

Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2) [2012] FCA 1214 (2 November 2012)

[UN !\[\]\(c8d96c8885d3000a912c2582004aed63_img.jpg\) uncitral.org/docs/clout/AUS/AUS_230112_FT.htm](http://uncitral.org/docs/clout/AUS/AUS_230112_FT.htm)

TABLE OF CONTENTS

	Content	Para(s)
A	Introduction	1 – 7
B	Legislative framework	8
B.1	Objects	9
B.2	Setting aside an award	10 – 12
B.3	Enforcement of an award	13 – 17
B.4	Requirement for natural justice in connection with the making of awards	18
C	Principles relating to public policy in the IAA	19
C.1	Does “public policy” relate to both procedural as well as substantive issues?	19
C.2	Does “public policy” have a similar meaning in the IAA in relation to setting aside an award and as a ground for refusal to enforce an award?	20 – 28
C.3	The seriousness of the breach of natural justice required for an award to be in conflict with public policy	29 – 33
C.4	The discretions to set aside an award or refuse to enforce it	34 – 35

C.4.1	The importance of uniformity of decisions as to “public policy”	36 – 38	
C.4.2	The meaning of “public policy” in the IAA and Convention	39 – 51	
C.5	The extent of the review when an award is challenged for breach of natural justice		52 – 61
C.6	Is there a relevant distinction between the requirement for natural justice in the Award as against the reasons underpinning it?		62 – 64
D	The setting aside applications		65
D.1	The Arbitration		66 – 102
D.2	The “no evidence” rule		103 – 109
D.3	The no evidence contention with regard to the 14% Starting Point Finding		110 – 124
D.4	The no evidence contention with regard to the Uplift Finding		125 – 132
D.5	The no evidence contention with regard to the Lost Sales Finding		133 – 150
D.5.1	The treatment of the expert evidence by the Tribunal	151 – 156	
D.6	The breach of the hearing rule contention		157 – 158
D.6.1	The operation of the hearing rule	159 – 168	

D.6.2 The application of the hearing rule to this case 169 – 176

D.7 Exercise of discretion 177 – 178

E The application to enforce the Awards 179

E.1 Castel's application for enforcement 179 – 184

E.2 The public policy opposition to enforcement 185 – 187

E.3 TCL's other ground in opposition to enforcement 189 - 191

Citation: Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2) [\[2012\] FCA 1214](#)

Parties: **CASTEL ELECTRONICS PTY LTD v TCL AIR CONDITIONER (ZHONGSHAN) CO LTD**

File numbers: VID 218 of 2011
VID 224 of 2011
VID 317 of 2011

Judge: **MURPHY J**

Date of judgment: 2 November 2012

Catchwords: **INTERNATIONAL ARBITRATION** – arbitration pursuant to the International Arbitration Act 1974 – domestically made Model Law award - setting aside an award — recognition and enforcement of award – meaning of “public policy” in International Arbitration Act 1974 (Cth) - whether arbitral award is in conflict with or otherwise contrary to public policy – whether “public policy” relates to procedural as well as substantive issues - importance of international uniformity to interpretation of “public policy” - whether “public policy” has the same or similar meaning in relation to grounds for setting aside an award as grounds for refusing enforcement of an award – requirement for natural justice in connection with the making of awards – seriousness of the breach of the rules of natural justice required to be in conflict with public policy - principles governing the proper exercise of the discretion to set aside or refuse enforcement - the extent of the review warranted when an award is challenged for breach of natural justice – whether a distinction exists between the award and the reasons underpinning it - whether arbitral tribunal breached the rules of natural justice in making the award – whether findings regarding the quantification of loss were made in breach of the no evidence rule and the hearing rule – whether tribunal was required to adopt expert’s quantification of loss

Legislation: Arbitration (Foreign Awards and Agreements) Act 1974 (Cth)
Arbitration Act 1996 (NZ)
Explanatory Memorandum to the International Commercial Arbitration Bill 1988
International Arbitration Act 1974 (Cth)
International Arbitration Amendment Act 1989 (Cth)
Judiciary Act 1903 (Cth)

Cases cited: AJT v AJU [2010] 4 SLR 649
Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd [2004] NZCA 17; [2004] 2 NZLR 614
Atkinson v Hastings Deering (Queensland) Pty Ltd (1985) 71 ALR 93
Attorney General of Canada v SD Myers Inc [2004] 3 FCR 368
Biggin & Co Ltd v Permanite [1951] 1 KB 422
Callaghan v William C Lynch Pty Ltd [1962] NSWLR 871
Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd [2012] FCA 21
Collins v Minister for Immigration and Ethnic Affairs [1981] FCA 147; (1981) 58 FLR 407
Corvetina Technology Ltd v Clough Engineering Ltd [2004] NSWSC 700
Corvetina, Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd [2010] SGHC 108
Deutsche Schachtbau-und Tiefbohrergesellschaft mbH v Shell International Petroleum Co Ltd [1990] 1 AC 295
Downer Connect Ltd v Pot Hole People Ltd (High Court, Christchurch, CIV 2003-409-2878, 19 May 2004)
Downer-Hill Joint Venture v Government of Fiji [2005] 1 NZLR 554
Enzed Holdings v Wynthea [1984] FCA 373; (1984) 57 ALR 167
F (Orse C) v C [1991] 2 IR 330

F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295
Fairmount Investments Ltd v Secretary of State for the Environment [1976] 2 All ER 865
Fox v PG Wellfair Ltd [1981] 2 LLR 514
Haider v JP Morgan Holdings Australia Ltd [2007] NSWCA 158
Hebei Import and Export Corp v Polytek Engineering Co Ltd [1999] HKCFA 40; [1999] 2 HKC 205
Hocking v Bell [1945] HCA 16; (1945) 71 CLR 430
IMC Aviation Solutions Pty Ltd v Altain Khuder [2011] VSCA 248
Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira) (1984) 2 LLR 66
Ironsands Investments Ltd v Toward Industries Ltd (unreported decision of the High Court of New Zealand, Auckland Registry, 8 July 2011)
JLW (Vic) Pty Ltd v Tsiloglou [1994] VicRp 16; [1994] 1 VR 237
Kioa v West [1985] HCA 81; (1985) 159 CLR 550
Mahon v Air New Zealand [1983] UKPC 29; [1984] 1 AC 808
Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc, [1985] USSC 203; 473 US 614 (1985)
Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation [1963] HCA 41; (1963) 113 CLR 475
Oil & Natural Gas Corporation Ltd v SAW Pipes Ltd (Civil Appeal 7419/2001, 17 April 2003)
Parks Holdings Pty Ltd v CEO of Customs [2004] FCA 820
Parsons & Whittemore Overseas Co, Inc v Societe Generale De L'Industrie Du Papier (RAKTA) [1974] USCA2 836; 508 F 2d 969 (2d Cir 1974)
PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597
R v Deputy Industrial Injuries Commissioner, Ex parte Moore [1965] 1 QB 456
R v Gemmill [2004] VSCA 72; (2004) 8 VR 242
R v Hall (1988) 36 A Crim R 368
R v Klamo [2008] VSCA 75; (2008) 18 VR 644
R v Turner [1975] 1 QB 834
Ramsay v Watson [1961] HCA 65; (1961) 108 CLR 642
Registrar of Titles (WA) v Franzon [1975] HCA 41; (1975) 132 CLR 611
Richmond v Richmond (1914) 111 LT 273
RP Robson Constructions Pty Ltd v Williams (1989) 6 BCL 219
Salemi v MacKellar [1977] HCA 26; (1977) 137 CLR 396
Schindler Lifts Australia Pty Ltd v Debelak [1989] FCA 311; (1989) 89 ALR 275
Starkey v State of South Australia [2011] SASC 34
Taylor v The Queen (1978) 45 FLR 343
TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2009] VSC 553
Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd (1977) 16 ALR 23
Telstra Corporation Ltd v Australian Competition and Consumer Commission [2009] FCA 757
Thurston v Todd (1966) 84 WN 231
Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2) [2012] FCA 276
Trustees of Rotoaira Forest Trust v Attorney-General [1999] 2 NZLR 452
Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131; (2011) 277 ALR 415

Date of hearing: 23, 24 and 26 April 2012

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 192

Counsel for Castel Electronics Pty Ltd: Mr R M Garratt QC with Mr D Bailey

Solicitor for Castel Electronics Pty Ltd: Browne & Co

Counsel for TCL Air Conditioner (Zhongshan) Co Ltd: Mr P B Murdoch QC with Mr A Trichardt

- One of the issues affecting the Tribunal's determination of Castel's lost sales of TCL-branded products was the extent to which the OEM products were directly competitive with and substitutable for them. Mr Williams discussed horizontal and vertical differentiation of products at paragraphs 32-35 of his report. He said:

32. The difference between the two kinds of product differentiation stems from the number of buyers who rank one product over another. Products are said to be horizontally differentiated if buyers differ in their rankings of the products so that, if all products were available at the same price, not all buyers would demand the same products. By contrast, products are said to be vertically differentiated if buyers have the same ranking of the products so that, if all products were available at the same price, all buyers would demand the same (most highly-ranked) product. As Tirole notes, one reason for vertical differentiation is difference in quality.
33. Consider the example of domestic motor vehicles. These products are differentiated because some products are sold at higher prices than others. The patterns of consumer preferences among motor vehicles involve elements of both horizontal and vertical product differentiation. Elements of horizontal differentiation seem to be matters such as: (i) seating capacity; (ii) engine size; (iii) four-door or two-door; (iv) hardtop or soft top; and so on. These are elements on which potential consumers have different preferences; that is, even if all cars were available at the same price, consumers would wish to purchase different cars depending on the extent to which the characteristics of the cars corresponded to their preferences over attributes such as these.
34. By contrast, almost all consumers would prefer: (i) a new car over a second-hand car; (ii) a car with perfect paint work over a car with defective paint work; and (iii) a car manufactured by a maker with a reputation for high quality engineering over one manufactured by a maker with a reputation for shoddy design and manufacture. That is, these are elements on which consumers will have similar preferences; that is, if all cars were available at the same price, consumers would choose those that were new, had perfect paintwork and were manufactured by a maker with a reputation for high-quality design and manufacture. That is, all consumers will prefer higher quality over poorer quality.
35. Economists often speak of products being located in 'product space'. Product space may have both vertical and horizontal dimensions. The closer one product is to another in product space, the more likely a consumer is to substitute one product for another if the price of the first product were to rise or if it were to become unavailable.

- In final submissions Castel relied on the lay evidence and attacked Mr Williams' estimate. I set out some parts of the submissions in detail as they illustrate the thrust of Castel's case. Castel submitted:

80. Mr Williams asserted that the conduct at the centre of this dispute involved versioning, and that "TCL seems to have attempted to sell its low-margin OEM products with different branding and through different distribution channels from those used for its TCL-branded product". He did not seek the obvious instructions which might readily have been available to support such speculation, which flew in the face of Mr Shi's evidence (at [17] HB:224 of his witness statement) that TCL took no interest in the distribution channels through which OEM product was sold. Mr Williams sought to sustain his view by observing that he would expect the OEM retailers not also to stock the branded goods. The reason is clear enough: the sales of one would have cannibalised the others because they were substitute goods. If Mr Williams had interested himself to enquire whether TCL made a lesser margin on OEM goods - one concomitant of versioning - he would have learned from his client that TCL did not. TCL only sold its products (of whatever type) at FOB - it derived no return from direct sales to retailers or consumers in Australia. A study of the TCL sales records in exhibit 4 would have shown him that the price to OEM customers and to Castel of particular capacity products was much the same.
81. The efforts made by TCL to distinguish the OEM goods and the TCL goods showed that the differences were differences of appearance only. No functional difference was pointed to. No evidence was adduced that consumers purchase such goods for other than what they do - that is, for functional reasons - rather than for reasons, or substantially for reasons, of appearance. It was asserted that the Castel goods were superior because of the after-sales service provided, but, as Mr Williams accepted, he would not expect a retailer to draw that to a consumer's attention. He accepted too that the retailer holds considerable sway over the purchaser's decision.
82. What is clear is that the OEM goods were known in the market place as TCL goods, and were being sold more cheaply. It is also clear that retailers were getting cross. Mr Francis sought confirmation that the OEM goods were being withdrawn, and told retailers that they had been - as indeed Mr Shi told Mr Kwong - when such was not the case. These assurances would not be sought by retailers and given by a sales manager like Mr Francis unless they were material to preserving sales of TCL branded goods. Mr Williams accepted that retailers would direct their efforts at maximising their profits. This would entail both (a) retailers not buying TCL goods from Castel if equivalent goods were being sold by other retailers at cheaper prices or there was a risk that this would happen; and (b) pointing out the customers, where the retailer had such goods, that the OEM goods which they were selling were effectively identical with the slightly more expensive TCL goods which were allergy friendly.