IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S178 of 2012

BETWEEN:

TCL AIR CONDITIONER (ZHONGSHAN) CO LTD

Plaintiff

and

THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA

First Defendant

CASTEL ELECTRONICS PTY LTD

Second Defendant

PLAINTIFF'S SUBMISSIONS IN REPLY

PART I

1 It is certified that these submissions are in a form suitable for publication on the internet.

PART II

2 The plaintiff replies to the written submissions of the second defendant, intervening parties and proposed joint amici curiae ("**amici**") as follows.

Answer to the *in limine* objection

3 The second defendant's *in limine* objection[1] should be rejected. The plaintiff objects to the enforcement of the award against it pursuant to arts 35 and 36 of the Model Law on the ground that those provisions are constitutionally invalid. Enforcement is the very controversy in respect of which Murphy J has currently reserved judgment in proceedings VID218 of 2011. The objection to that enforcement in this court is not hypothetical.[2] If the relevant provisions are invalid it follows that there is no jurisdiction pursuant to which Murphy J may enforce the awards.

4 It is not necessary for the plaintiff to establish an error of law on the face of the award. It is enough that the plaintiff establishes that the provisions upon which enforcement of the award is sought are invalid. While no constitutional objection to enforcement was raised before Murphy J, that is not a general bar to the present proceedings.[3]

5 Moreover, under the Model Law there is no provision for a party to seek to set aside an award or resist its enforcement on the ground of error of law on the face of the award and,

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1 Second defendant submissions, [11]-[15]. Apparently supported by Western Australia: [5].
2 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.
3 Cf *Dickson v The Queen* (2010) 241 CLR 491, 500-501 [7].

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accordingly, there was no avenue for the plaintiff to raise an objection based upon such error in the Federal Court of Australia proceedings. That notwithstanding, the following errors of law on the face of the award can be readily identified:

(a) having accepted that the plain language of the GDA led to a certain construction (AB 46 [83]), the Tribunal adopted a different construction; one which it considered made more commercial sense (AB 47-49 [86]; 51-52 [98]-[99]), taking into account the fact of the agreement being drafted by business people (AB 50 [88]) and evidence of the surrounding circumstances (AB 45 [79]; 52 [101]);[4]

(b) the Tribunal's assessment of damages suffered by the second defendant was on the basis of no evidence before it (AB 73-87 [189]-[239]);[5] and

(c) having found that the second defendant elected to affirm the GDA rather than terminate on the basis of the repudiatory conduct of the plaintiff (AB 58-59 [131]), the Tribunal relied upon that same conduct to find valid the second defendant's later termination of the agreement, rather than determining whether the plaintiff's post-affirmation conduct was sufficiently repudiatory (AB 57-59 [127]-[135]).[6]

The IAA extends beyond the agreement of the parties

6 Much, if not all, of the propositions advanced by the second defendant, interveners and amici rely upon an assumption that the IAA does no more than give effect to an agreement of the parties. That assumption ought to be rejected.

Agreement to abide

7 The suggestion of the second defendant and amici that a court exercising jurisdiction under art 35 of the Model Law is enforcing an underlying contractual promise to abide by the award is not a satisfactory explanation. The Commonwealth relies on this erroneous explanation as distinguishing the arbitral process under the IAA from the judicial process.[7] The suggestion is contrary to the express terms of arts 35 and 36 of the Model Law which refer to enforcement of the "award". Further, an unqualified promise to abide by the award is not implied into every contract containing an arbitration clause. The case upon which the second defendant relies at [25] in support of this proposition, being a first instance judgment of the Queens Bench,[8] does not support it. In concluding that there was an implied term at 443, Otton J expressly relied upon the analysis of Mustill and Boyd, *Commercial Arbitration* (1982) at 367, which he had quoted at 442 as follows: "[p]arties to an arbitration agreement impliedly promise to perform a valid award" (emphasis added). The extent of any agreement to abide by the award was correctly stated by Kitto J in *Minister for Works (WA) v Civil and Civic Pty Ltd*[9] as follows:[10]

> "although an authority given to an arbitrator to decide a specific question of law cannot be interfered with ..., yet an authority to decide any other question between parties is intended to be exercised in accordance with the law, and consequently a decision in purported exercise of it but arrived at by error of law may be set aside,

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4 Cf *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352 (Mason J); *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1.

5 This is the subject of the review proceedings before the Federal Court of Australia in proceedings VID224 and VID317 of 2011, although raised in the context of a breach of natural justice rather than an error of law.

6 Cf *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 656 (Mason J); *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55 (Kitto J).

7 Commonwealth submissions, [38]-[39].

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

9 (1967) 116 CLR 273, 284.

10 See also *Kelantan Government v Duff Development Co Ltd* [1923] AC 395, 409 and *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 ("***Hancock***"), 586 (Isaacs J).

> provided that the Court can perceive the error of law without having "travelled into the fact" ... by going behind the award into the proceedings of the arbitration itself."[11]

8 Thus, any implied term can extend no higher than a promise to abide by an award made without legal error.[12] Any implied term may also be excluded or further qualified by express terms of the contract. Parties may, for example, purport to apply the *Commercial Arbitration Act 1984* (NSW) (Repealed) to the arbitration and agree, in accordance with s 38(4)(a), for there to be "appeals" on any questions of law. Yet the Model Law by arts 5 and 34 excludes the ability of any courts to review for errors of law, and art 35 deems an award infected with error binding and enforceable with no ground of review in art 36 to refuse enforcement. Accordingly, under the Model Law, the court can go beyond enforcing this implied promise since it is required to enforce an award even when there is an error of law on the face of the award.

A hybrid power

9 While the initial act that sets the arbitral process in train is a private agreement between the parties to arbitrate, the resulting award is not the product of only a private arbitral power.[13] The powers of the arbitral tribunal and the effect (enforceability) of the award go beyond the consent of the parties.[14] The parties cannot opt out of the Model Law (s 21, IAA). The true position is that an arbitral tribunal under the Model law is a hybrid authority, exercising entwined private and public powers, which produces an outcome (award) which at the moment of creation is conferred with a particular legal status by the State, namely, that it is "binding".

10 At every step along the way the arbitral process is facilitated by the conferral of public power. By art 8 of the Model Law (and where relevant, as here, s 7 of the IAA), the jurisdiction of the courts over the dispute is ousted and parties are driven to the arbitral tribunal. Where the parties have not agreed the composition of the arbitral tribunal (arts 10-15), the process or procedure for the arbitration (arts 19 to 26), or the law to apply to the dispute (art 28), the Model Law supplies the rules. The arbitral tribunal is given power to order security for costs (s 23K, IAA), to award interest (ss 25 to 26), and to order costs (s 27) unless the parties have expressly agreed to the contrary. The Model Law gives an arbitral tribunal power to rule on its own jurisdiction (art 16) and the power to order interim measures (arts 17 and 17A), including in relation to the provision of security, disclosure and costs and damages (arts 17E to 17G). The Model Law prescribes the form and contents of the award (art 31), including by requiring reasons unless this has been expressly excluded by the parties, as well as procedures for settlement, termination and a slip rule which apply regardless of any contrary intention of the parties (arts 30, 32 to 33). The Model Law lends the enforcement machinery of the courts to the tribunal at various points during the process (arts 13(3), 14, 16(3), 17H to 17J, 27 and ss 23 and 23A, IAA).

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11 Significantly, art 28 of the Model Law itself requires the tribunal to resolve the dispute by applying "rules of law" (art 28(1)) or "*the* law" (art 28(2)) subject to contrary agreement. Applying an erroneous principle of law is not the application of "rules of law" or "*the* law": cf *Westport Insurance v Gordian Runoff* (2011) 244 CLR 239, 267 [42] (French CJ, Gummow, Crennan and Bell JJ).

12 Unless the very matter referred to the arbitrator for determination was a question of law: *Hancock* (1927) 39 CLR 570.

13 Responding to the submissions of the second defendant at [17]-[22], the Commonwealth at [15], NSW at [44], Victoria at [6]-[11], the amici at [13]-[16] and [55]-[59]. The amici concede an aspect of public power is invoked (at [56]).

14 Cf *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645, 658 [31], where the Court spoke of judicial power as a power "exercised independently of the consent of the person".

11 The very moment the award is made, the Model Law attaches legal consequences to it. The Model Law expressly provides in art 35(1) that the award "shall be recognized as binding". It thus prescribes the legal effect of the award in every case regardless of whether the court's processes are subsequently called in aid to either set aside or enforce the award. The Model Law then immunises the award from any challenge other than through the limited grounds in art 34 (arts 5 and 34). The Model Law requires the court to enforce the award in arts 35 and 36, subject only to narrow exceptions, which the opposing party, if it receives notice, must prove on the balance of probabilities.[15]

12 It is therefore inaccurate to say that arbitration under the Model Law is an exercise of purely private power. Aspects of sovereign power play a role at every stage of the arbitral process.[16] Through the Model Law and IAA, the Commonwealth has given its imprimatur to the arbitration and loaned the machinery of the State and its coercive powers in aid of the arbitral process. The powers tribunals exercise are not entirely divorced from sovereign power, making the intervening parties' reliance on the statement in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* inapposite.[17]

A separate "matter"

13 Certain of the parties place emphasis on the contention that the enforcement of an award is a different "matter" (in the sense of a justiciable controversy) to the "matter" involving the underlying dispute between the parties (which cannot under the Model Law be adjudicated by a court, and which can only be adjudicated by an arbitrator).[18] However, the parties diverge on the question of what precisely is being enforced. The second defendant and amici suggest that what is being enforced is simply an aspect of the underlying contract, which they characterise as a generic and unqualified promise to abide by the award allegedly implied into every contract.[19] They say that what the court does under the IAA is not relevantly distinguishable from what a court did in an action on the award at common law. That should be rejected because, as explained above, the Model Law goes beyond the agreement of the parties.

14 On the other hand, the Commonwealth, New South Wales and Queensland submit that it is the award (or set of rights and liabilities created by the award) that is being enforced. They say there is no institutional impairment of the court since the Parliament can select whatever factum it wants to trigger the court's jurisdiction and an adjudication process is involved.[20] This argument should be rejected because it does not consider the nature of what the court is actually called upon to do.

15 It is no answer to merely point to the fact that the court is called upon to perform some kind of adjudicative process. As French CJ said in *Totani*:[21]

> "the fact that the impugned legislation provides for an adjudicative process does not determine the question whether it impairs the institutional integrity of [the court] by impairing the reality or appearance of judicial decisional independence. The laws held invalid in *Kable* and *International Finance Trust Co Ltd* both allowed for an adjudicative process by the court to which they applied."

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15 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717, 765-766.

16 But see *Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd* [2012] NSWSC 1306 ("*Ashjal*"), [42].

17 (2001) 203 CLR 645, 658 [31]. See Commonwealth submissions, [36]; NSW, [20]; Victoria, [8]; Queensland, [35].

18 Commonwealth submissions, [23]-[26]; NSW, [38]; Queensland, [9]-[12].

19 Second defendant submissions, [27]; amici, [86].

20 This position finds support in the recent decision of *Ashjal* [2012] NSWSC 1306, which is against the plaintiff but which the plaintiff submits is wrong.

21 *Totani* (2010) 242 CLR 1, 51 [78]. See also at 157 [428] where Crennan and Bell JJ spoke of "confining the Court's adjudicative process."

16 And it is going too far to say that the Parliament has an unconstrained entitlement to select whatever factum it wishes, irrespective of its content and the other features of the legislative scheme.[22] The nature of the factum selected is one matter to be considered in the overall scheme of the legislation and in asking the question whether the "particular combination of features"[23] substantially impairs the institutional integrity of the court. The correct approach is to consider the substance of the adjudicative process and what the court is actually being called upon to do (and is not permitted to do) in that process.[24] As was explained by Gummow J in *Totani* at 63 [134], this requires consideration not only to the form of the law granting jurisdiction, but "its operation and ... its 'pith and substance'".

17 A factum, the enforcement of which would require the court to act in a manner repugnant to the judicial process to a fundamental degree, would substantially impair the institutional integrity of the court.[25] Where the factum involves the anterior decision of another, that factum must be scrutinised to ascertain whether it would be repugnant to the judicial process if enforced by the court. Thus, it would be impermissible for the Parliament to select as a factum a decision of a tribunal to the effect that a person was guilty of a criminal offence and seek to have the court enforce that factum as if it were an order of the court.[26]

A factum bearing the hallmarks of judicial power

18 The factum in this case is the award. The award is a determination of contractual rights and liabilities and is a determination of a kind that lies at the traditional core of the judicial power. In *Breckler*, the plurality said:[27]

> "In *Federal Commissioner of Taxation v Munro* [(1926) 38 CLR 153 at 175], Isaacs J gave as examples of functions which are appropriate exclusively to judicial action not only the determination of criminal guilt but also actions in contract and tort. These examples indicate a view of what, at least by reference to history and tradition, are basic rights and interests necessarily protected and enforced by the judicial branch of government."

19 There is no question that if the matter determined by the arbitral tribunal in this case had instead been determined by a court with enforcing powers it would have been an exercise of judicial power. However, the traditional notion of arbitration of disputes arising under a contract sees the activities of determination and enforcement split apart, with the former assigned to the arbitrator and the latter assigned to the court. Historically, that bifurcation has been accepted on the basis that the court, which ultimately adds conclusiveness, maintains "checks and balances"[28] over the arbitration and the award. This also ensured any enforcement of the award went no further than the scope of the parties' agreement.

20 But in this case of course, the determination, being the award, has not been made by a court with the attendant judicial process and it is not binding by virtue only of a contractual

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22 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 ("***Fardon***"), 619 [108], 621 [114] (Gummow J). See also *Baker v The Queen* (2004) 223 CLR 513, 532 [43] (McHugh, Gummow, Hayne and Heydon JJ) where the proposition "a legislature can select whatever factum it wishes as a 'trigger' of a particular legislative consequence" is qualified by the words "in general".

23 *Totani* (2010) 242 CLR 1, 82 [204] (Hayne J).

24 *Totani* (2010) 242 CLR 1, 65 [139] (Gummow J). See also *Fardon* (2004) 223 CLR 575, 614 [90] (Gummow J).

25 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 ("***Re Macks***"), 233 [208] (Gummow J).

26 Cf *Re Macks* (2000) 204 CLR 158, 234 (Gummow J).

27 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 109 [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258 (Mason CJ, Brennan and Toohey JJ).

28 *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 ("***PMT Partners***"), 319 (Toohey and Gummow JJ).

agreement to agree. The award is the "significant integer"[29] in the court's decision to enforce it. Just as the Attorney General's act of declaring an organisation was "the vital circumstance and essential foundation for the making by the Magistrates Court of the control order"[30] in *Totani*, so it is that the award is the vital circumstance and essential foundation for the court making an order under arts 35 and 36 of the Model Law.

21 The court is called upon to re-make the award of the arbitrator as its own order.[31] In so doing, the court may not exercise its traditional functions of fact finding, identification of relevant legal principle, and the application of legal principle to the facts as found in relation to the matters the subject of the award. Instead, the court must make an order which duplicates the award if it is satisfied that the original award or a copy thereof has been supplied to the court (art 35(2)) and if the party against whom it is sought to be enforced has not successfully raised one of the limited exceptions (art 36(1)).

22 The limited exceptions to enforceability found in art 36 of the Model Law do not permit a resisting party to ventilate all errors of law that may appear on the face of the record, nor all complaints as to whether the award is the product of a tribunal complying with its functions prescribed in the Model Law or which is truly reflective of the parties' agreement. Yet, in the face of readily apparent errors or departure from its mandate, the court is required by arts 35 and 36 to enforce the award. In that way, the court's exercise of jurisdiction is directed in a manner repugnant in a fundamental degree to the judicial process.[32]

23 It is inconsistent with a court's essential nature to require it to enforce an award that the court believes or suspects to contain a legal error. This is so because the determination of rights and liabilities under contract lies at the traditional heartland of judicial power. The court's ability to make that determination itself has been circumvented. Instead, it is told the determination and it is told to enforce that determination even if it manifests legal error.

24 Determination of rights and liabilities under contract and the enforcement of such determination – two activities which in the civil context are the raison d'etre of a court – have been broken apart. The Model Law then attempts to bring them back together but gives the court a determination to enforce that is, if infected by error, qualitatively inferior to that which the court could have determined for itself. That is the vice. The Model Law goes a step further by then conferring the otherwise non-binding determination of rights and liabilities under contract with a binding and enforceable effect.

Foreign judgments

25 The key features of the Model Law distinguish arbitration (as prescribed and enforced by the Model Law) from the role of courts in enforcing other dispute resolution mechanisms, including the enforcement of foreign judgments.

26 Other mechanisms of dispute resolution, be it mediation, conciliation or expert determination, do not involve the enforcement of an anterior process bearing the hallmarks of judicial power,[33] nor is there a Commonwealth enactment conferring dispute bodies with functions and powers and providing for enforcement in the same manner as the IAA.

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29 *Totani* (2010) 242 CLR 1, 62 [130] (Gummow J).

30 *Totani* (2010) 242 CLR 1, 66 [142] (Gummow J).

31 See Plaintiff's submissions in chief at [45]-[48].

32 *Nicholas v The Queen* (1998) 193 CLR 173, 232 [146] (Gummow J); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 352-353 [49]-[52] (French CJ), 366-367 [97] (Gummow and Bell JJ), 379 [140] (Heydon J).

33 Expert determination, for example, usually requires the expert to apply his or her expertise (as opposed to law to facts) to resolve a narrow issue referred to them: *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305, 314-316 [25]-[27] (French CJ, Crennan and Kiefel JJ), 319

27 Some parties[34] seek to draw an analogy between the enforcement provisions under the Model Law and those under the *Foreign Judgments Act 1991* (Cth) as well as enforcement of foreign judgments at common law. It is said that enforcement of foreign judgments does not substantially interfere with the institutional integrity of the court and therefore no concerns can validly arise under the Model Law.[35] That submission should not be accepted as it ignores qualitative differences between foreign judgments and arbitral awards.

28 In short, a foreign judgment is an exercise of sovereign power to reach judgment after a proceeding conducted in accordance with the judicial process and in respect of which there have ordinarily been rights of appeal and/or review. The "factum" of a foreign judgment sits in altogether a different position to the "factum" of an award when considered in the overall context of the practical operation of the legislative schemes for the enforcement of foreign judgments and arbitral awards respectively.

29 In *Totani*, Gummow J pointed to the fact that certain "matters" arise under s 76(ii) of the *Constitution* where a significant element is some "anterior decision or determination" not made in the exercise of federal judicial power. His Honour pointed to the enforcement of arbitral awards as one example and to the enforcement of foreign judgments as another example.[36] As noted above, the particular factum selected is one matter to be considered in assessing whether the particular combination of features impair the institutional integrity of the courts. In the case of foreign judgments, an important consideration in that process is that the "anterior decision" is one that has been rendered in accordance with the judicial process. So much is clear from Gummow J's obiter remarks in *Re Macks* that the enforcement of foreign judgments does not raise an incompatibility issue within the *Kable* principle. Key to that proposition was the assumption that a foreign judgment was rendered in the exercise of the judicial process. His Honour said:[37]

> "The reasoning in *Kable* might be applicable where, for example, legislation of a State obliged its Supreme Court to enforce as if it were its own judgment an executive or legislative determination of a nature which was at odds with the fundamentals of the judicial process. That situation is far from that which is presented here." (emphasis added)

30 Thus the fact that a court has made the decision is a significant fact to be weighed in the balance.

31 The principle of international comity also plays an important role in requiring the court to give recognition to the judgment of another nation's courts.[38] "*Comity*" as explained in *Hilton v Guyot*:[39]

> "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

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[39] (Gummow and Bell JJ). See further G B Born, *International Commercial Arbitration*, (Kluwer Law International, 2009), 223-233.

34 Second defendant submissions, [47]-[51]; Commonwealth, [28]-[30]; NSW, [63]-[64]; Victoria, [30]; Queensland, [14]-[16]; amici, [97]-[99].

35 SA submissions, [31]-[33].

36 *Totani* (2010) 242 CLR 1, 64 [136] (Gummow J).

37 *Re Macks* (2000) 204 CLR 158, 232-233 [208].

38 *Bouton v Labiche* (1994) 33 NSWLR 225, 234 (Kirby P); *Jenton Overseas Investments Pty Ltd v Townsing* (2008) 21 VR 241, 246 (Whelan J).

39 159 US 113 (1895), 163-164.

32 The principle of comity is a matter to be considered in weighing the "particular combination of circumstances" and whether as a whole those circumstances give rise to the conclusion that the institutional integrity of the court has been substantially impaired.

33 A foreign judgment is not deemed valid by any Act of Parliament nor does the Parliament confer foreign courts with functions and powers. That the judgment must be one of competent jurisdiction and final and binding in that court's jurisdiction recognises that the validity of the judgment is determined by the sovereign laws of the State from which it emanates and within that State's own systems of review. The valid exercise of judicial power in that State gives rise to an obligation on the parties to comply with the judgment,[40] which courts of another State through principles of comity choose to recognise and enforce subject to limitations and exceptions. The validity of a judgment infected with an error is a matter for the judicial system of the foreign State. If that system provides the judgment is valid, then, subject to the recognised exceptions, comity requires it be recognised as such.

The exceptions to enforcement are narrow in compass

34 In contrast to the submissions of the amici,[41] the other parties submit that the review rights under the Model Law are of broad compass.[42] For example, South Australia submits that the exceptions to enforcement – which it describes as being grounds of subject-matter jurisdiction, natural justice and conformity with public policy[43] "largely mirrors common law review rights".[44] This is simply not correct. In particular, the rules of natural justice are but one small subset of possible errors of law on the face of the award. Moreover, the proposition that the exceptions are broad is contrary to the intent underpinning the Model Law and also the intent of Parliament in enacting the Model Law. The fact is that the "checks and balances"[45] supplied by the common law and continued by the various arbitration statutes have been ousted by the Model Law.

Dated: 2 November 2012

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40 *Rubin v Eurofinance SA* [2012] UKSC 46, [9] (Lord Collins), citing *Williams v Jones* (1845) 13 M & W 628, 633 [153 ER 262, 265] (Parke B); *Godard v Gray* (1870) LR 6 QB 139, 147, (Blackburn J); *Adams v Cape Industries plc* [1990] Ch 433, 513; *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484, (Lord Bridge of Harwich).

41 The amici correctly submit that "the grounds on which an award can be set aside under Article 34 of the Model Law relate primarily to ensuring the process of arbitration is fair and in conformity with the parties' agreement" (at [57]).

42 Commonwealth submissions, [47]-[52]; Victoria, [14]; Queensland, fn 47; SA, [19].

43 SA submissions, [28].

44 SA submissions, [29].

45 *PMT Partners* (1995) 184 CLR 301, 319 (Toohey and Gummow JJ).