

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
PROBATE LIST

Not Restricted

S CI 2015 0978

GIEDO VAN DER GARDE BV
GIEDO GIJSBERTUS GERRIT VAN DER
GARDE

Plaintiff

v

SAUBER MOTORSPORT AG

Defendant

<u>JUDGE:</u>	CROFT J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	9 March 2015
<u>DATE OF JUDGMENT:</u>	11 March 2015
<u>CASE MAY BE CITED AS:</u>	Giedo van der Garde BV & anor v Sauber Motorsport AG
<u>MEDIUM NEUTRAL CITATION:</u>	[2015] VSC

ARBITRATION – Enforcement of a foreign arbitral award – Whether arbitration dealt with a difference not contemplated or falling outside submission to arbitration – Arbitrability – Public policy – Natural justice – *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 – *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387 – *International Arbitration Act 1974* (Cth), ss 8(5)(d), 8(7)(a), 8(7)(b), 8(7A)(a), 8(7A)(b).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicants	Mr T. Clarke	King & Wood Mallesons
For the Respondent	Mr R. Garrett QC with Ms C. Van Proctor	Hall & Wilcox Solicitors
For the Other Drivers	Mr W.T. Houghton QC with Mr T. Purdey	

HIS HONOUR:

Introduction

- 1 By Originating Application to Enforce Foreign Award filed on 5 March 2015, the Applicants seek enforcement of a foreign arbitral award (a partial award, but final as to presently relevant matters) made by sole arbitrator Mr Todd Wetmore (“the Arbitrator”), dated 2 March 2015 (“the Award”) (“the Arbitration”).¹
- 2 Under the arbitration agreement, the agreements were to be governed by the laws of England.
- 3 The First Applicant, Giedo van der Garde BV (“GVDG BV”), is a company established to manage the interests of the Second Applicant, Giedo Gijsbertus Gerrit van der Garde (“van der Garde”), as a race driver.
- 4 The critical dispositive provision of the Award grants an order requiring the Respondent, Sauber Motorsport AG, to –
- refrain from taking any action the effect of which would be to deprive Mr. van der Garde of his entitlement to participate in the 2015 Formula One Season as one of Sauber’s two nominated race drivers.²
- 5 It is common ground between the parties that the threshold requirements of section 8 (with reference to section 9) of the *International Arbitration Act 1974* (Cth) (“the IAA”) are satisfied.³ Consequently enforcement of the Award can only be successfully resisted by the Respondent if it proves to the satisfaction of the Court the circumstances provided for in sections 8(5) and (7) of the IAA.⁴
- 6 In the course of the application to enforce the Award, leave was sought by Messrs Marcus Ericsson and Luiz Felipe de Oliveria Nasr (“the Other Drivers”) to be

¹ *Giedo Van Der Garde BV & Giedo Gijsbertus Gerrit Van Der Garde v Sauber Motorsport AG* (First Partial Award, 2 March 2015) SCAI Case No. 300315ER-2014, Award, 2 March 2015) SCAI Case No. 300315ER-2014.

² See *Giedo Van Der Garde BV & Giedo Gijsbertus Gerrit Van Der Garde v Sauber Motorsport AG* (First Partial Award, 2 March 2015) SCAI Case No. 300315ER-2014, [339].

³ Transcript, p. 15, lines 23–28; and see *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303 at 343 [135], 345 [146].

⁴ See IAA s 8(3A).

represented and heard. The Other Drivers are the two drivers currently selected and nominated by the Respondent for entry in the 2015 Formula 1 Season. Neither of the Other Drivers is a party to the relevant arbitration agreement and neither was represented or heard in the course of any aspect of the arbitral proceedings. In view of their claimed interest in the outcome of this enforcement application and the conceded lack of any prejudice to the Applicants, leave was granted.

Grounds submitted for refusal of enforcement

7 In resisting enforcement, the Respondent submits that –

- (a) Section 8(5)(d) of the *IAA* applies on the grounds that the Arbitrator wrongly proceeded on the basis that van der Garde had a personal contractual right enforceable against the Respondent. The Respondent never entered into an agreement with van der Garde and van der Garde's role in the arrangement between GVDG BV and the Respondent was simply to give undertakings to support the performance of the obligations of GVDG BV. As such, the Award deals with matters not contemplated by, or not falling within the terms of, the submission to arbitration, and further or alternatively, it decides matters beyond the scope of the submission to arbitration and therefore it ought not be enforced.⁵
- (b) Section 8(7)(b) of the *IAA* applies such that to enforce the Award would be contrary to public policy for any or all of the following reasons –
 - (i) Enforcement of the critical dispositive provision would compel the Respondent to engage in conduct that may endanger lives, place people in danger of serious injury, or negligently cause serious injury;⁶
 - (ii) With reference to section 8(7A)(b), (a) the Arbitrator made findings with respect to the contractual relationship between van der Garde

⁵ *Respondent's Submissions*, [4]-[5].

⁶ Transcript, p 40, line 29 to p 41, line 23.

and the Respondent which were not contended for by the parties, and (b) the Other Drivers were not given an opportunity to be heard during the arbitral proceedings. In these circumstances, substantial breaches of the rules of natural justice occurred;⁷

- (iii) The critical dispositive provision is vague and uncertain.⁸ A party subject to an order of the Court must be able to ascertain in precise terms what it is that they must do, or refrain from doing.⁹ Requiring the Respondent to refrain from taking any action the effect of which would be to deprive van der Garde of his entitlement does not of itself suggest that anything must be done, so the critical dispositive provision cannot be said to contain sufficient precision as to be translated into a judgment of the Court in this instance;¹⁰ and
- (iv) The enforcement of the Award, and therefore its critical dispositive provision, would be futile in the form sought, as it does not oblige the Respondent to take any positive step.¹¹ Moreover, an order could not be enforced in the manner sought by the Applicants as there is no possibility of van der Garde being able to participate in the Australian Grand Prix as a driver for the Respondent.¹² In order to have a car suitable for van de Garde to drive, extensive technical modifications need to be undertaken to the car, in particular to the seat (in order to meet safety regulations).¹³ These modifications to the car simply could not be completed in time for the Australian Grand Prix.

⁷ *Respondent's Submissions*, [18]-[22]; Counsel for the Other Drivers also submitted that the absence of the opportunity for the Other Drivers to be heard at the arbitration constituted a "very clear breach of the rules of natural justice or procedural fairness.", Transcript, p 59, line 12-13.

⁸ *Respondent's Submissions*, [35].

⁹ Transcript, p 44, line 30 to p 45, line 16.

¹⁰ Transcript, p 50, lines 18 - 20.

¹¹ *Respondent's Submissions*, [41].

¹² *Respondent's Submissions*, [44]; and see Transcript, p 50, line 26 to p 51 , line 11; Transcript p 59, line 15 to p 61, line 26.

¹³ *Affidavit of Jacob Paul Uljans affirmed 8 March 2015*, [15].

8 In addition to their submissions that enforcement would be contrary to public policy on the grounds of a breach of natural justice under ss 8(7)(b) and 8(7A)(b) of the IAA,¹⁴ as a basis for resisting enforcement having regard to the claimed serious prejudice to their positions which enforcement would entail, the Other Drivers submit that the matter was not capable of settlement by arbitration under the laws of this State, and therefore that the Court should refuse to enforce the Award under section 8(7)(a) of the IAA.¹⁵

9 In essence, the Other Drivers submit that the matter was not capable of settlement by arbitration because they were not joined as parties or otherwise involved in the Arbitration. This was, they say, despite the potential for their interests to be fundamentally affected in the event of an order which amounts to injunctive relief by the Arbitrator. The breach of the rules of natural justice argument in the public policy context is similarly based. The Other Drivers submit that they had a real interest in the sense that they could be prejudiced by the outcome of the Arbitration – but were not given an opportunity to be heard.

No grounds to refuse to enforce

10 I reject the arguments advanced by the Respondent and the Other Drivers for the following reasons and consider that the Court should make an order enforcing the Award and giving effect to its critical dispositive provision.

Section 8(5)(d) – Award beyond the scope of the submission to arbitration

11 Having regard to the contents of the Award and the terms of the relevant documents considered by the Arbitrator,¹⁶ I am not satisfied that there are grounds to refuse enforcement of the Award under s 8(5)(d) of the IAA. The submission of this matter to arbitration was clearly made on the assumption of all parties that the relevant agreements between the parties were entered into in order (among other things) to

¹⁴ See above n 7.

¹⁵ Transcript, p 4, lines 21–28.

¹⁶ *Giedo Van Der Garde BV & Giedo Gijsbertus Gerrit Van Der Garde v Sauber Motorsport AG* (First Partial Award, 2 March 2015) SCAI Case No. 300315ER-2014, [18]–[20].

facilitate van der Garde's involvement as a driver for the Respondent. As such, the Arbitrator's findings in relation to van der Garde's personal interest and rights in the context of the contractual arrangements between the parties were not beyond the contemplation of the parties or the scope of the submission to arbitration.

- 12 In this respect the Court does nevertheless stress that this enforcement application does not involve anything in the nature of a merits appeal from the Award. Indeed, it is not the function of the Court to investigate this issue, save to indicate that on the basis of the material, including the submission to arbitration, it was clearly open to the Arbitrator to make the relevant findings as set out in the Award.
- 13 The Applicants also relied on the *Contracts (Rights of Third Parties) Act 1999* (UK),¹⁷ in this regard. However this is, in my view, a matter going principally to the merits.

Section 8(7)(a) – Non-arbitrability

- 14 I am also not satisfied that s 8(7)(a) of the IAA is applicable in the present circumstances.
- 15 In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,¹⁸ Allsop J (as he was then and with whom Finn and Finkelstein JJ agreed) provided a detailed summary of the origins of the key phrase contained in s 8(7)(a) of the IAA, namely "capable of settlement by arbitration".¹⁹ After tracing the origins of the phrase, his Honour observes that the types of disputes that were considered incapable of settlement by arbitration (or "non-arbitral") were "disputes such as those concerning intellectual property, anti-trust and competition disputes, securities transactions and insolvency."²⁰
- 16 His Honour goes on to state, at paragraph [200]:

It is sufficient to say three things at this point. First, the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable

¹⁷ Transcript, p 52, line 29.

¹⁸ (2006) 157 FCR 45.

¹⁹ (2006) 157 FCR 45 at 97–8, [199]–[200].

²⁰ (2006) 157 FCR 45 at 98, [200].

private resolution of disputes concerning them outside the national court system inappropriate. Secondly, the identification and control of these subjects was the legitimate domain of national legislatures and courts. Thirdly, in none of the *travaux préparatoires* was there discussion that the notion of a matter not being capable of settlement by arbitration was to be understood by reference to whether an otherwise arbitrable type of dispute or claim will be ventilated fully in the arbitral forum applying the laws chosen by the parties to govern the dispute in the same way and to the same extent as it would be ventilated in a national court applying national laws.

- 17 In light of these statements by Allsop J, it is clear that the concept of arbitrability, as understood in the context of the Model Law²¹ and the New York Convention,²² is not directed to matters such as whether affected non-parties have or could have been given an opportunity to be heard. Instead, the phrase “capable of settlement by arbitration” in s 8(7)(a) of the IAA is directed to those disputes where, for reasons of public policy, jurisdiction is retained exclusively by national courts.
- 18 A dispute does not lose its “arbitral quality” merely because a non-party or parties have an interest in the outcome of the arbitration. Indeed, to find otherwise would be to undermine the essence of arbitral proceedings as fundamentally contractual. While non-parties may suffer prejudice as a result of an arbitral proceeding to which they are not parties, arbitral proceedings are necessarily *inter partes* in nature and, as such, whether the Arbitrator could have heard the Other Drivers is not a matter for this Court.
- 19 In any event, the subject matter of this dispute was clearly capable of settlement by arbitration and there are no grounds to refuse enforcement under s 8(7)(a) of the IAA.

Section 8(7)(b) – Public policy²³

- 20 Finally, I am of the view that enforcement of the Award would not be contrary to

²¹ *UNCITRAL Model Law on International Commercial Arbitration* (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

²² United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

²³ “Public policy” as a basis for refusal of enforcement of a foreign arbitral award is construed very narrowly: see, for example, *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, 436; [2011] FCA 131 at [126]; *Traxys Europe SA v Balaji Coke Industry Pty Ltd (No 2)* [2012] FCA 276 at [90].

public policy either on the grounds that a breach of natural justice occurred in connection with the making of the award, or on other grounds. Consequently, there are no grounds to refuse enforcement under ss 8(7)(b) or 8(7A)(b) of the IAA.

- 21 The critical dispositive provision of the Award to which reference has been made, which is cast in negative terms, is not devoid of meaning when it is considered that it would operate *inter partes* in circumstances where all concerned are well aware of the nature of the dispute referred to arbitration. The elements and resolution of the matters giving rise to the critical dispositive provision are the subject of a comprehensive arbitral award – the Award.
- 22 Moreover, to the extent that the application of the Orders arising out of this critical dispositive provision may give rise to any doubt or difficulty – a possibility which may arise with respect to Court or arbitral orders in any event – the assistance of this Court is always available at the request of either party. This Court’s Arbitration List is available for this purpose – at all times and at all hours, seven days a week. It is, of course, the case – both in an arbitration context and more generally – that the Court is “concerned to preserve the integrity of its process, and to see that it is not abused.”²⁴ However, this is not a situation in which these considerations arise.
- 23 In relation to the arguments that enforcement of the Award would be contrary to public policy because of a breach of the rules of natural justice, the Court was not taken to any authority in support of the proposition advanced by either the Respondent or the Other Drivers.
- 24 However, in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*,²⁵ the Full Court of the Federal Court (Allsop CJ, Middleton and Foster JJ) considered the application of the rules of natural justice in the context of the Model Law and the IAA. Relevant to the current controversy, the Full Court placed the relevance and application of the rules of natural justice in the context of the IAA as a matter confined to the parties to the arbitration agreement, stating –

²⁴ See *Soleimany v Soleimany* [1999] QB 785 at 800.

²⁵ (2014) 311 ALR 387.

The system enshrined in the Model Law was designed to place independence, autonomy and authority into the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties.²⁶

25 The Full Court added, at paragraph [111], that –

The assessment as to whether those rules have been breached by reference to established principle is not a matter of formal application of rules disembodied from context, or taken from another statutory or human context. The relevant context is international commercial arbitration.

...

It suffices to say that no international award should be set aside unless, by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered by an international commercial party in the conduct and disposition of a dispute in an award.²⁷

26 In light of these statements, there is no basis for argument that there has been a breach of natural justice brought about by the non-involvement of non-parties, namely the Other Drivers, in the arbitral proceedings. Indeed, there cannot be a breach of the rules of natural justice every time a person who may be affected by the outcome of an arbitration (however seriously) is not invited to join the process and to make submissions. As previously observed, arbitral proceedings are necessarily *inter partes* in nature and so the arguments advanced by the Respondent and the Other Drivers in relation to sections 8(7)(b) and 8(7A)(b) of the IAA must fail.

27 In relation to the arguments that enforcement of the critical dispositive provision would be futile, I note a divergence of evidence as between that provided to the Emergency Arbitrator in the course of the arbitral proceedings²⁸ and the evidence in this respect which was relied upon in the present proceedings. As the evidence before the Emergency Arbitrator indicates, the utility of the orders sought in the arbitral proceedings was an issue which was clearly in the minds of the parties – and the Arbitrator, as the Award indicates.²⁹ Consequently, as the issue is one which goes in many respects to matters canvassed in evidence and considered in the

²⁶ (2014) 311 ALR 387, 414 [109] (emphasis added).

²⁷ (Emphasis added).

²⁸ Transcript, p. 100, lines 2–31.

²⁹ See *Giedo Van Der Garde BV & Giedo Gijsbertus Gerrit Van Der Garde v Sauber Motorsport AG* (First Partial Award, 2 March 2015) SCAI Case No. 300315ER-2014, [334]–[338].

arbitral proceedings, and by the Arbitrator in the Award, it is not an issue into which an enforcing court should venture. To do so would be to enter into the merits of the Award, a step which is not permitted in an application such as this under the *IAA*.

28 With respect to the safety, training, insurance and other issues of concern raised by the Respondent in this context, the negative character of the critical dispositive provision is determinative. No relevant issue of public policy arises in this respect as nobody, certainly not the Court, would contemplate that compliance with the Orders would involve compromising safety, training, insurance or other like requirements.

29 In any event, any practical issues or problems with respect to enforcement of the Orders may be the subject of an application to this Court for assistance, as indicated previously.

30 It should also be borne in mind in relation to futility that the critical dispositive provision sought to be enforced applies to the whole of the 2015 Formula 1 Season – not just in relation to the coming few days in Melbourne for the Australian Grand Prix.

Conclusions

31 For these reasons, the Application is successful. I observe that it appears to be accepted by all parties that s 8(3) of the *IAA* requires that enforcement of the Award must be by an order in the same terms as the critical dispositive provision of the Award. In my opinion this is the correct view.

32 The parties are to bring in orders to give effect to these reasons.

33 Finally, as indicated at the conclusion of the hearing on 9 March 2015, it was my original intention to provide summary reasons at this time before publishing detailed reasons for judgment in due course. On further reflection, following the conclusion of the hearing, I decided that it would be of more assistance to the parties to deliver judgment in this matter at this time rather than a short summary accompanying the making of the Orders. In the limited time available this judgment

is, however, necessarily expressed more briefly and in less detail than would usually be the case.