with the powers of the Court. If this were permissible the Commonwealth could effectively set up bodies to usurp the role of the Court in adjudicating matters affecting persons subject to the statutory powers.

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70. The determination of the HREOC became binding and enforceable immediately upon registration (by administrative act) in the Federal Court which was compulsory and automatic.

71. The position of an arbitral body determining a private dispute pursuant to a private contract is different in a crucial respect. The parties are not required by statute to have their dispute decided by a private arbitrator, they do so by their own private agreement[34].

30 72. It is this distinction that removes the enforcement of private arbitration awards from the ratio of *Brandy's case*[35].

73. The rationale of the courts upholding the arbitration process was stated as follows:

> *Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person. Then no cause of action can arise before the exercise by that*
40 *person of the functions committed to him. There is nothing to enforce; no cause of action accrues*[36].

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[34] *Attorney-General v Breckler* (1999) 163 ALR 576 (*"Breckler"*).
[35] See *Breckler* at [43].
[36] *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 (*"Dobbs"*).

74. The common law has long recognised the efficacy of arbitration agreements. Arbitration has not been regarded as ousting the jurisdiction of the courts[37].

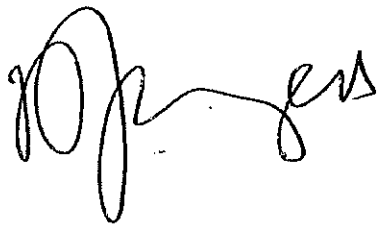
75. The process engaged in by parties to a private arbitration results in the original cause of action being replaced with a different obligation. It is the newly created obligation that is enforced by the courts, see *Dobbs*.

76. A court called upon to enforce an arbitral award is doing no more than enforcing an obligation in a summary way. At common law contracts are enforceable, as a general proposition. So the enforcement of an agreement to arbitrate, and of a resultant award, entails no erosion of judicial power. The task undertaken by the court is no different in quality from when the court enforces other forms of binding agreement in a summary manner[38].

PART VII: ESTIMATED TIME FOR ARGUMENT

77. Castel estimates that the time for presentation of oral argument (including reply) is 3 hours.

Dated: 23 October 2012



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[37] See *Dobbs*.

[38] See for example the *FCR* 2011 dealing with summary disposition Part 26.