Introduction

1. Commercial arbitration and constitutional law tend to inhabit different universes. One is concerned with purely private agreements whereby parties elect to have their dispute resolved by a third person chosen by them rather than by a court; the other (at least under our constitutional structure) is primarily concerned with the allocation and exercise of public power.

2. There is, however, one unavoidable point of intersection. While an arbitration agreement is a private contract, its efficacy, in particular, the ability to enforce an award made by the arbitrator pursuant to the agreement, depends on enlisting the compulsive power of the state. Under international instruments such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1985 UNCITRAL Model Law on International Commercial Arbitration, enforcement of an international arbitral award is a function carried out by a national court. That function is reflected in the Commonwealth *International Arbitration Act* 1974, which provides for the Federal Court and State and Territory courts to enforce an international arbitral award on application of one of the parties to it.

3. The question raised in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*\(^1\) was whether, where an international arbitral award is made in Australia, the role of the Federal Court in enforcing it gives rise to an incompatibility with the requirements of Chapter III of the Constitution.

4. The suggested incompatibility arose from the circumstance that under the International Arbitration Act (which implements the international instruments I have mentioned), legal error is not a ground for a court refusing to enforce an award.

\(^1\) [2013] HCA 5; (2013) 87 ALJR 410; (2013) 295 ALR 596.
5. That feature is crucial to the international currency of an arbitral award. One of the principal attractions of arbitration as a means of resolving disputes arising out of business transactions is finality. The parties can agree to submit their dispute to a decision-maker of their choice, from whose decision no appeal is available. Any facility which enabled a national court to review an award for legal error would plainly undermine this.

6. The exclusion of any role for national courts in reviewing legal error is the basis of another of the attractions of international arbitration: neutrality. It can be very important for parties to an international arbitration to have the comfort that their dispute will be determined by an adjudicator who is independent of the states of any contracting party. This comfort is immediately lost if it is a national court, rather than the arbitrator, who has the last word on any question of law determined by the arbitration.

7. There is a tension between these important aspects of commercial arbitration and the principle of legality. Specifically, in the context of our constitutional structure, there might be thought to be an incongruity in a court, to which is assigned exclusively the function of applying the law to the facts of a case, being relegated to the role of giving legal effect to an award made by a person who is not a court, where that award contains an error of law on its face.

8. The incongruity is starker when it is borne in mind that the sorts of disputes which are now recognised as capable of submission to arbitration include not only contractual disputes, but also some disputes involving alleged contraventions of statutorily proscribed norms of conduct, such as misleading or deceptive conduct or unconscionable conduct under the *Competition and Consumer Act* 2010, and allegations of oppression under the *Corporations Act* 2001 (at least where only inter partes relief is sought).

9. Is it constitutionally permissible for privately appointed arbitrators to be given the final word on such matters, and for a court to do nothing more than give effect to their judgment? That is the question that lies at the heart of TCL.

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3 *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896.
10. The resolution of that question raises, in a novel context, issues about the division between public and private power, the ramifications of the decision in *Kirk v Industrial Court of New South Wales*⁴, and the role of history in constitutional interpretation.

**The arguments in TCL**

11. The provisions at issue in *TCL* were Arts 35 and 36 of the UNCITRAL Model Law, which as I have said are incorporated into Australian law by the International Arbitration Act.

12. The scheme of the Act is to distinguish between two forms of international arbitral awards: foreign awards, defined as awards made outside Australia and to which the New York Convention applies; and other international arbitral awards, including awards made in Australia.⁵ It is the latter category that was relevant in *TCL*. The Act provides that the recognition and enforcement of this category of award is governed by the UNCITRAL Model Law (although I note that the enforcement provisions in the UNCITRAL Model Law do not differ materially from those in the New York Convention).

13. Article 35 of the UNCITRAL Model Law provides that a competent court (relevantly, in that case, the Federal Court of Australia), must enforce an international arbitral award unless one of a number of limited exceptions apply. The exceptions, which are set out in Art 36, concern matters such as incapacity, invalidity of the arbitration agreement, certain procedural defects, awards that deal with matters not submitted to arbitration or not capable of arbitration, or infringement of public policy. However, as I have said, legal error is not a ground for a court refusing to enforce an award.

14. On the plaintiff’s argument, the Federal Court’s inability to refuse to enforce an award on the ground of error of law on the face of the award gave rise to two species of incompatibility with Chapter III.

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⁵ An international arbitral award is an award involving an international element e.g. the place of arbitration, or the place of business of one of the parties, or the place of performance of the contract, is a country other than Australia: see Art 1 of the UNCITRAL Model Law.
15. First, it was argued that in co-opting the Federal Court’s assistance to enforce an arbitral award which may contain legal error, the International Arbitration Act impaired the institutional integrity of the Federal Court.

16. Secondly, it was said the Act impermissibly conferred judicial power on the arbitral tribunal by giving it the last word on the law applied in deciding the dispute submitted to arbitration.

17. The High Court rejected these arguments. Before turning to its reasons for doing so, it is necessary to say something about the legal framework within which commercial arbitration operates at the domestic level, and also its history.

**Domestic commercial arbitration**

18. This background is important because it provides the key to understanding the gravamen of the plaintiff’s complaint.

19. The role of the common law courts in enforcing arbitral awards is long-standing. Although an award can be sued upon as a cause of action, beginning with the first Arbitration Act of 1698, English legislation has provided statutory means for the direct enforcement of arbitral awards. Originally, those statutory provisions did not recognise legal error as a basis for refusing to enforce an award.

20. Yet by the 18th century, the Court of King’s Bench had asserted a supervisory jurisdiction to quash or set aside an award for error apparent on its face. In addition, since the end of the 19th century, a statutory facility has existed whereby a party could apply to a court to have a question of law arising in the arbitration judicially determined.

21. These jurisdictions – one common law and one statutory – survived in Australia until the passing of uniform commercial arbitration acts in all the States and Territories, commencing with the enactment of the New South Wales Commercial Arbitration Act

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6 The jurisdiction is discussed in *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257.
7 *Arbitration Act* 1889 (UK), s 19; *Arbitration Act* 1902 (NSW), s 19.
1984. This legislation in effect merged the old common law and statutory jurisdictions. It abolished the Supreme Court’s jurisdiction to set aside an award on the ground of error of law on the face of the award; however it created a statutory right of appeal to the Supreme Court on any question of law arising out of the award. The right was subject to a leave requirement which would be satisfied, where, inter alia, there was a manifest error of law on the face of the award. (In Westport Insurance Corporation v Gordian Runoff Ltd, the High Court determined that, contrary to what had been held in earlier intermediate appeal court decisions, the requirement for the error of law to be “manifest” did not require the error to have any particular quality; it simply required that the error be apparent to a reader of the award.)

22. The gist of the plaintiff’s complaint in TCL was that Arts 35 and 36 of the UNCITRAL Model Law, in so far as they preclude resort to error of law on the face of the award as a ground for refusing to enforce an award, represent a departure from a centuries old practice of common law courts supervising the legality of an arbitrator’s decision and determining questions of law arising in the arbitration.

23. It is worth noting that the 1984 uniform commercial arbitration legislation has since been replaced with new uniform commercial arbitration acts in all the States, again commencing in New South Wales with the enactment of the Commercial Arbitration Act 2010 (NSW). This legislation adopts the UNCITRAL Model Law. As such, it makes no provision for an arbitral award to be appealed from, or for the court to refuse to enforce it, on the ground of error of law. With the passage of this legislation, commercial arbitration at the domestic level has been brought into line with the regime governing international commercial arbitration.

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8 See s 38.
9 (2011) 244 CLR 239.
10 Commercial Arbitration Act 2013 (Qld); Commercial Arbitration Act 2011 (SA); Commercial Arbitration Act 2011 (Tas); Commercial Arbitration Act 2011 (Vic); Commercial Arbitration Act 2012 (WA);
11 See ss 35 and 36.
24. It follows that had the plaintiff’s complaint in TCL been upheld, the suggested incompatibility with Chapter III would have infected not only international arbitral awards made in Australia but domestic arbitral awards as well.12

**The decision of the Court**

25. Two separate judgements were delivered, one by French CJ and Gageler J, and the other by Hayne, Crennan, Kiefel and Bell JJ. The judgments reject the plaintiffs’ arguments for largely similar reasons.

26. The first argument, it will be recalled, was that the requirement that a court enforce an arbitral award, notwithstanding the possibility that it may contain an error of law, impairs the institutional integrity of the court. This argument invokes the principle in *Kable v DPP*,13 as elaborated in *Forge v Australian Securities and Investments Commission*.14 In the latter case the High Court explained that the institutional integrity of a court may be distorted because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making processes. The relevant defining characteristic in TCL was said to be judicial independence, which was said to be distorted by the absence of scope for substantive review of an award for error of law when the Federal Court determines the enforceability of the award.

27. The High Court rejected this argument on the basis that a court, when enforcing an arbitral award, is enforcing the binding result of the agreement of the parties to submit their dispute to arbitration.15 By the operation of accord and satisfaction, the award extinguishes the rights and liabilities which were the subject of the dispute referred to arbitration, and imposes new obligations on the parties in substitution for them.16

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12 Indeed, an identical complaint concerning awards under the *Commercial Arbitration Act 2010 (NSW)* was made in *Ashjal Pty Ltd v Alfred Toepfer International (Aust) Pty Ltd* (2012) 82 NSWLR 93. It was dismissed by Stevenson J, largely for the same reasons as those subsequently given by the High Court in TCL.
14 (2006) 228 CLR 45 at [63].
15 At [34], [104].
16 At [78], [79]; see also [9].
enforcing those new obligations the court is not endorsing the legal content of the award which brought them into being.\textsuperscript{17}

28. I interpose here that, seen in this way, a court’s function in enforcing an arbitral award is little different to its function in enforcing a settlement agreement. The court is not concerned with the rights and wrongs of the settlement or the legal merits of the dispute that was settled; its only concern is to enforce adherence to the (new) obligations created by the settlement itself.

29. The High Court considered that its conclusion was not undermined by the fact that, historically, courts had exercised a jurisdiction to set aside an award for error of law on its face.\textsuperscript{18} That jurisdiction operated in haphazard and anomalous ways. Most notably, its availability depended on whether or not the arbitrator had chosen to set out in the award, as opposed to in a separate document, the legal reasoning on which it was based. In truth, the High Court stated, the general principle, to which the particular common law jurisdiction just mentioned was an exception, was that the arbitrator was the final judge of all questions submitted to him.\textsuperscript{19} This was not so much a free-standing principle of law as a corollary of the fact that, as I have indicated, by the operation of the doctrine of accord and satisfaction, the award extinguishes the dispute which was referred to arbitration and so precludes the parties from agitating it in the courts.

30. Turning to the second argument, the plaintiff had contended that the judicial power of the Commonwealth is impermissibly conferred on the arbitral tribunal because it has the last word on the law applied in deciding the dispute submitted to arbitration without any supervision by a court.

31. The High Court rejected this argument too, emphasising again that the parties had agreed to have their dispute resolved by the arbitrator’s award. That the award was not binding of its own force but depended on the voluntary agreement of the parties distinguished it from an exercise of judicial power, the fundamental characteristic of which is that it is

\textsuperscript{17} At [34].
\textsuperscript{18} [35]-[38]; [81], [99], [104].
\textsuperscript{19} [37], [78], [81], [99].
exercised independently of the consent of the person against whom the proceedings are brought.20

Consideration

32. Several matters of interest emerge from the decision. I wish to highlight four.

33. One noticeable feature of the case is the High Court’s emphasis on the importance of the finality of arbitral awards as essential to the efficient conduct of international commerce. French CJ and Gageler J21 quoted at length from a decision of the Full Court of the Federal Court where it was said that “an ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce …”22 The plurality referred to the various international conventions and laws from the 1920s onwards dealing with international commercial arbitration agreements, which have been directed to encouraging a level of uniformity in national statutes.23 They said:24

“the Federal Court’s determination of the enforceability of an award, upon criteria which do not include a specific power to review an award for error, serves the legitimate legislative policy of encouraging efficiency and impartiality in arbitration and finality in arbitral awards”.

34. Certainly it is true that had the High Court taken the view that some facility to review an award for error of law were necessary before the Federal Court could be co-opted into enforcing an arbitral award made in Australia, the attraction of arbitration in Australia as a method of resolving international disputes would be seriously imperilled.

35. Arbitrations typically arise out of contractual disputes; and the construction and application of contractual provisions generally involve decisions about questions of law. If such questions were subject to review by a court on an application by the losing side, it might be thought there would be little point in taking them to arbitration in the first place.

20 [108]; [28]-[29], [31].
21 At [10].
22 Comandate Marine Corp v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45 at [192].
23 At [46].
24 [105].
36. Further, the importance to international arbitration of a neutral forum, free from interference by national courts, should not be underestimated. It is telling that the enforcement regime for international arbitral awards under the New York convention is adhered to by over 140 states. There is no comparable international regime for the enforcement of the judgments of national courts.

37. It would be simplistic to suggest that the High Court was influenced in its decision by the practical or commercial ramifications of declaring Articles 35 and 36 of the Model Law invalid. It seems the point being made was a more subtle one. References to internationally recognised policy objectives of finality, efficiency and impartiality are a reminder that legality is not a sole or absolute characteristic of the exercise of judicial power. It is commonplace for courts to be precluded, whether by statute or by the common law, from inquiring into the legality of particular conduct: examples include privative clauses (at least where they do not preclude review for jurisdictional error); and the principles of res judicata and issue estoppel.25 The application of these principles may itself involve difficult judgments about the proper limits to be drawn between legality and finality.26 The point is that while courts do have the function of adjudicating upon the application of law to facts, it does not follow that they should exercise that function on every occasion on which a party would wish to invoke their jurisdiction. The proposition that a court must have jurisdiction to review the legality of an arbitrator’s award is not self-evidently true.

38. Secondly, the role of history in the argument and reasoning in TCL should be remarked upon. It is well-established in Chapter III jurisprudence that whether or not a function is judicial can be informed by a consideration of whether the function is one that has been historically performed by the courts. That consideration was seized upon by the plaintiff in TCL, who pointed out that courts have traditionally reviewed awards for error of law on their face. The main problem with that approach was that the history cut both ways. As the High Court pointed out, history suggested a recognition by the common law of the

25 Several other instances are surveyed by the Hon AM Gleeson in “Finality: The 2013 Maurice Byers Address”, Bar News, Winter 2013.
26 An example is the very recent decision of the High Court in Smith v WA [2014] HCA 3 concerning the limits of the exclusionary rule as to the admissibility of evidence from a juror as to the deliberations of a jury.
finality of arbitral awards, subject only to a capriciously operating and anomalous exception in the case of review for error law on the face of the award.

39. There is also a distinction between using historical considerations to support a conclusion that a particular action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it, and the contention that a particular common law rule manifests a fundamental characteristic of judicial power. The first class of case is relatively straightforward – if a particular power was exercised by the courts at the time of Federation, it is very difficult to argue that the continued exercise by the courts of that power would infringe Chapter III. (An example is the power to issue preventative detention orders which was the subject of the decision in Thomas v Mowbray\textsuperscript{27}). But it is another matter to say that the continued exercise of a particular power is a fundamental characteristic of a court which it must continue to exercise. As French CJ and Gageler J pointed out, not every common law rule reflected well on the common law courts; and very few were the manifestation of some fundamental characteristic of judicial power.\textsuperscript{28}

40. This brings me to the third point. Why is the ability to review an award for error of law not a fundamental characteristic of judicial power? In Max Cooper & Sons Pty Ltd v University of New South Wales,\textsuperscript{29} which was an appeal to the Privy Council from a decision of the New South Wales Supreme Court, Lord Diplock described the jurisdiction to review an award for error of law on the face of the award as analogous to that which the court of King’s Bench asserted over inferior tribunals by use of the prerogative writ of certiorari. As this audience will well know, the High Court has in recent times been astute to identify a constitutional underpinning for this jurisdiction.

41. Thus, in Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476, the Court explained that the jurisdiction of the High Court to grant relief under s 75(v) of the Constitution for jurisdictional error by an officer of the Commonwealth cannot be removed by a privative clause enacted by the Parliament (although the actual decision in

\textsuperscript{27} (2007) 233 CLR 307 at [16]-[17], [116]-[120].
\textsuperscript{28} At [35].
\textsuperscript{29} [1979] 2 NSWLR 257 at 261.
that case was that as a matter of construction the privative clause there in question did not purport to do so).

42. In *Kirk*, the Court found that the supervisory jurisdiction of State Supreme Courts over the exercise of State executive and judicial power, exercised through the grant of prerogative writs, was a defining characteristic of those courts (whose existence is entrenched by the Constitution) and cannot be removed by a privative clause. To permit that to occur, the plurality said, “would be to create islands of power immune from supervision and restraint”.30

43. The key to understanding why the power exercised by an arbitrator is different does not lie in distinctions between what might be labelled public power on the one hand and private power on the other. That dichotomy is a false one when it comes to the arbitral process. In *Westport*, in a passage picked up by French CJ and Gageler J in the present case,31 the plurality had pointed out that performance of the arbitral function is not “purely a private matter of contract, in which the parties have given up their rights to engage judicial power” and is not “wholly divorced from the exercise of public authority”.32

44. This reflects the role played by both the legislature and the judiciary in facilitating the arbitral process. For instance, the UNICTRAL Model Law lays down requirements for matters such as the composition of the arbitral tribunal, appointment of arbitrators, and challenges to arbitrators where the parties have made no contrary agreement (Arts 10-13). It sets out the procedure for the conduct of an arbitration (Arts 18-27), and regulates what an award must contain (Art 31). There is also provision enabling the tribunal or the parties to enlist the assistance of the court in matters such as the taking of evidence (Art 27) and the issuing of subpoenas (s 23 of the International Arbitration Act). These features make it difficult to describe arbitral power as completely “private” in any real sense.

30 (2010) 239 CLR 531 at [99].
31 At [9].
32 (2011) 244 CLR 239 at [20].
45. The feature that does appear to distinguish arbitral power from the sort of power at issue in Kirk is its consensual basis. Kirk, and SL57, are concerned with controlling excess of jurisdiction by public officials and decision-makers whose authority comes, ultimately, from laws made by the Parliament. An arbitrator is different because his or her authority to decide is an authority conferred by agreement of the parties. While statute (relevantly, the International Arbitration Act insofar as it implements the UNCITRAL Model Law) facilitates the conduct of the arbitration in the manner I have referred to above, and provides for the enforcement of the award which results from it, nothing in any law authorises or requires an award to be made by an arbitrator in the first place.

46. Fourthly, the element of consent is helpful in distinguishing TCL from other High Court cases where the Kable principle concerning the institutional integrity of a court has been invoked. Perhaps the closest analogy is to that class of case where the judiciary is effectively co-opted to act as an arm of the executive. One recent example is South Australia v Totani33, where the Court invalidated legislation requiring a magistrate to make a control order if satisfied that a person was a member of a declared organisation. Declaration was an executive act, and took into account judgments on a number of legal and factual questions, including findings of commission of criminal offences, which lie at the heart of the judicial function. Although the court had an adjudicative role, the vital and essential question – whether an organisation should be declared – had already been determined by the executive.

47. There are obvious similarities to the role a court plays in enforcing an arbitral award. Absent satisfaction of one of the limited grounds for refusing to enforce the award, the court must simply give effect to a decision that has already been made by a non-judicial body, and over the making of which it has no substantive control.

48. There are two determinative differences however. The decision already made is a decision made by an arbitrator appointed by the parties and not by the executive; there is thus no infringement of the separation of powers doctrine. Further, the decision made by the arbitrator is not itself an exercise of federal judicial power because it comes about as a

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result of the binding agreement of the parties to submit their differences to arbitration and not as a result of any compulsion by the state.

**Conclusion**

49. Before *TCL*, the last occasion on which commercial arbitration had come before the High Court was in *Westport*. In that case, in a passage entitled “The Merits of Arbitration”, Heydon J said:

> “[111] The arbitration proceedings began on 15 October 2004 when Gordian served points of claim. This appeal comes to a close 7 years later. The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy. It is not intended to make any criticisms in these respects of the arbitrators, of Einstein J, or of the Court of Appeal, for on the material in the appeal books none are fairly open. But it must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater relevant expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three. Comment on these melancholy facts would be superfluous.”

50. In light of recent developments, perhaps one comment can be ventured by way of postscript. The cause of the delay in *Westport* was the facility for review of an award for error of law for which the NSW Commercial Arbitration Act then provided. The delay was caused largely because a case originally intended to be resolved by an arbitrator became subject to the system of reviews and appeals which is an incident of any municipal court system. Under the regime now prescribed in the Commercial Arbitration Acts and the International Arbitration Act, the arbitrator has the last word on the questions of fact and law determined by the award. In upholding the constitutional validity of that regime, the High Court has put beyond doubt the element of finality which is essential to the efficacy of commercial arbitration, and the absence of which precipitated the melancholy history decried by Heydon J.

**Michael Izzo**

14 February 2014