Case Note

The March 2015 Formula One Grand Prix, International Arbitration, Enforcement of Award and the Supreme Court of Victoria[1]

Giedo van der Garde BV v Sauber Motorsport AG [2015] VSC 80
Sauber Motorsport AG v Giedo van der Garde BV [2015] VSCA 37
Giedo van der Garde BV v Sauber Motorsport AG (No.2) [2015] VSC 109

Michael Heaton QC[2]

Introduction

The thrill of motorsport and the interest of petrol heads spilled over to the field of international arbitration and rolling cases in the Supreme Court of Victoria in March 2015 to enforce a Swiss arbitral award. Giedo van der Garde and his company sought reinstatement as one of two drivers for the Sauber Motorsport team for the 2015 Formula One season. Ultimately a confidential compromise was reached but only after multiple hearings in the Supreme Court of Victoria. The Court made itself available at short notice on public holidays and at all hours to facilitate the parties and the arbitral process. The Court enforced the award and ultimately stayed enforcement until further order.

Background

In January 2014, Dutch racing driver Giedo van der Garde and his company Giedo van der Garde BV, entered into agreements with Sauber Motorsports AG whereby the team agreed to nominate him as a test and first reserve driver for the 2014 Season, and upon exercise of a contractual option, as one of its two nominated race drivers in the 2015 Season.

In June 2014, Sauber exercised the option in question, confirming van der Garde as one of its two drivers for the 2015 Season.

But in early November 2014, Sauber informed him that the two positions had been given to other drivers and he would be without a drive in 2015.

The relevant arbitration agreement provided that any disputes were to be settled by a single arbitrator in accordance with the International Arbitration Rules of the Geneva Chamber of Commerce, being the Swiss Rules of International Arbitration, published by the Swiss Chambers' Arbitration Institution.

1 This case note is an adaption with additions of a blog by the Honourable Justice Clyde Croft with his kind permission.

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The arbitral seat was Geneva, Switzerland, the governing law was that of England, and the language of the arbitration was to be English.

The arbitral proceedings

Van der Garde promptly made an application for emergency relief proceedings under Article 43(1) of the Swiss Rules within days of being notified of the team's new arrangements.

As part of these proceedings, he sought interim injunctive relief to restrain Sauber from taking any action, the effect of which would be to deprive him of an opportunity to participate in the 2015 Season, pending final determination at arbitration in February.

Following an exchange of submissions, an emergency arbitrator, Simon Greenberg (who, incidentally, is an Australian) granted the interim injunction. The parties then agreed to an accelerated timetable for the hearing of van der Garde's claim for permanent injunctive relief. The matter was set down for a hearing in early February, allowing just enough time for sole arbitrator Todd Wetmore to render his award before the commencement of the 2015 Formula One Season at Albert Park in Melbourne on 15 March 2015. The arbitration was conducted in London over two days and Mr Wetmore published his 109 page First Partial Award on 2 March 2015. The critical dispositive provision of the Award had the effect of granting the relief sought, ordering Sauber to:

> *refrain from taking any action the effect of which would be to deprive … van der Garde of his entitlement to participate in the 2015 Formula One Season as one of Sauber's two nominated race drivers.*

Commencement of Proceedings in Victoria – substituted service

Two days after the rendering of the Award, van der Garde's Australian representatives contacted the Supreme Court of Victoria in accordance with paragraphs 10 to 12 and 14 of Practice Note No 8 of 2014 — Commercial Arbitration Business. The matter was listed for the hearing of an urgent *ex parte* application the following day (a Thursday) at 11am, at which van der Garde sought orders permitting substituted service of the Originating Application on Sauber.

Sauber is a Swiss company and its registered business address is in Switzerland. As such, without an order for substituted service, service would have had to have been effected in accordance with Order 80 of the Supreme Court (General Civil Procedure Rules) 2005, which sets out the procedure for service under the Hague Convention protocols. Amongst other things, this would have required:

a) an application to be made to the Prothonotary in his capacity as a forwarding authority for request of service of the Originating Application in Switzerland, to be made to the relevant authority in Switzerland; and

b) unless service was accepted voluntarily, the Originating Application to be translated into one of Switzerland's three official languages, that is into German, French or Italian.

In the circumstances, and on the basis of extensive written submissions, Croft J found that service in accordance with the Hague Convention protocols was impracticable. Accordingly, and following a brief

ex parte hearing, orders were made for substituted service under rule 6.10(1), directing service to be made by delivery of the relevant documents:

f) to the offices the Australian Grand Prix Corporation;

g) to Sauber by fax and email; and

h) to Sauber's representatives in the Arbitration by email.

It was further ordered that:

a) Sauber file and serve any appearance by 4pm the following day;

b) all documents upon which the parties wished to rely in the enforcement proceedings, including submissions, be filed only three days later (on a Sunday) by email to the Associates for Croft J; and

c) the hearing of the Originating Application be adjourned to 10am the next Monday, which was the Labour Day public holiday.

The parties duly filed their materials in accordance with these orders, giving Croft J Sunday evening to read extensive written submissions and affidavit material from both sides.

Given the public interest in the matter, Croft J allowed the domestic and international media full access to the courtroom — including the ABC, who filmed the entire proceeding. The hearings were also webcast live through the Supreme Court website.

Hearing before Croft J

During the course of the Labour Day hearing on 9 March 2015, the other two drivers selected and nominated by Sauber for entry in the 2015 Season sought leave to be represented and heard. Neither of the Other Drivers was a party to the relevant arbitration agreement; nor were they represented or heard in the course of any aspect of the arbitral proceedings. However, in view of their interest in the enforcement application and the conceded lack of any prejudice to van der Garde and his company, leave was granted.

It was common ground between the parties at the hearing of the matter at first instance that the threshold requirements of the *International Arbitration Act 1974* (Cth) (**IAA**) had been satisfied, namely that the party seeking enforcement produce to the Court duly certified copies of the original award and the arbitration agreement.

Sauber sought to resist enforcement on grounds that it would be contrary to the public policy of Australia: IAA section 8(7)(b). Their counsel relied on the following four principal and alternative arguments to support this proposition:

a) that enforcement would be futile because, regardless of the Court's decision, there was no chance of van der Garde being able to drive in the Australian Grand Prix the next weekend. In this regard, Sauber cited the need for extensive technical modifications to the race car if van der Garde were to be reinstated, and his lack of a Super License, which is required by all Formula One drivers: IAA section 8(7)(h) and section 8(7A)(h).

b) that enforcement would compel Sauber to breach the Crimes Act 1958 by engaging in conduct that may endanger lives and/or place spectators and others at risk of serious injury, essentially because of van der Garde's lack of practice in the new race car and general lack of preparation with the team.

c) that the critical dispositive provision sought to be enforced was vague and uncertain, such that Sauber would be unable to ascertain what it must refrain from doing in order to comply with any order; and

d) that the failure to give the Other Drivers an opportunity to be heard during the arbitral proceedings constituted a breach of the rules of natural justice in connection with the making of the Award: IAA section 8(7A)(b).

Sauber also argued that the Award dealt with matters beyond the scope of the submission to arbitration and therefore should not be enforced. This submission was based on an argument that the Arbitrator wrongly proceeded on the basis that van der Garde had a personal contractual right enforceable against Sauber in circumstances where, it was argued, it was van der Garde's company, not him personally, who had entered the relevant agreements with Sauber: IAA section 8(5)(d).

Finally, the Other Drivers argued under the IAA that, having regard to the claimed serious prejudice to their respective positions that enforcement would entail (namely the fact that one of them would be required to make way for van der Garde), the matter was not capable of settlement by arbitration.

Decision - *Giedo van der Garde v Sauber Motorsport AG [2015] VSC 80*

Judgment was handed down on 11 March 2015 — just over 36 hours after the conclusion of the full hearing. Croft J rejected all of the arguments of award beyond the scope of the arbitration (IAA section 8(5)(d)), non-arbitrability (IAA section 8(7)(a)) and public policy (IAA section 8(7)(b) and section 8(7A(b)) advanced by Sauber and the other drivers against enforcement and made orders giving effect to the critical dispositive provision of the Award, namely the prohibitive injunction restraining Sauber from taking any action that would deny van der Garde of his place in the team for the 2015 Season.

Sauber pressed the argument that enforcement of the Award would be futile if, as Sauber claimed, there was no chance of van der Garde racing that weekend. However, no authority was cited in support of the position that futility would enliven the public policy ground for resisting enforcement.

Croft J was not satisfied that futility was established, or that the issue would, in any event, be relevant to the application, noting in the judgment 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.*[3]

Accordingly, even if van der Garde were unable to race in Melbourne, it did not follow that he would be unable to race in the rest of the 2015 Season. More importantly however, and as Croft J also set out in the judgment,

3 At [30].

> *[the evidence before the Emergency Arbitrator indicated that] 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 indicate[d]. Consequently, as the issue is one which goes in many respects to matters canvassed in evidence and considered in the 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.*[4]

The other arguments advanced against enforcement also failed. In relation to the safety concerns, Croft J found that no issue of public policy arose in this context because 'nobody, [and] certainly not the Court would contemplate that compliance with the Orders would involve compromising safety'.[5]

Indeed, there was nothing in the critical dispositive provision that required Sauber to breach any laws or risk safety; if the Formula One governing body or other competent authority determined that it was unsafe for van der Garde to race, so be it. Under such circumstances, the Orders would not have required Sauber to ensure that van der Garde raced in any event, and so no issue of public policy arose on that basis.

Finally, in relation to the natural justice arguments, Croft J found that:

> *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.*[6]

Thus, the fact that the Other Drivers were not told about or invited to join the arbitral proceedings was irrelevant to the grounds upon which the Court can refuse enforcement under IAA. The overriding justification for this conclusion was that arbitral proceedings are necessarily inter partes in nature.

Appeal – *Sauber Motorsport AG v Giedo van der Garde BV [2015] VSCA 37*

Within hours of judgment being handed down on the Wednesday morning, Sauber filed a Notice of Appeal with the Court of Appeal Registry. An appeal bench comprising of Justices Simon Whelan, David Beach and Anne Ferguson agreed to hear the appeal. They also agreed to a change of venue considering Court 15 was equipped with the technology for proceedings to be videoed and the decision broadcast live through the Court website, so F1 fans across the globe could tune in to watch what was happening.

The appeal judges sat that very afternoon to determine Sauber's leave to appeal application, and the substantive appeal, in the event that leave were granted.

4 At [27].
5 At [28].
6 At [26].

The hearing concluded the following morning – Thursday – and the appeal judgment was handed down that afternoon, three days before the Australian Grand Prix was to take place.

The Court of Appeal granted leave to appeal but dismissed the appeal in its entirety for the reasons given at first instance. Sauber's grounds of appeal were essentially the same as those arguments advanced against enforcement at first instance. In relation to the safety concerns, the Court of Appeal confirmed that:

> *[n]o person is required to undertake any illegal or unsafe activity. These events are highly regulated. We proceed on the assumption that the regulators will ensure all safety requirements are complied with.*[7]

Further, and in relation to the natural justice grounds of appeal, the Court of Appeal restated and emphasised that the Court is not permitted to consider the merits of an arbitral award when hearing an enforcement application. It was in this context that their Honours found that:

> *[t]he complaint now made [by Sauber] in this regard is a complaint as to a legal or factual conclusion which is, to use the words of the Full Court of the Federal Court in [TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd], 'dressed up as a complaint about natural justice.'*[8]

Finally, the Court of Appeal rejected the argument of the Other Drivers, also advanced at first instance, that the failure to give notice to them of the arbitral proceedings rendered the matter incapable of arbitration. In so doing, their Honours emphasised the 'necessary inter partes nature' of arbitral proceedings. Accordingly, their Honours reasoned that the Arbitrator had determined who the parties to the relevant contracts were, and that neither Sauber nor the Other Drivers had 'established that it would be contrary to public policy to enforce that determination'.

Contempt proceedings

Shortly before the appeal judgment was handed down, late Thursday afternoon, van der Garde's representatives notified the Associates of Croft J of their intention to make a further application in the event that the appeal failed.

As anticipated, within minutes of the appeal being dismissed, van der Garde commenced contempt proceedings against Sauber on the grounds that it had failed to comply with my Orders made the day before.

At a resumed hearing before Croft J immediately following the appeal judgment, van der Garde sought, among other things:

a) a freezing order over Sauber's assets located in Victoria;

b) a declaration that Sauber was guilty of contempt;

c) an order that Sauber's CEO be punished for the contempt committed by Sauber; and

7 At [14].
8 At [17].

d) orders that sequestrators be appointed with the power to take possession of Sauber's assets located in Victoria.

In support of the application, van der Garde argued that Sauber had breached the Orders by:

a) preparing to participate in the Australian Grand Prix without van der Garde as a driver; and

b) refusing or declining to prepare to participate in the Australian Grand Prix with van der Garde as a driver.

Critical to the evidence in this regard, in senior counsel's submission, was an email from Sauber's solicitors – sent close to midnight only the day before – in which Sauber claimed that the relevant contracts with van der Garde had previously been terminated.

In response, senior counsel for Sauber indicated that he had been unable to obtain instructions from his client. Consequently, the proceeding was adjourned until the following morning, two days before the race. Later on that Friday, the matter was adjourned after senior counsel for van der Garde indicated that some 'constructive discussions were taking place between the parties', and the Court resumed sitting at 10am the next day, Saturday.

Upon resumption, senior counsel submitted consent orders seeking leave to withdraw its summons filed in the contempt proceedings and to discontinue the proceedings following successful negotiations overnight.

Orders stayed – *Giedo van der Garde BV v Sauber Motorsport AG (No.2) [2015] VSC 109*

By summons filed 24 March 2015 Sauber by consent sought orders that paragraphs 1 and 2 of the orders made on 11 March 2015 pursuant to the provisions of the IAA by way of recognition and enforcement of a foreign arbitral award in the following terms:

a) The first panel award handed down by Mr Todd Whitmore on 2 March 2015 in SCAI Case No. 30031ER – 2014 be enforced as if it were a judgment or order of this Court.

b) The respondent refrain from taking any action the effect of which would be to deprive van der Garde of his entitlement to participate in the 2015 Formula One season as one of Sauber's two nominated race drivers,

be vacated or alternatively discharged or permanently stayed.

In the application the respondent submitted 'on the basis of these authorities, it is submitted that in circumstances where the parties have agreed that Sauber has discharged all of its obligations under the relevant driver agreements and the relevant driver agreements have been terminated by agreement, the basis for the continuation of an injunction restraining Sauber 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", has been removed by events subsequent to the judgment and the Orders. In these circumstances, it was submitted that the interests of justice require the lifting of the permanent injunction so that Sauber can continue the 2015 Formula 1 Season with its two

nominated drivers, Messrs Ericsson and Nasr, without acting in contravention of an order of this Court.'

Croft J considered[9] the circumstances before him were not properly characterised as a situation where it was open to all parties who seek to vacate, vary or discharge orders to do so by consent because of the nature of the orders being orders recognising and enforcing a foreign arbitral award under the provisions of the IAA. His Honour noted there was no provision in the IAA, the New York Convention or the Model Law for undoing recognition or enforcement, though his Honour considered it would open to an enforcing court on the basis of its own procedures to stay enforcement in appropriate circumstances. His Honour considered having regard to the purpose of the IAA, the New York Convention and the Model Law, an enforcing court would only in very clear circumstances act to stay enforcement of a foreign arbitral award where that award was properly recognised and enforceable within the jurisdiction of that court.

His Honour did however consider[10] there was some flexibility for the circumstances before him. His Honour referred to Article III of the New York Convention allowing for orders 'regulating' the process of enforcement. His Honour considered an order staying enforcement until further order of the enforcing court was consistent with the New York Convention but not an order vacating, discharging or permanently staying an enforcement order.

His Honour further observed the relevant award was extant and had not been annulled or otherwise the subject of orders by any of the courts of the arbitral seat, Switzerland. Further, the orders made at first instance by Croft J had been affirmed by the Court of Appeal.

Taking into account agreements now reached between the parties and agreement of the parties to stay the orders in Victoria, his Honour considered it was appropriate to stay the orders until further order (but not permanently) having regard to the mandate under the provisions of the IAA, the New York Convention and the Model Law that foreign arbitral awards must be recognised and enforced subject only to the exceptions provided in that legislation, the New York Convention and the Model Law. His Honour thus stayed the orders until further order and reserved liberty to apply to the court.

Conclusion

The effort by the Court to resolve the issues in this matter in a short space of time was acknowledged by all involved.

These cases clearly indicate and demonstrate the capacity of the Court to handle high profile, urgent arbitration matters and provide an excellent platform upon which to promote Australia as an arbitral forum of choice in the Asia-Pacific.

They demonstrate the pro-arbitration attitude and its application by the Court.

9 At [19].
10 At [20].

Further, as Croft J emphasised in his judgment in the Sauber case, practitioners should remember that the Supreme Court's Arbitration List is available at all times and at all hours, seven days a week. This is a critically important service and one well worth talking about to fellow practitioners both in Australia and overseas – and, most importantly, to the end-users of arbitration services, namely commercial clients and in-house counsel.