TCL AIR CONDITIONER (ZHONGSHAN) CO LTD v THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA & ANOR (S178/2012)

Date application referred to the Full Court: 21 August 2012

The Plaintiff ("TCL") is a company registered in the People's Republic of China. It manufactures air conditioners. In 2003 TCL entered into a distributorship agreement ("the agreement") with Castel Electronics Pty Ltd ("Castel"), a company registered in Australia. A dispute later arose between the parties when Castel alleged that TCL had breached the agreement. In July 2008 Castel commenced an arbitration, pursuant to clause 12(1) of the agreement. TCL opposed that claim and it also counter-claimed against Castel. After hearing both claims, an arbitral tribunal made two awards ("the Arbitral Awards"). On 23 December 2010 it awarded $2.8M to Castel and on 27 January 2011 it also awarded Castel costs of $732,500. Castel then commenced Federal Court proceedings to enforce the Arbitral Awards under the *International Arbitration Act* 1974 (Cth) ("IA Act").

In a judgment delivered on 23 January 2012 ("the interlocutory judgment"), Justice Murphy held that the Federal Court had the jurisdiction to determine Castel's application. This was pursuant to Articles 35 and 36 of the United Nations Commission on International Trade Law's *Model Law on International Commercial Arbitration* ("the Model Law") and s 16 of the IA Act, read with s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth) and s 54 of the *Federal Court of Australia Act* 1976 (Cth).

The case proceeded to final hearing (along with two proceedings commenced by TCL to set aside the Arbitral Awards). On 26 April 2012 Justice Murphy reserved his judgment, which remains reserved as at the time of writing.

On 4 July 2012 TCL filed an Application for an Order to Show Cause. It seeks orders restraining the First Defendant from enforcing the Arbitral Awards, and/or quashing Justice Murphy's interlocutory judgment. Also on that date, TCL filed a Notice of a Constitutional Matter under s 78B of the *Judiciary Act* 1903 (Cth). The Attorneys-General of the Commonwealth, New South Wales, Queensland, Victoria, Western Australia and South Australia have all informed the Court that they will be intervening in this matter.

On 21 August 2012 Justice Gummow referred this matter into the Full Court for final hearing.

The grounds said to justify the granting of relief include:

- The Federal Court's finding of jurisdiction should be quashed, and any further action by the First Defendant in respect of the enforcement of the Arbitral Awards should be restrained by a writ of prohibition, because Articles 35 and 36 of the Model Law, read with s 7 and Part III of the IA Act:

    a) purport to confer the judicial power of the Commonwealth on arbitral tribunals contrary to the requirements of Chapter III of the *Constitution*; and/or

b) impermissibly interfere with the judicial power of the Commonwealth contrary to the requirements of Chapter III of the *Constitution*; and/or

c) undermine the institutional integrity of Chapter III Courts, and are invalid.