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Australia

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2019

AUSTRALIA

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Law and Practice

Contributed by Clifford Chance

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Clifford Chance has the largest international arbitration practice in Australia, whether measured by case load, aggregate quantum in dispute or team size. The team in Australia is recognised throughout Clifford Chance as the "go to" team globally for any complex mining and energy arbitrations anywhere in the world. Members of the arbitration team are at the forefront of practice and theory in this area, being active as both advocates and thought leaders (speakers, teachers and authors). Lawyers regularly give presentations on key market developments and topics such as international arbitration, investor-state dispute settlement and international investment law, regulatory issues and sanctions. The team regularly produces client briefings, updates and publications.

Authors

Ben Luscombe leads Clifford Chance's Litigation and Dispute Resolution practice in Australia. With nearly 40 years' experience representing parties in disputes throughout Australia and Asia, Ben is a true leader in the field. Year after year, he leads some of the highest profile international and domestic arbitration and litigation cases in the region. Ben is currently acting in a number of international commercial arbitration cases, including an UNCITRAL Rules arbitration for Saipem SA (a USD 1.9 billion dispute arising out of a contract for the construction of an LNG loading jetty for the Gorgon gas project off the Western Australian coast), an ICC Rules arbitration in Singapore concerning a dispute under a consortium agreement, and an ICC Rules arbitration for a Mauritian company against the State-owned mining company of the Democratic Republic of Congo. A major part of Ben's practice is Investor-State Dispute Settlement (ISDS) under Bilateral Investment Treaties and Free Trade Agreements. As part of his role in these ISDS cases, Ben conducts oral advocacy (for example, in the Cortec Mining v Kenya hearing in January 2018, Ben cross-examined one Ambassador and an expert witness on damages).

Sam Luttrell is a Partner in the Litigation and Dispute Resolution team. His practice is focused on international arbitration in the energy and resources sectors. He leads Clifford Chance's Asia-Pacific Public International Law and Investor-State Dispute Settlement (ISDS) practice - the only practice of its kind in Australia and the largest ISDS practice in the Asia-Pacific. Based in Perth, Sam is immersed in the natural resources sector and is currently representing mining and energy companies in ISDS cases against a range of States, including Indonesia, Kenya, Thailand and Egypt. In the past year, Sam has also been involved in various advisory matters, including Public International Law matters arising out of the re-drawing of the Australia-Timor-Leste maritime boundary, issues concerning the Trans-Pacific Partnership, and the negotiation of investment-related agreements and guarantees for natural resources projects in Africa and Asia. He is a member of the ICC Commission on Arbitration and ADR, the SIAC User Council and the ACICA Practice and Procedure Board. In 2017 and 2018, he was voted "International ADR Practitioner of the Year" at the Australian Disputes Centre awards in Sydney. In addition to his work as counsel, Sam regularly publishes and lectures in the fields of international arbitration and investment law at universities and arbitral institutions around the Asia-Pacific.

Peter Harris is Counsel in the International Arbitration Group, based in Perth. He advises clients in relation major project disputes, international commercial arbitration and investment treaty arbitration. He is currently leading teams representing investors in high-value treaty claims against Thailand and Kenya. Peter's recent work includes acting for clients in complex arbitrations under the UNCITRAL, ICC, ICSID, LCIA and SIAC Rules. In addition to his work as counsel, he has contributed a number of articles to industry publications and has lectured on international arbitration at institutions around the Asia-Pacific. He is a member of the Chartered Institute of Arbitrators, the Law Society of England and Wales, the Society of Construction Law Australia and Knowledge & Information Committee, Perth Centre for Energy and Resources Arbitration.

1. General

1.1 Prevalence of Arbitration

The steady growth in outbound trade and investment by Australian-domiciled companies has increased the volume of cross-border disputes. Foreign companies investing in or doing business in Australia are also driving an increase in the use of international arbitration in relation to Australian projects, particularly in the infrastructure, energy and resources sectors. The key motivating factors for parties opting for international arbitration in Australia are confidentiality and the New York Convention enforcement mechanism. Speed and efficiency are less critical factors than in other jurisdictions because the courts in Australia are efficient and reliable.

Australia is also actively seeking to establish itself as a seat for international arbitration. In part, this is being driven by its natural advantages as an English-language jurisdiction with a sophisticated and reliable common-law legal system. In addition, recent changes to Australia's regulatory regime for international arbitration, as well as some pro-arbitration decisions in Australian courts, have helped to bolster Australia's reputation as an arbitration-friendly destination. In addition, the Federal Court of Australia released a new practice note in 2016 which created a national allocations system for enforcement of international arbitral awards issued in Australia with judges specialising in international arbitration.

There has also been a rise in the number of skilled and experienced arbitration practitioners who promote Australia as an arbitration-friendly jurisdiction and reliable seat. This is particularly notable in the international law firms that have opened offices in Australia and in the number of senior members of the profession who have achieved high-ranking status as arbitrators. Indeed, Australia boasts some of the world's leading arbitrators, including heavyweights Professor Michael Pryles AO PBM, Doug Jones AO and Dr Gavan Griffith QC. In parallel, an increasing number of former senior counsel and judges of the High Court of Australia and various state supreme courts are taking appointments as arbitrators, or have signalled their intention to do so upon retirement from the judiciary. These include Perth-based barrister Kanaga Dharmanda SC, former Chief Justice Robert French AC and former Chief Justice of New South Wales, James Spigelman AC QC.

It is also noteworthy that in the last two years there have been a number of worldwide arbitration conferences held in Australia that have raised Australia's profile among the international arbitration community. For example, Sydney hosted the International Bar Association (IBA) annual conference in 2017 and in April 2018, Sydney hosted the International Council for Commercial Arbitration (ICCA) conference. Most state capitals also hold their own annual "arbitration week" events. This relatively recent phenomenon shows the growth of the international arbitration community in Australia.

1.2 Trends

The following are a number of current "hot topics" that are relevant to arbitration in Australia in 2018, and will likely continue to be so in the near future.

Consolidation of Arbitrations and Joinder of Parties

Arbitral institutions around the world have been updating their rules to incorporate mechanisms for the consolidation of related arbitrations and the joinder of third parties to arbitrations. Consolidation and joinder allow arbitrations to be conducted more efficiently, ensuring that parallel disputes on substantively similar issues are not litigated across separate proceedings. The creation of procedural rules facilitating consolidation has been a relatively recent feature of international arbitration. In Australia, the Australian Centre for International Arbitration (ACICA) published its new rules (ACICA Rules) at the beginning of 2016, which included rules on the consolidation of proceedings (Article 14) and the joinder of parties (Article 15). In Australia, the power for tribunals to order consolidation upon the request of a party is granted under section 24 of the IAA.

Tribunal Secretaries

Tribunal secretaries have recently come into the spotlight in international arbitration in other jurisdictions, and the same is true in Australia. The use of tribunal secretaries is widespread, and they can be extremely useful to arbitrators, allowing them effectively to manage their caseload and keep the costs of an arbitration down. However, tribunal secretaries have attracted criticism for the potential that, in undertaking some of their roles, they may exercise substantive decision-making power on behalf of the tribunal. Last year, ACICA published its *Guideline on the Use of Tribunal Secretaries*, which applies to all secretary appointments made in ACICA-administered arbitrations after 1 January 2017. The Guideline can also be adopted by parties in other arbitrations. Among other things, the Guideline clearly sets out the duties of tribunal secretaries, including an express prohibition on secretaries engaging in decision-making (Guideline 12).

Third-Party Funding

Australia has been a leader in third-party funding in arbitration and litigation and is described as "*arguably, the most funding-friendly jurisdiction in the world*" (Lisa Bench Nieuwveld and Victoria Shannon, *Third-Party Funding in International Arbitration* (2012, Kluwer), p71). In an effort to ensure Australia retains its reputation in third-party funding, the Australian Law Reform Commission (**ALRC**) has conducted an inquiry into class actions and third-party liti-

gation funders. Though the inquiry predominantly focuses on class actions, any legislation regulating third-party funding that may be introduced as a result of the inquiry will likely affect third-party funding for international arbitration in Australia. On 31 May 2018, the ALRC published a discussion paper on its inquiry into third-party funding, which made a number of proposals. As is relevant to arbitration, those proposals include that:

- third-party funders be required to obtain and maintain litigation funding licences, which would require funders to:
  (a) provide their services efficiently, honestly and fairly;
    (i) adequately manage conflicts of interest;
    (ii) have sufficient resources (including financial and technological resources);
    (iii) have adequate risk management systems; and
    (iv) be subject to annual audits; and
- lawyers' professional conduct rules be amended to require disclosure of third-party funding arrangements, including those in international arbitrations.

Investor-State Dispute Settlement

Ever since the investor-State arbitration between Philip Morris and Australia, in which Philip Morris sought to claim compensation for measures the Federal Australian Government took to enact plain packaging legislation, investor-State arbitration has been the subject of public debate and (at times intense) criticism. The concerns primarily relate to the perception that investor-State dispute settlement (**ISDS**) allows private entities to stifle public decision-making, while being shielded from accountability. Though these criticisms generally have little empirical basis, there are genuine reasons for arguing for greater transparency in ISDS, particularly given the public interest that is ordinarily involved in these types of disputes. Accordingly, on 18 July 2017, Australia signed the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, which provides for a regime that incorporates the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* in certain investor-State arbitrations. This treaty is discussed in more detail below. Against the backdrop of these developments, there is growing awareness and increasing use of the ISDS system by Australian companies, the past year seeing new treaty claims by Australian companies against Thailand (under the Australia-Thailand Free Trade Agreement) and Egypt (under the Australia-Egypt BIT), bringing the total number of ISDS claims by Australian companies to 12.

1.3 Key Industries

The infrastructure, mining, and oil and gas industries are experiencing significant international arbitration activity in 2018, and will likely continue to do so in the near to mid-term future. Conversely, only 1% of arbitration of disputes relating to technology, media and telecommunications were arbitrated in Australia (according to the 2016 Queen Mary International Arbitration Survey).

1.4 Arbitral Institutions

Within Australia, ACICA is the principal arbitral institution. The Australian Disputes Centre (ADC) (headquartered in Sydney) provides world-class dispute resolution facilities in the centre of Sydney's CBD. Combined with ACICA's role as an arbitral institution, both ACICA and ADC offer users of international arbitration a "one-stop shop" for their disputes. The Perth Centre for Energy and Resources Arbitration (PCERA) is another, relatively new, arbitral institution in Australia, which has been specifically set up to cater for the ever-increasing number of disputes in the energy and resources sector.

The International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL) are also popular choices for international arbitrations seated in Australia. The ICC has a domestic presence through its Australian national committee that, among other things, makes arbitrator appointments for Australian-seated ICC arbitrations, and UNCITRAL has a domestic presence through the UNCITRAL National Coordination Committee for Australia. Sometimes these arbitrations are linked to ACICA or PCERA but are also frequently conducted on an *ad hoc* basis or with a degree of administrative support from an overseas institution such as the ICC Court. Additionally, there is the Australian Resolution Institute which functions as a professional body that promotes alternative dispute resolution and incorporates the body that was formerly known as the Institute of Arbitrators and Mediators of Australia (IAMA). Resolution Institute provides facilities and soft-law instruments (including rules and protocols) for parties to international arbitrations and is also able to act as an appointing authority. ACICA or PCERA can also perform such functions.

International arbitrations concerning Australian substantive law or projects in Australia, are also referred to the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC) and other regional centres.

2. Governing Law

2.1 Governing Law

International arbitration is governed by the *International Arbitration Act 1974* (Cth) (IAA). It adopts almost all of the UNCITRAL Model Law provisions – the Model Law has the force of law in Australia by virtue of section 16 of the IAA and is incorporated into the IAA as Schedule 2 of that Act – save for a number of deviations which are set out in

section 22. Broadly, these provisions deal with party defaults, confidentiality, evidence and security for costs.

While not strictly a deviation, in Australia, the test for successfully establishing bias challenges is slightly different than under the Model Law position. Article 12 of the Model Law allows parties to challenge the appointment of an arbitrator when there are "*justifiable doubts*" as to the independence and impartiality of that arbitrator. Under section 18A of the IAA, "*justifiable doubts*" is taken to be established only when there is a "*real danger*" of bias on the part of the arbitrator (see Sam. Luttrell, *Arbitration International*, Volume 26, Issue 4, 1 December 2010, pp625–632). The threshold for establishing a challenge in Australia is, accordingly, set higher than in other jurisdictions, meaning that bias challenges are more difficult to make out in an Australian-seated arbitration than in most other jurisdictions.

Further, each Australian state and territory has enacted its own *Commercial Arbitration Act*, which govern domestic arbitrations conducted in those states and territories. However, the legislation governing domestic arbitrations is not covered in this chapter.

2.2 Changes to National Law

Since 2015, there have been no significant changes to the IAA. However, there is currently pending before the Australian Senate the *Civil Law and Justice Legislation Amendment Bill 2017* (Cth). The Bill amends the IAA to: "*specify the meaning of 'competent court' for the purpose of the Model Law; clarify procedural requirements for enforcement of an arbitral award; modernise provisions governing certain arbitrators' powers; and clarify the application of certain confidentiality provisions*".

In specifying the meaning of "*competent court*" for the purpose of the Model Law, the Bill clarifies that " *competent courts*" are the supreme courts of a given state or territory, or in any case, the Federal Court of Australia, for those articles of the Model Law that do not specify what are "*competent courts*" (Articles 17H, 27, 35 and 36). This resolves any potential questions of jurisdiction when parties attempt to engage the courts' jurisdiction under those articles.

In clarifying the procedural requirements for enforcement of an arbitral award, the Bill introduces a welcome development which clarifies the scope of the recognition of arbitral awards. Currently, section 8(1) of the IAA states that "*a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.*" An issue in enforcement arises when parties who are non-signatories to an arbitration agreement ultimately end up being parties to an arbitration award, either through consolidation of proceedings or joinder of parties. The Bill amends section 8(1) – and section 8(5)(f) (on one of the grounds for refusing enforcement of an award) – to read "*a foreign award is binding by virtue of this Act for all purposes on the parties to the award*".

The Bill notably increases the discretion given to a tribunal in awarding costs in an arbitration. Currently, section 27 of the IAA contains references to the taxation of costs on a party/party or solicitor/client basis, which, as stated in the Explanatory Memorandum to the Bill, are "*outmoded and inflexible in contrast to current practice in international arbitration*". The Bill proposes a number of technical amendments to remove references to taxation and to give tribunals greater discretion in the amounts that they award in costs, including the manner and basis of payment.

The Bill also updates the confidentiality provisions in the IAA to reflect Australia's signing of the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (**Mauritius Convention**), which provides for the application of the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (**Transparency Rules**) for certain investor-State arbitrations. The Bill amends section 22 of the IAA to clarify that the current "*opt-out*" regime for the confidentiality of arbitrations conducted in Australia would not apply when the parties to an investor-State arbitration have agreed to the application of the Transparency Rules (which contain a modified confidentiality regime).

Presuming these amendments are passed by the Australian Federal Parliament, they will bring Australia in line with current best practice in international arbitration, as well as current public expectations regarding transparency in investor-State arbitrations.

3. Arbitration Agreement

3.1 Enforceability

As under the *New York Convention*, section 3 of the IAA requires arbitration agreements to be in writing to be enforceable, and sections 7(2) and 8(7) provide, in effect, that the dispute must be capable of settlement by arbitration. Australia has adopted Option 1 of Article 7 of the Model Law (IAA section 16(2)). Article 7 of the Model Law provides an expansive definition of the writing requirement for arbitration agreements – in effect, any written medium can satisfy the writing requirement for arbitration agreements. This would include arbitration agreements concluded by emails and even text messages.

An arbitration agreement can be challenged on the basis of the usual categories of invalidity under contract law (eg illegality, fraud, mistake, etc). However, those defects must specifically relate to the arbitration agreement, and not to the principal agreement. The doctrine of separability applies

under Australian law, which quarantines the arbitration agreement from the principal agreement, and ensures the arbitration agreement can survive in circumstances where the principal agreement may be invalid. Arbitration agreements can also be void for lack of certainty or unenforceable as 'pathological'. However, Australian courts will generally strive to give effect to arbitration agreements where possible (see, for example, *Robotunits Pty Ltd v Mennel* [2015] VSC 268).

3.2 Arbitrability

Generally speaking, parties enjoy a wide ambit of the types of disputes they may agree to submit to arbitration subject to certain limitations. For example, pre-dispute (before a claim has been made and rejected) arbitration agreements concerning insurance contracts that fall under the scope of the *Insurance Contracts Act 1984* (Cth) are "*void*" pursuant to section 43 of that Act. Under section 11 of the *Carriage of Goods by Sea Act 1991* (Cth), arbitration agreements concerning certain carriage of goods agreements have no effect if the arbitration agreement provides for arbitration outside Australia.

Though there was historically some question about whether the misleading or deceptive conduct provisions in the *Australian Consumer Law* were considered to be arbitrable, it is now well settled that they are, in fact, arbitrable (see, for example, *Casaceli v Natuzzi SpA* [2012] FCA 691 para 50). Further, the *Australian Consumer Law* may potentially have the effect of rendering arbitration agreements – limited to certain consumer contracts – to be "*unfair*" pursuant to the terms of that legislation and, accordingly, be rendered "*void*". Though the vast majority of business contracts will not fall within the scope of the unfair terms regime of the *Australian Consumer Law*, there is a risk that businesses that include arbitration clauses in standard form contracts with consumers could fall within this scope.

Under section 24 of the *Australian Consumer Law*, terms of contracts are unfair when they cause significant imbalance between the parties; the term is not reasonably necessary to protect the legitimate interests of the party being advantaged by the term; and the term causes a detriment to a party in its application. Section 25(k) lists as an example of an unfair term "*a term that limits, or has the effect of limiting, one party's right to sue another party*". If recourse to arbitration (to the exclusion of litigation) is incorporated by way of an arbitration agreement in a consumer contract, there is a risk that the term would be determined to be "*unfair*" and, accordingly, "*void*" pursuant to section 23 of the *Australian Consumer Law*.

3.3 National Courts' Approach

Australian courts have traditionally been, and continue to be, pro-arbitration. Accordingly, Australian courts will ordinarily enforce arbitration agreements (through the grant of a stay of litigation) unless there are very compelling reasons not to do so.

In a rare example, it was recently decided (20 April 2018) by the Federal Court of Australia that arbitration proceedings in New York would be stayed in favour of court proceedings in Victoria, Australia: *Kraft Foods Group Brands LLC v Bega Cheese Limited* [2018] FCA 549. However, in this case, Kraft had commenced both the arbitration and litigation at issue. Bega applied for an anti-arbitration injunction, arguing that the subject-matter of both disputes was essentially the same, and was successful.

Notwithstanding this decision, which can be distinguished based on facts particular to the case, Australia remains a pro-arbitration jurisdiction, and parties can take comfort in the knowledge that their arbitration agreements will be properly enforced. In this regard, as discussed further below, Australian courts have a good track record of staying court proceedings commenced in violation of the agreement to arbitrate (see, for example, *KNM Process Systems Sdn Bhd v Mission NewEnergy Ltd formerly known as Mission Biofuels Ltd* [2014] WASC 437).

3.4 Validity

Australian law recognises the doctrine of separability, under which an arbitration agreement (or an arbitral clause contained in a wider contract) will be considered valid even if the rest of the contract is deemed invalid (for reasons of, say, illegality). The doctrine of separability forms part of Australian arbitration law by virtue of Article 16(1) of the Model Law, which states that "*an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*"

4. The Arbitral Tribunal

4.1 Limits on Selection

With the exception of arbitral proceedings under the *Convention on the Settlement of Investment Disputes* (**ICSID Convention**) (in which nationality provisions apply), there are no limits on the parties' autonomy to select arbitrators, save for the requirement that arbitrators are impartial and independent. Any person may act as an arbitrator and arbitration law in Australia imposes no qualification requirements. A person is not to be precluded from acting as an arbitrator solely on the basis of their nationality, unless otherwise agreed by the parties (Article 11(1) of the Model Law).

Equally, parties are free to impose qualification requirements as they see fit. This could be particularly helpful in the context of particular types of contracts such as construction contracts or reinsurance contracts, where particular expertise of arbitrators may be desirable. However, as usual, care needs to be taken in the drafting of any qualification requirements in an agreement to arbitrate. A recent decision of the English Court of Appeal (13 March 2018) in *Allianz Insurance Plc and Sirius International Insurance Corporation v Tonicstar Limited* [2018] EWCA Civ 434 provides a useful example of this and demonstrates this need to take care in drafting such qualification requirements. There, the parties were in dispute over the selection of an arbitrator on the basis of a qualification requirement in their arbitration agreement that provided that "[…] *the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance*". The reinsurers, Allianz and Sirius, selected a senior London-based barrister with 30 years' experience in insurance and reinsurance matters. Tonicstar objected, saying that the arbitrator had to be engaged in the *business* of insurance and reinsurance. Ultimately, the Court found in favour of the reinsurers, holding that the appointment of the barrister was in accordance with the terms of the arbitration agreement, and, in making the decision, the Court upheld the agreement of the parties in setting their qualification requirements for selecting arbitrators. If an Australian court is faced with a similar dispute, it is likely that this decision would provide persuasive precedent.

4.2 Default Procedures

When the parties' chosen method for selecting arbitrators fails, the Model Law provides for a default procedure. Article 11 of the Model Law sets out this procedure.

For an arbitration with three arbitrators, the default procedure is that each party appoints one arbitrator, and the two party-appointed arbitrators appoint the third arbitrator. If either party fails to appoint within 30 days of a request from the other party, or if the party-appointed arbitrators cannot agree on the identity of the third arbitrator within 30 days of their appointment, the appointment is to be made upon request of a party by either the court or prescribed "*other authority*".

For an arbitration with a sole arbitrator, failing agreement between the parties, the court or prescribed "*other authority*" will appoint the arbitrator at the request of either party.

Under regulation 4 of the *International Arbitration Regulations 2011* (Cth), ACICA is the prescribed "*other authority*" for this purpose.

4.3 Court Intervention

Australian courts have the power to intervene in the selection of arbitrators in specified circumstances. As set out above, a default in the parties' procedure for the selection of arbitrators entitles a party to apply to the court to appoint an arbitrator. Further, if an arbitrator's mandate expires or is withdrawn voluntarily or by agreement of the parties or the arbitrator cannot perform his or her duties by reason of law or fact or otherwise fails to act without undue delay, any party may make a request to the court to decide on the removal of the arbitrator (IAA, Model Law, Article 14). Substitute arbitrators are appointed according to the same procedure applicable for the arbitrator being replaced (Article 15).

4.4 Challenge and Removal of Arbitrators

Article 13 of the Model Law defers to the parties' agreement for the procedure for challenging or removing arbitrators. However, failing any such agreement, Article 13 provides that a party may submit written reasons for their challenge to the tribunal within 15 days of becoming aware of the constitution of the tribunal, and unless the arbitrator withdraws or the other party agrees to the challenge the tribunal will decide on the challenge. Within 30 days of a decision rejecting the challenge the challenging party may apply to the court to make a final decision on the challenge.

4.5 Arbitrator Requirements

Under Article 12(1) of the Model Law, an arbitrator has a duty of impartiality and independence and a duty to disclose without delay any circumstances that are likely to raise justifiable doubts about their impartiality, their independence or whether they have the qualifications agreed to by the parties. The test for removal of an arbitrator is whether there is a "*real danger*" of bias (IAA section 18A).

5. Jurisdiction

5.1 Matters Excluded from Arbitration

As discussed above in **3.2 Arbitrability**, there are some restrictions on the types of disputes that parties may agree to submit to arbitration. Those are arbitrations arising out of certain contracts of insurance, carriage of goods by sea agreements, and consumer agreements. In addition, matters which relate to criminal offences, divorce, custody of children, property settlement, wills, employment grievances, some intellectual property disputes, competition law disputes and bankruptcy and insolvency matters cannot be the subject of private arbitration in Australia. The recent case of *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164 considered the arbitrability of matters arising under the *Corporations Act 2001* (Cth), in which WDR Delaware had sought to argue that a winding-up order under the Corporations Act also falls in the category of non-arbitrable matters since it affects third parties (shareholders) and there is a public interest element in ensuring all steps relating to the winding-up should be considered by a court. The Court stated that "[*b*]*lanket propositions in support of the*

proposition that all claims in a Corp[*orations*] *Act proceeding are not arbitrable will not usually find favour with the Court* " and found that a winding-up order under the Corporations Act was arbitrable since the only shareholders affected were the two parties to the dispute. In the circumstances, there was no substantial public interest element or an effect on third parties which could place the matter outside the scope of the arbitrability.

5.2 Challenges to Jurisdiction

The *Kompetenz-Kompetenz* (competence-competence) principle has the force of law by virtue of Australia's adoption of the Model Law. Under Article 16 of the Model Law, an arbitral tribunal is empowered to rule on its own jurisdiction and on any objections to the existence or validity of the arbitration agreement.

5.3 Circumstances for Court Intervention

There has been recent case law that has clarified the scope of the *Kompetenz-Kompetenz* principle, and, in particular, when Australian courts will engage in a review of the arbitration agreement in deciding whether to grant a stay of litigation in favour of arbitration. Under the principle of *Kompetenz-Kompetenz*, commentators commonly note that the principle has a positive effect, in allowing tribunals to rule on their own jurisdiction, and a negative effect, that national courts will refrain from ruling on jurisdiction and leave that task to tribunals.

There have been two competing approaches developed as to the standard of review of jurisdiction that a court will engage in. The first is the "prima facie review approach" (referred to as such by the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57). Under this approach, if a court is satisfied that it is arguable that the arbitration agreement covers the dispute in question, then a stay of the litigation will be granted. This approach is preferred in Singapore and Hong Kong, which are key arbitration jurisdictions in the Asia-Pacific region.

The second approach is the full review approach (again, referred to as such by the Court in *Tomolugen*). Under this approach, a court will undertake a full merits review as to the existence and scope of the arbitration agreement before determining, on the balance of probabilities, whether to order a stay. This is the approach undertaken by the English courts: *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky* [2013] 2 Lloyd's Rep 242.

In 2016, in the decision of *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2016] WASC 193, Le Miere J adopted the full review approach in determining whether to grant a stay of litigation proceedings commenced by Samsung in the Supreme Court of Western Australia (a stay in favour of arbitration in Singapore was ultimately granted). That decision came under some criticism after it was delivered, on the basis that the full review approach adopted by the Supreme Court was not a faithful adherence to the *Kompetenz-Kompetenz* principle. Subsequently, in *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658, the Federal Court of Australia held (in a case concerning the Australian domestic arbitration legislation):

"*We think that any rigid taxonomy of approach is unhelpful, as are the labels 'prima facie' and 'merits' approach. How a judge deals with an application under s 8 of the CA Act will depend significantly upon the issues and the context. Broadly speaking, however, and with some qualification, aspects of the prima facie approach have much to commend them as an approach that gives support to the jurisdiction of the arbitrator and his or her competence, as recognised by the common law and by s 16 of the CA Act, whilst preserving the role of the Court as the ultimate arbiter on questions of jurisdiction conferred by ss 16(9) and (10), 34(2)(a)(iii) and 36(1)(a)(iii) of the CA Act. Broadly, the approach is consonant with the structure of the CA Act and the Model Law. However, it is difficult to see how the Court can exercise its power under s 8 without forming a view as to the meaning of the arbitration agreement. Further, it may be that if there is a question of law otherwise affecting the answer to the question of jurisdiction, especially one that is confined, which might be dispositive, it might be less than useful for the Court not to deal with it.*"

The Court's qualified support of the *prima facie* approach appears to suggest an adoption of that approach, with the appropriate caveat that it will look to the arbitration agreement in more detail when the circumstances necessitate that inquiry.

5.4 Timing of Challenge

Under Article 16(2) of the Model Law, a plea challenging a tribunal's jurisdiction can be raised within the tribunal proceedings no later than the submission of the statement of defence; and, a plea that the tribunal has exceeded its jurisdiction is to be brought as soon as the matter alleged to be beyond the tribunal's discretion is raised in the proceedings. Under Article 16(3), a tribunal may rule on such a plea as a preliminary question or in an award on the merits.

Within 30 days of a tribunal ruling on a preliminary question of jurisdiction, any party may request to the court specified in Article 6 to decide the matter (IAA, Model Law, Article 16(3)). However, in Australia, an application to the court is limited to instances when a tribunal rules that it *has* jurisdiction (but not when it rules that it *lacks* jurisdiction). This is in contrast to other jurisdictions, such as Singapore, England & Wales and France, where the ability to seek court assistance is open in circumstances where the tribunal rules that it either does or does not have jurisdiction (Singapore: *International Arbitration Act* (Singapore, cap 143A, 2002 rev

ed) s 10; England & Wales: *Arbitration Act 1996* (UK) s 30; France: see *Swiss Oil Corporation (Cayman Islands) v Société Petrograb and Republic of Gabon*, Cour d'Appel, Paris, 16 June 1988, (1991) XVI *Yearbook of Commercial Arbitration* 133).

Section 18 of the IAA directs that the court specified for Article 6 is the Supreme Court of the state or territory of the place (seat) of arbitration or the Federal Court of Australia.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

While there is an international trend towards limiting reconsideration of the both factual and legal findings of arbitral tribunals, in Australia the court has discretion regarding the extent of its review of the tribunal's decision on jurisdiction.

In *Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (All), the English Supreme Court held that the reviewing court is entitled "*and indeed bound*" to revisit the question of tribunal's jurisdiction (para [104]). Further, in considering a question of jurisdiction the "*starting point cannot be a review of the decision of the arbitrators*" that a valid arbitration agreement existed between the parties, but rather must be "*an independent investigation by the court*" of the question of the jurisdiction of the tribunal (para [160]).

The recent case of *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* [2018] VSC 221 confirmed that the appropriate standard of review by a court of an arbitral tribunal's preliminary ruling on jurisdiction is a de novo review. The issue was considered by the Supreme Court of Victoria in relation to section 16 of the *Commercial Arbitration Act 2011* (Vic). Croft J noted there had been a lack of authoritative guidance in Australia on the preferred approach, and the Model Law neither prescribed nor expressly resolved the issue. His Honour considered the approaches undertaken in other foreign jurisdictions, including Singapore, Hong Kong, England and New Zealand. Ultimately, Croft J concluded:

"*On the basis of these authorities and commentaries, the position is, in my view, that a hearing de novo is the correct standard of review to be applied under s 16(9) of the CAA. Deference should duly be given to the cogent reasoning of the arbitral tribunal but the Court is the final 'arbiter' on the question of jurisdiction. As has been observed, this is an aspect of court assistance and support of arbitral processes and is not at odds with the policy of minimal court intervention or 'interference'.*"

5.6 Breach of Arbitration Agreement

Australian courts will generally stay court proceedings that are commenced in breach of an arbitration agreement (see, for example, *KNM Process Systems Sdn Bhd v Mission NewEnergy Ltd Formerly Known as Mission Biofuels Ltd* [2014] WASC 437). In respect to an international arbitration agreement to which Australia or an Australian state or resident is a party, and proceedings that are capable of determination by arbitration are *pending* in an Australian court, the other party to the arbitration agreement may apply to the same court for a stay of legal proceedings under section 7(2) of the IAA (see *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 p 351).

If proceedings capable of determination by arbitration are pending in a court, the other party to the arbitration agreement may apply to the same court for a stay of proceedings or as much of the proceedings as necessary to have the matter in question referred to arbitration.

In some states, such as Western Australia, Australian courts have ordered indemnity costs against the party that commenced court proceedings in breach of the arbitration agreement (*Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 (S); *KNM Process Systems Sdn Bhd v Mission NewEnergy Ltd Formerly Known as Mission Biofuels Ltd* [2014] WASC 437 (S)); however, not all states take the same approach.

5.7 Third Parties

The *New York Convention* forms Schedule 1 of the IAA. Article II of the Convention requires that each State recognise an agreement in writing by which the parties submit to the jurisdiction of an arbitration.

Extending the jurisdiction of an arbitral tribunal to a third party or non-signatory to the arbitration agreement would be inconsistent with the national law unless there are grounds for establishing that a non-signatory is the alter ego or agent of a signatory. This principle was accepted in the case of *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 although, in that case, the Court declined to find that the relevant non-signatory was (or had been considered by the Tribunal to be) a party to the arbitration agreement by virtue of the agency/alter ego principle. In the same case, the Court also acknowledged that a non-signatory to an arbitration agreement who nevertheless participated in arbitration proceedings may be estopped from contesting jurisdiction later on (although in that case the Court found no basis for an estoppel).

6. Preliminary and Interim Relief

6.1 Types of Relief

An arbitral tribunal in Australia may order interim relief under Article 17 of the Model Law which is incorporated in Australian national law by Schedule 2 of the IAA (see *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 [127]–[129]).

Pursuant to Article 17 of the Model Law, a tribunal has wide powers to make an order that a party maintain or restore the status quo pending determination of the dispute, that a party take action to prevent or refrain from action that would cause current or imminent harm or prejudice to the arbitral process, that a party preserve assets out of which a subsequent award may be satisfied, or to preserve evidence. Article 17A sets out the conditions for the grant of interim measures, which is similar to, although slightly different from the test under the national courts, being that: (i) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (ii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

Since the Model Law does not contain a procedure for the appointment of an emergency arbitrator to decide on an interim measure where a party requires instant relief, prior to the constitution of the tribunal, this has been included in the revised ACICA Rules (effective from 1 January 2016). The revised ACICA Rules now provide for emergency interim measures of protection in Schedule 1 to the ACICA Rules. An application for an emergency interim measure is to contain details of the nature of the relief sought, the reasons why such relief is required on an emergency basis and the reasons why the party is entitled to such relief (ACICA Rules, Schedule 1, Clause 1.3). The emergency arbitrator has " *power to order or award any interim measure of protection on an emergency basis that he or she deems necessary and on such terms as he or she deems appropriate*." The emergency arbitrator may also " *modify or vacate the emergency interim measure for good cause shown at any time prior to the constitution of the Arbitral Tribunal*" (ACICA Rules, Schedule 7, Clauses 3.2 and 3.3).

6.2 Role of Courts

The Model Law expressly acknowledges the concurrent jurisdiction of the courts and arbitral tribunals in relation to interim measures. Article 17J provides that a court has the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in court.

Despite the existence of an arbitration agreement or clause "[…] *there may be circumstances where urgent relief is required from a court. For example, the preservation of the subject matter of a dispute which requires arbitration may be sought*." However, non-urgent applications for relief will not " *from any policy perspective* " require intervention from the court and should be addressed during the course of arbitration (see *Amcor Packaging (Aust) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253 [41]; *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 [127]–[129]).

The ACICA Rules relating to emergency interim measures also make it clear that they are intended to have an alternative operation to recourse to the courts for interim relief. ACICA Rules, Schedule 1, Clause 7.1 states:

" *The power of the Emergency Arbitrator under this Schedule 1 shall not prejudice a party's right to apply to any competent court or other judicial authority for emergency interim measures. If any such application or any order for such measures is made after the referral of an application for emergency interim measures of protection to an Emergency Arbitrator, the applicant shall promptly notify the Emergency Arbitrator, all other parties and ACICA in writing.*"

However, there may be circumstances where it is preferable to apply to a court instead of an emergency arbitrator (or the arbitral tribunal), such as if an order affecting third parties is required. For example, an Australian court can impose penalties for breach of an interim order whereas an emergency arbitrator does not have that power.

The issue of enforceability of an emergency interim measure does not apply with respect to interim measures granted under the Model Law, since Article 17H expressly provides that "[a] *n interim measure issued by an arbitral tribunal shall be recognized as binding and* […] *enforced upon application to the competent court, irrespective of the country in which it was issued*."

6.3 Security for Costs

An arbitral tribunal in Australia may order security for costs under Article 17E of the Model Law.

There is also specific provision in the Model Law (Article 17H), which allows state courts to order security if the arbitral tribunal has not already made a determination with respect to security or it is deemed necessary to protect the rights of third parties.

7. Procedure

7.1 Governing Rules

Aside from the Model Law and the IAA, ACICA publishes Arbitration Rules and Expedited Arbitration Rules (together **ACICA Rules**) which can be referred to in any contract. The current version of the ACICA Rules came into effect on 1 January 2016 following a review and consultation process. These Rules supersede the 2011 and 2005 editions of the ACICA Rules. If the parties have specifically agreed to the application of an earlier edition of the ACICA Rules, ACICA will administer the arbitration under those rules. Parties may also agree to the application of the UNCITRAL Arbitration Rules and designate ACICA as the administering body.

Article 2.1 of the ACICA Rules provides that:

"[*w*]*here parties agree in writing that disputes shall be referred to arbitration under the rules of or by ACICA, then such disputes shall be resolved in accordance with these Rules, subject to such modification as the parties may agree in writing*."

In such circumstances, the ACICA Rules will govern the arbitration except that where any of the ACICA Rules are in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

The ACICA Rules make it clear that they apply in addition to the Model Law, as clarified in Article 2.3 which states that "[*b*]*y selecting these Rules the parties do not intend to exclude the operation of the UNCITRAL Model Law on International Commercial Arbitration*."

The overriding objective of the ACICA Rules is "*to provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved*."

7.2 Procedural Steps

The IAA provides that if the Model Law applies to an arbitration it "*covers the field*", in that the laws of an Australian state or territory relating to arbitration do not apply to that arbitration. There are no additional procedural steps specified in the IAA that are not specified in the Model Law. Division 3 of the IAA contains additional provisions to the Model Law, but these do not relate to procedural steps. The provisions provide for parties to obtain subpoenas from a court, and to apply to court for orders where a party has failed to assist the tribunal in various ways (failure to appear as a witness). Division 3 also contains provisions on disclosure of confidential information (sections 23C–23E), and on consolidation of arbitral proceedings (section 24).

In relation to the appointment of arbitrators, under Article 18 of the IAA, ACICA is appointed as the body to determine the appointment of arbitrators where the parties or the arbitrators fail to appoint an arbitrator (as prescribed by regulation 4 of the *International Arbitration Regulations 2011* (Cth).

If a party to an arbitration agreement dies, the IAA provides that the agreement is not discharged, the authority of an arbitral tribunal is not revoked and the arbitration agreement is enforceable by or against the personal representative of the deceased (Article 23H).

7.3 Powers and Duties of Arbitrators

The parties to an arbitration agreement that falls under the IAA are free to agree on the powers and duties of an arbitral tribunal subject to the duties prescribed in the IAA and the general law.

The IAA vests an arbitrator with a duty of impartiality and independence and a duty to disclose without delay any circumstances that are likely to raise doubts about their impartiality, their independence or whether they have the qualifications agreed to by the parties (Article 12(1)). The arbitral tribunal and each individual arbitrator have a duty to state the reasons upon which their award is based unless otherwise agreed by the parties.

In *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402 [22]–[23], Hargrave J held that an arbitrator has a duty to provide reasons commensurate with the "*functions, talents and attributes of the tribunal member*" and the circumstances of the case (affirmed by the Supreme Court of Victoria Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255 [27]).

In addition to the Model Law, section 24 of the IAA grants an arbitral tribunal the power to consolidate proceedings where a common question of law or fact arises, where the rights to relief claimed arise with respect to the same transaction (or series of transactions), or for some other reason specified in the application, where it is desirable that a consolidation order be made.

Tribunals are granted broad powers to award interest, both on the period prior to the issue of an award (Article 25), and on the non-payment of an amount due under an award. Article 25 of the IAA allows a tribunal to include interest "*at such reasonable rate as the tribunal determines on the whole or any part of the money*" from the period between the date on which the cause of action arose and the date on which the award is made. Article 26(2) of the IAA provides the tribunal with power to order that interest is payable, including compound interest, if an amount ordered to be paid under an award is not paid on or before the due date. Article 27

provides tribunals with discretionary power to award costs, including the fees and expenses of the arbitrator(s).

As discussed under **6 Preliminary and Interim Relief**, a tribunal is granted power make preliminary orders and interim measures in accordance with Article 17 of the Model Law.

7.4 Legal Representatives

Beyond the requirement that a legal practitioner representing a party before an arbitral tribunal must be a duly qualified legal practitioner from any legal jurisdiction of that party's choice (section 29(2) IAA), there are no other qualification requirements. Legal practitioners in Australia must abide by the applicable professional conduct rules and obligations, including with respect to dealing with conflicts of interest, maintaining client confidentiality and their fundamental duties to the court and the administration of justice.

8. Evidence

8.1 Collection and Submission of Evidence

In Australia, and subject to agreement of the parties to an arbitration, the general approach to collection and submission of evidence tends to follow that of an adjudicated litigation process that is structured into distinct stages with each having discrete timelines. For example, there is likely to be a distinct pleadings stage followed by a discovery, submission of witness evidence, expert witness evidence and finally a hearing.

8.2 Rules of Evidence

The rules of evidence applying to arbitral proceedings are for the tribunal to fix. Pursuant to Article 27 of the Model Law, an arbitral tribunal or a party with the tribunal's approval, may request assistance in the taking of evidence from a competent court, which may execute the request according to its rules on taking evidence.

In addition to the Model Law, section 23J of the IAA grants a tribunal the power to make an order allowing the tribunal or a specified person to inspect, photograph, observe or conduct experiments on evidence that is in the possession of a party to the proceedings. An order allowing a sample of such evidence to be taken by the tribunal or specified person may also be made.

For proceedings administered by ACICA, the ACICA Rules also contain provisions relating to evidence which apply in addition to the Model Law. In particular, clause 31.1 provides that an arbitral tribunal "*shall have regard to, but is not bound to apply, the International Bar Association Rules on the Taking of Evidence in International Arbitration in the version current at the commencement of the arbitration*."

More widely, in the authors' experience, the *IBA Rules on the Taking of Evidence in International Arbitration* are commonly applied as a guide for parties and the arbitral tribunal in relation to international arbitration proceedings seated in Australia.

8.3 Powers of Compulsion

Arbitral tribunals themselves have limited powers of compulsion under the IAA and Model Law to require parties to produce documentary or other evidence.

Rather, in accordance with the Model Law, the arbitral tribunal or a party, with the tribunal's permission, may request assistance in taking evidence from the appropriate court and that court may execute the request according to its rules (Article 27 of the Model Law). Sections 23 and 23A of the IAA provide parties with the ability to apply to a court to obtain subpoenas or other orders, but only with the permission of the arbitral tribunal.

The recent decision in *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd & Ors* [2018] VSC 316 (commentary on this judgment may be found at https://www.cliffordchance.com/briefings/2018/06/client_briefing_subpoenasinaidofarbitration.html) shows the Australian courts' willingness to issue subpoenas in aid of international arbitration seated in Australia. However, the Australian courts have also refused to issue such relief in aid of foreign-seated arbitrations as seen in *Samsung C&T Corporation, Re Samsung C&T Corporation* [2017] FCA 1169.

Importantly, in addition to the powers under the Model Law and IAA relating to court assistance, section 23B of the IAA provides that if a person defaults in failing to attend for examination or to produce a document ordered by a court, refuses to comply with other orders of the court, or fails to comply with a requirement of the arbitral tribunal, the arbitral tribunal may continue with the proceeding, and make an award on the evidence before it.

9. Confidentiality

9.1 Extent of Confidentiality

The position regarding the confidentiality of arbitral proceedings and their constituent parts has been the subject of debate in Australia. However, much of this debate was resolved through the introduction of amendments in 2015 to the IAA. These amendments, notably the addition of sections 23C–23G (which are "opt-out" provisions), have brought Australian arbitration legislation more into line with the case law in other major common law jurisdictions such as England & Wales and Singapore. Most notably, the 2015 amendments essentially prescribe that, with limited exceptions, the default setting for international arbitrations seated

in Australia is that they are confidential (for those arbitrations commenced after the amendments came into force). (Prior to the introduction of these amendments, in the 1995 case *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 183 CLR 10, the High Court of Australia held that there was no implied obligation of confidentiality in arbitration agreements (so confidentiality was an obligation only if expressly agreed by the parties in the wording of the arbitration agreement). Nevertheless, there are differences in approach depending on what part of the arbitral process is being considered and there are exceptions. These are described below.

The basic protection for confidential information in relation to international arbitrations seated in Australia arises under section 23C of the IAA which provides that "*the parties to arbitral proceedings commenced in reliance on an arbitration agreement must not disclose confidential information in relation to the arbitral proceedings*", unless one of the exceptions listed in the Act applies.

Confidential information is defined broadly and includes:

- the statement of claim, statement of defence and all other pleadings, submissions, statements or other information supplied to the arbitral tribunal by the parties;
- any evidence, whether documentary or otherwise, supplied to the arbitral tribunal and any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal;
- transcripts of oral evidence or submissions given before the arbitral tribunal; and
- any rulings and awards made by the arbitral tribunal. (section 15(1))

The exceptional circumstances allowing for the disclosure of confidential information are:

- all parties consent to the disclosure;
- the disclosure is made to a party's professional or other advisor;
- the disclosure is necessary to ensure that a party to the arbitral proceedings has a full opportunity to present the party's case (and the disclosure is no more than reasonable for that purpose);
- the disclosure is necessary for the establishment or protection of a party's legal rights in relation to a third party (and the disclosure is no more than reasonable for that purpose);
- the disclosure is necessary for the purpose of enforcing an arbitral award (and the disclosure is no more than reasonable for that purpose);
- the disclosure is required by the IAA or the Model Law;
- the disclosure is in accordance with an order made or a subpoena issued by a court;
- the disclosure is required by a competent regulatory body, and the person making the disclosure gives written details of the disclosure including an explanation of reasons for the disclosure to the parties and the tribunal. (section 23D(2–9))

The IAA also allows, in certain circumstances, for the tribunal to order disclosure of confidential information and for a court to allow or prohibit disclosure (sections 23E and 23F).

Arbitration hearings are not expressly covered by the "confidential information" provisions of the IAA; however, the High Court of Australia in *Esso v Plowman* (1995) 183 CLR 10 observed that historically the "*agreement to arbitrate gave rise to an arbitration which was private in the sense that strangers were not entitled to attend the hearing*." Additionally, Article 22.1 of the ACICA Rules provides that all arbitration hearings shall take place in private.

10. The Award

10.1 Legal Requirements

The form of an arbitral award is prescribed by Article 31 of the Model Law, which requires that an award be made in writing and signed by the arbitrator or arbitrators. Signature by majority of members is insufficient.

There must be reasons stated for an award unless the parties have otherwise agreed that no reasons are necessary to be given or the award is to record an agreed settlement. Further, the Model Law does not contain any time limit that must be abided by for an award; the applicable rules may also be silent on this point. If parties wish to include a time limit for an award, they must do this either in their arbitration agreement or otherwise agree a time within which the tribunal is required to deliver an award. It will then be up to the tribunal as to whether it can adhere to the stated time and to raise this with the parties if it considers more time is required. In this regard, different arbitral rules and institutions have different provisions. For example, the ACICA Rules do not make any provision for the timing of the award; however, under rule 11(1) of the PCERA Arbitration Rules, the arbitral tribunal is to deliver its final award within a period of three months. However, rule 11 of the PCERA Rules allows for the parties or PCERA to extend the time limit for the award.

10.2 Types of Remedies

There are no specified limits on the types of remedies that an arbitral tribunal may award. However, punitive damages for breach of contract are not generally available under Australian law; it is unclear whether an arbitral tribunal or court would enforce an arbitral award providing for such punitive damages and there are apparently no reported cases where this issue has been tried. If such an award is permitted under

the governing law of the contract, it would militate in favour of enforcing the award. However, given public policy considerations that the award would not otherwise be generally enforced, the court would be likely to weigh the arguments carefully.

In relation to specific performance, declarations and other equitable remedies there is no obvious reason why an Australian court would not enforce an award granting such remedies (to the extent they are within the scope of Australian law). In this context it should be noted that the power of the court to enforce an award of specific performance is expressly granted in Australia's local (state) arbitration acts. For example, section 33A of the *Commercial Arbitration Act 2010* (NSW) provides that "[*u*]*nless otherwise agreed by the parties, the arbitrator has the power to make an award ordering specific performance of any contract if the Court would have power to order specific performance of that contract*."

10.3 Recovering Interest and Legal Costs

In general, in Australia, costs will be awarded to the prevailing party. Where an arbitral award orders payment of money, the general practice regarding interest and legal costs is that it will award interest on that sum from the date on which the cause of action arises. The unsuccessful party is generally ordered to pay the legal costs of the successful party. These matters are the subject of sections 25, 26 and 27 of the IAA. It is possible to opt out of these provisions.

11. Review of an Award

11.1 Grounds for Appeal

There are very limited grounds available for setting aside an award in Australia. These grounds are set out in Article 34 of the Model Law (incorporated into Australian law via section 16 of the IAA). Broadly, these grounds allow for an award to be set aside in the following circumstances:

- incapacity of party when entering into the arbitration agreement;
- legal invalidity of the arbitration agreement;
- the party making the application was not given proper notice of the appointment of the arbitrator or the arbitral proceedings;
- a party was unable to present its case;
- the award deals with matters beyond the scope of the reference to arbitration;
- the arbitral tribunal was constituted in accordance with the arbitration agreement or the law of the seat of the arbitration;
- the arbitration procedure was not in accordance with the arbitration agreement or the law of the seat of the arbitration;
- the subject matter of the dispute is not legally capable of settlement by arbitration; or
- the award is in conflict with public policy.

The last of the grounds above – the public policy ground – is also addressed by section 19 of the IAA which provides that, for the avoidance of doubt, an award (or interim measure) will be contrary to the public policy of Australia if it was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred in connection with the award (or interim measure).

The Australian courts have generally taken a pro-arbitration stance in refusing to set aside arbitral awards unless there are compelling reasons. For example, in the leading case of *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, the Court held (at [55]) that:

"[*a*]*n international commercial arbitration award will not be set aside or denied recognition or enforcement under Arts 34 and 36 of the Model Law (or under Art V of the New York Convention) unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness. The demonstration of real unfairness or real practical injustice will generally be able to be expressed, and demonstrated, with tolerable clarity and expedition. It does not involve the contested evaluation of a fact-finding process or 'fact interpretation process' or the factual analysis of asserted 'reasoning failure', as was argued here.*"

Any application to set aside an award must be made within three months after the date of receipt of the award or after the arbitral tribunal has disposed of an application to correct or interpret the award (Model Law Article 34(3)).

11.2 Excluding/Expanding the Scope of Appeal

Australian courts recognise party autonomy in international arbitration and support the ability of parties to agree such dispute resolution mechanisms as they wish (*TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at para 110). On the other hand, the principle of finality in relation to an arbitral award is equally fundamental. Indeed, when exercising their powers in relation to the conduct or enforcement of arbitration proceedings, section 39(2)(ii) of the IAA requires Australian courts to have regard to the fact that "[arbitral] *awards are intended to provide certainty and finality*." There is a possible tension between these two principles. On the one hand, courts ought to recognise and give effect to the agreement of the parties to apply a review mechanism for arbitral awards. On the other hand, the existing regime for arbitral awards treats such awards as final and binding (and only reviewable in limited, prescribed circumstances). In the absence of any test case on

this issue, if asked to consider this issue, it is most likely that the Australian courts would scrutinise the wording of the arbitration agreement carefully. If it is unequivocally clear that the parties intended an award to be reviewable, and the process and scope of such review is sufficiently clear and certain, then it is likely the Australian courts would give effect to the parties' agreement. However, if there is a lack of clarity, it may be hard for the party seeking to set aside (or resist enforcement of) the arbitral award to persuade the court that the parties intended the relevant award not to be final or that the interests of justice are best served by reviewing such award. In this context it is noted that section 39(2)(i) of the IAA also requires Australian courts to have regard to the fact that "*arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial dispute*."

11.3 Standard of Judicial Review

In relation to the reviewability of an award more generally, as set out above, in principle, unless it is obvious that what has occurred is contrary to public policy or made in breach of natural justice, Australian courts will consider that the arbitral tribunal's findings of fact and law should be upheld. In relation to breach of natural justice, the Court in *TLC Air Conditioner* found that the award should not be set aside unless there exists real unfairness or real practical injustice in the conduct of the arbitration or issuance of the award (paras. 55–56). The Court also held that a merits review may undermine the international arbitration system:

" *If the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been conducted regularly and fairly*." (para. 54)

12. Enforcement of an Award

12.1 New York Convention

Australia acceded to the *New York Convention* in March 1975 (without making any reservations). In the same year, Australia also signed the *ICSID Convention* (without making any reservations) although it did not enter force in Australia until 1991. Australia is not party to the *Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971*.

In March 2018, Australia opened a public consultation in relation to the new draft Hague Convention on foreign judgments that is being considered as part of the Hague Conference Foreign Judgments Project: https://www.ag.gov.au/Consultations/Pages/Recognition-and-enforcement-of-foreign-judgments.aspx

12.2 Enforcement Procedure

Foreign arbitral awards are enforceable in Australia through section 8(3) of the IAA which provides that they are to be treated as if they were a federal court judgment. A "foreign award" is defined in the IAA as "*an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies*." In order to enforce an award, section 9 of the IAA also provides that the enforcing party must produce (i) "*the duly authenticated original award or a duly certified copy*" and (ii) "*the original arbitration agreement under which the award purports to have been made or a duly certified copy*."

Parties seeking to enforce an arbitral award in Australia should file the Federal Court Request for Enforcement form in accordance with the *Federal Court of Australia Act 1976* (Cth) and the *Federal Court Rules 2011* (Cth).

12.3 Approach of the Courts

The grounds for resisting enforcement of an arbitral award are set out in sections 8(5) and 8(7) of the IAA. Sections 8(5) and 8(7) of the IAA broadly reflect Article V of the New York Convention and Article 36 of the Model Law and include:

- incapacity of party when entering into the arbitration agreement;
- legal invalidity of the arbitration agreement;
- the party making the application was not given proper notice of the appointment of the arbitrator or the arbitral proceedings;
- a party was unable to present its case;
- the award deals with matters beyond the scope of the reference to arbitration;
- the arbitral tribunal was constituted in accordance with the arbitration agreement or the law of the seat of the arbitration;
- the arbitration procedure was not in accordance with the arbitration agreement or the law of the seat of the arbitration;
- the award has not yet become binding on the parties or has been suspended by a competent court of the country under which law the award was made;
- the subject-matter of the dispute subject to the award is not capable of settlement by arbitration under the laws in force in the state or territory in which the court is sitting; or
- to enforce the award would be contrary to public policy.

The general approach of the Australian courts to enforcement was articulated in the case of *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSC 248 as being that, to the extent the words used in IAA allow, a narrow interpreta-

tion may be applied to the grounds for resisting enforcement (para. 129). However, in this case, the Court held that an award creditor must first establish:

- there is a foreign award;
- the foreign award was made pursuant to an arbitration agreement; and
- the foreign award was made against a person who was a party to that arbitration agreement.

Once the award creditor establishes these facts, the onus then shifts to the award debtor to establish its grounds for non-enforcement. To establish one of the grounds listed in section 8(5) of the IAA, the party resisting enforcement must prove any facts constituting the defence (including, where applicable, the content of foreign law) on the balance of probabilities. The Court further held that "[*w*]*hile the standard of proof that applies to the defences under s 8(5)(a) – (e) is the normal civil standard (balance of probabilities), the onus placed on the award debtor in respect of those defences can be properly described as a heavy onus*" (*IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSC 248at para. 43). On the facts of this particular case, the Court refused to enforce part of the award that ordered a payment from a non-party to the arbitration agreement. However, the Court did acknowledge that if the non-party had been an agent for the relevant party the award may have been enforceable against it. The Court also allowed for the possibility that had the non-party participated in the arbitration process it could have been estopped from resisting enforcement of the award.

The public policy ground has also been the subject of Australian judicial discourse on enforcement. In the case of *Sauber Motorsport AG v Giedo Van Der Garde BV* [2015] VSCA 37, enforcement of the award would result in one driver, who was not a party to the arbitration, not being able to participate in the 2015 Formula One season. It was argued, among other things, that this would be a breach of the rule of natural justice (and therefore the award could be refused enforcement as contrary to public policy). However, dismissing an appeal from a decision ordering that the award be enforced, the Court of Appeal held that the fact that non-parties' rights would be affected by enforcement did not mean that enforcement was against public policy (para. 26).

The public policy ground was also framed in terms of a breach of the rules of natural justice by the applicant in the case of *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FACFC 109. In that case, the applicant claimed that it had not been given a reasonable opportunity to present its case (despite having consented to an award to be issued against it in the event that it defaulted on its payment obligations under a settlement agreement – it then defaulted). The Australian Court held that the award was enforceable on the basis that the arbitrators and the courts of the seat considered a reasonable opportunity had been given (para. 52). The fact that a foreign court had already given a decision supporting the award was given significant weight.

Clifford Chance
7/190 St Georges Terrace
Perth WA 6000
Australia

CLIFFORD
CHANCE

Tel: +61 8 9262 5555
Fax: +61 8 9262 5522
Email: ben.luscombe@cliffordchance.com
Web: www.cliffordchance.com