COMMERCIAL ARBITRATION IN AUSTRALIA[*]

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1. Introduction

Commercial arbitration continues its global growth – with very significant increases in the number of disputes initiated, as well as in the monetary sums in dispute. This strong trend can be partially attributed to developing and rapidly industrialising economies, particularly those in Asia, and the consequent increase in business opportunities and ensuing disputes. No doubt the impact of long established arbitral jurisdictions, such as London, New York, Paris and other European centres, has also played a part. However, given that international arbitration relies primarily on mutual consent, businesses and legal practitioners must have been satisfied at the time of contracting that dispute resolution by arbitration was fair, efficient, and enforceable. Contracting parties must first have had a favourable disposition towards arbitration, and also been able to understand the specific factors and decisions to be made which influence the particular ways in which an arbitration may be conducted. Surveys such as the *2025 International Arbitration Survey – The path forward: Realities and opportunities in arbitration*[2] show that parties do consider various factors in choosing a favourable seat or law to govern the contract.

Given the sophistication of the corporations that utilise international arbitration, there is a certain level of competition between arbitral jurisdictions. Potential seats take active measures to promote their approach to arbitration; otherwise they risk marginalisation in the competitive global marketplace. Failing to present attractively may have significantly adverse consequences, particularly in terms of the development of a jurisdiction's international legal expertise, and the involvement of its legal and other professionals in international trade and commerce.

Success in this respect is, of course, not only dependent on arbitrators and arbitration practitioners. The whole process must be well supported by arbitral institutions and, importantly, the courts. All concerned must play their part in maintaining the quality of arbitral processes and outcomes, and in reducing delay and expense. Legislatures must do all they can to facilitate laws that create a favourable arbitral environment. Courts,

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[2] Queen Mary, University of London, School of International Arbitration, *2025 International Arbitration Survey – The path forward: Realities and opportunities in arbitration*, sponsored by White & Case LLP ('*QM Survey*').

whether they be supervising or enforcing, are also tasked with understanding and supporting arbitration in all these respects – and they must be impartial and efficient. Arbitral institutes are also playing an increasing role, and must maintain a strong level of expertise, impartiality and efficiency, to the extent they are involved in both administered disputes, and in exercising any statutory functions, such as appointment powers. These duties, shared amongst all actors in the legal field, are particularly important in an atmosphere of concern, internationally and domestically, at the incidence of delay and expense. Also of fundamental importance is the state of the arbitration law, the legislation regulating both domestic and international arbitration.

In the last decade or so, there have been significant efforts made by individuals and organisations, public and private, to encourage and develop arbitration in Australia. These include efforts by the judiciary to create and promote the services of specialist lists and judges, significant legislative changes, and development of new rules, services and education programs by arbitral institutes and centres. Arbitrators, arbitration practitioners, arbitral institutes, governments and courts involved or interested in arbitration are, with this momentum, utilising the opportunities to bolster and reinforce both domestic and international arbitral regimes. Arbitral institutions are also playing their part as promoters, educators and guardians of ethical standards.[3]

These efforts are increasingly employed to overcome Australia's lack of high volume commercial arbitration business, particularly where arbitration is booming in the broader Asia-Pacific region. This is in contrast to the outstanding success of arbitration, seen over many years, in the United Kingdom, Europe and the United States, for example. There are many reasons for this, which no doubt include the role and impact, both perceived and real, of the national and state legislatures, courts, and arbitral bodies.

The aim of the present arbitration reinvigoration process is to increase the use of both international and domestic commercial arbitration in Australia. International experience indicates that countries that have been successful in establishing busy international arbitration centres and attracting significant international arbitration work also have significant and active domestic arbitration sectors. The two feed off each

[3] Including the Australian Centre for International Commercial Arbitration ('ACICA'), the Chartered Institute of Arbitrators (Australian Branch) and the Resolution Institute ('RI') (which now incorporates the former Institute of Arbitrators and Mediators Australia ('IAMA')).

other. The vibrant domestic arbitration sector provides significant experience for its arbitrators – and also for its courts. It is all the more so where the domestic arbitration law is based on an international regime, such as the UNCITRAL Model Arbitration Law (the 'Model Law')[4] – as is the position now in Australia.

This paper discusses these issues with reference to the international and domestic arbitration environment in Australia, together with the role of the specialist Arbitration List in the Commercial Court of the Supreme Court of Victoria (which I developed and headed for a decade from 2009 to 2019).

2. The arbitral environment

The *Queen Mary – 2025 International Arbitration Survey – The path forward: Realities and opportunities in arbitration* ('the *QM Survey*') provides a review of factors influencing the attractiveness, or otherwise, of a jurisdiction as a seat for arbitrations. The *QM Survey* found that some of the most important factors influencing the choice of the seat are the '… support for arbitration by local courts, neutrality and impartiality of the local legal system and national arbitration law and a strong enforcement track record'[5] The passage of the Model Law based legislation enhances Australia's position in this respect. Australia, like other attractive international arbitration seats, has stable government institutions. With these legislative reforms, the 'arbitration friendliness' of Australia has improved significantly. As discussed below, the Arbitration List in the Victorian Supreme Court was established to facilitate efficient arbitration proceedings by providing constantly accessible and efficient court processes to support arbitration proceedings at all stages – and to ensure the absence of delay in the hearing of urgent applications. According to the *QM Survey*, these are considerations in determining the convenience, hence the attractiveness, of a seat.

The governing law of the contract is also an important factor in selecting an arbitral seat – and this and the law of the seat may coincide. While Australian law is obviously not

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4 United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration (1985) (as adopted by UNCITRAL on 21 June 1985). Adopted by the UN General Assembly on 11 December 1985 (General Assembly Resolution 40/72), with revisions (as amended by UNCITRAL and adopted on 7 July 2006) adopted by the UN General Assembly on 4 December 2006 (General Assembly Resolution 61/33).

5 *QM Survey*, 7.

as frequently specified as the law of the contract as, for example, English or New York law, it may be seen as a useful option. It is based on English common law and its own developed jurisprudence is regularly cited and applied in other jurisdictions. Of course, arbitrations in Australia can and do apply English law with relative ease; or, similarly, New York, Singapore or Hong Kong law if that is desired. The same applies with respect to civil law systems, such as Indonesia or the Philippines. The effect of the choice of seat on enforceability of the arbitral award is also a serious matter – and one to be considered carefully. The choice of a jurisdiction where neutrality and impartiality is questionable may invite enforcement problems. Australia does not, of course, present any such problem. Additionally, as emphasised in the *QM* Survey, a critical factor in choosing the governing law is the neutrality and impartiality of the legal system – and Australian law and Australia cannot be faulted on that score.

Arbitral institutions and their rules are another factor that may influence the choice of the seat. The Australian Centre for International Commercial Arbitration ('ACICA') provides a choice of modern arbitration rules – a set of rules of general application to international arbitrations and an expedited set of rules tailored for smaller disputes,[6] together with any emergency arbitrator option directed to providing interim measures of protection.

There is also the important question of cost (arbitrators', experts' and lawyers' fees, alike). In this context, steps might be taken to limit or control fee structures which do not encourage efficiency, such as time costing, and which may cut across the aim of legislatures, courts and arbitrators to promote speed and cost-effective processes.[7]

It would, of course, be counterproductive to gloss over the fact that, at times, there has been a perception that the Australian courts have hindered effective commercial arbitration, both by intervening too much in the arbitral process and by interpreting the arbitral law in an interventionist rather than a supportive way. This perception, as well as many other factors, was one of the reasons that Australian commercial arbitration

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6 See www.acica.org.au.

7 See, in the litigation context, Justice Clyde Croft, 'AON and its implications for the Commercial Court, a paper presented at the Commercial Court CPD and CLE – *Aon Risk Services Australia Ltd v ANU* [2009] HCA 27: What does this mean for litigation and how will it affect trial preparation?' seminar on 19 August 2010, available at <https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/12/e6/25fda5c16/AON%20and%20its%20implications%20for%20the%20Commercial%20Court%2019082010.pdf>.

legislation required attention; though the domestic legislation had also become very dated as a result of developments in legislation elsewhere.[8] Prior to the enactment of the then new, uniform, domestic commercial arbitration legislation in the mid-1980s, commercial arbitration had been constrained very significantly by the case stated procedure which could be used, in effect, to force a retrial of the issues in an arbitration in the reviewing court. Naturally, the cost, expense and delay involved had the effect of making commercial arbitration very unattractive.

There were great hopes for the uniform legislation, based on the English experience. For example, it was expected that the new constrained appeal and review provisions, based as they were on the 1979 English legislation, would lead Australian courts to adopt the same 'hands-off' approach which came to be expressed by Lord Diplock in the, so called, 'Nema guidelines'.[9] With the hindsight of history, we know that this did not occur, at least not uniformly, and a good deal of uncertainty resulted which did not assist the development of commercial arbitration.

In defence of the courts, it might be said that the legislatures could have included *The Nema* guidelines in the new Acts if this had been the legislative intent, but given the provenance of the legislation and the English case law, I think it would have to be conceded that there were some 'unfortunate' decisions. There were some problems with over intervention in the arbitration process by way of judicial review of awards and as a result of an increasing tendency for parties to challenge awards on the basis of, what is generally best described as, 'technical misconduct'. This should not, however, overshadow the very effective and useful work of the courts in expediting and supporting arbitration through very 'arbitration friendly' decisions on the operation of the arbitration legislation, and more generally. This is unsurprising and consistent with

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8 The domestic commercial arbitration legislation, prior to the enactment of the *Commercial Arbitration Act* 2010 in New South Wales was uniform (or substantially uniform) legislation which flowed from the work of the Standing Committee of Attorneys-General ('SCAG') in the late 1970s and early 1980s which was based on the then new and innovative legislative developments in England which resulted in the enactment of new legislation in the form of the *Arbitration Act* 1975 (Eng) and, principally, the *Arbitration Act* 1979 (Eng). Victoria was the first State to enact the legislation SCAG had developed, in the form of the *Commercial Arbitration Act* 1984. New South Wales followed shortly afterwards as, in due course, did the other States and the Territories. Apart from in New South Wales, as a result of its enactment of the *Commercial Arbitration Act* 2010, this is the domestic commercial arbitration legislation still in force in Australia.

9 See *Pioneer Shipping Ltd v BTP Tioxide Ltd ('The Nema')* [1982] AC 724, 742; and see JA Sharkey and JB Dorter, *Commercial Arbitration* (1986, LBC), 268–274.

the approach of the common law over a long period of time. In this respect it is, in my view, worth noting that the common law courts were, as far back as the 18th century, extraordinarily supportive of commercial arbitration – as Professor James Oldham's account of the work of Lord Mansfield in the latter part of that century illustrates.[10] More recently, the English, Singapore and Hong Kong courts, for example, have been very supportive, as many of the Australian courts have been, and continue to be.

Also of concern has been the actual performance of arbitration itself. Although the education programs of the arbitral institutions seek to develop and promote innovative techniques which save time and cost, all too often arbitration as practised in Australia has tended to replicate traditional litigation. I say 'traditional litigation' as for many years the commercial courts in Australia and other countries have embraced aggressive case management and time saving techniques which have made 'innovative litigation' far more attractive than domestic commercial arbitration in many instances.

In more recent times, this healthy competition and the example provided by these courts has fed into arbitration processes and emboldened arbitrators to be more robust in applying active case management and more innovative techniques. This process has also been assisted by cross fertilisation from international arbitration where innovation in arbitration processes has tended to be in advance of domestic arbitration, if only because of very significant time, cost and logistical constraints applying to the former. Interestingly the approach of international arbitrators has also assisted the courts and we now see the application of such techniques as 'chess clock' time management being used by the Australian courts. Other positive influences include the very successful special reference procedures available and applied extensively by the Supreme Court of New South Wales – which provide, in effect, an expedited, supervised, commercial arbitration process with minimal appeal potential and no enforcement problems. From my own experience, I can report that these provisions are now being applied more frequently in the Supreme Court of Victoria.

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10 J Oldham, *English Common Law in the Age of Mansfield* (2004, University of North Carolina Press), 68–72.

3. The role of governments and legislatures in supporting arbitration

There are two primary ways in which legislatures can assist arbitration: through the legislative provision of 'best-practice' in arbitral regimes (both domestic and international), and through other assistance, whether that be via trade promotion, public-private partnerships, or direct financial assistance.

In addition to the latter, financial assistance, governments across the globe have seen the need to support and encourage efforts to develop particular cities and jurisdictions in a manner favourable to arbitration. In the Asia-Pacific region, Singapore has led the field with Maxwell Chambers. Australia was quick to follow. August 2010 saw the opening of the Australian International Disputes Centre (now the Australian Disputes Centre), based in Sydney. Funded by the Australian and New South Wales governments and ACICA, it offers modern purpose-built hearing facilities akin to its counterpart in Singapore, and also houses leading ADR providers in Australia – including ACICA, the Australian Branch of the Chartered Institute of Arbitrators, and the Australian Commercial Disputes Centre ('ACDC'). It has long been envisaged that other Australian states, including Victoria, will also follow suit, acting in conjunction through a 'grid' of co-ordinated centres throughout Australia to offer services to international and domestic parties alike.[11]

Governments have also devoted a great deal of time and effort to reviewing and developing new legislation designed to produce an attractive arbitral climate, and to achieve something in the nature of 'best practice' arbitration law. There has been significant legislative activity in the Asia-Pacific region. In particular, the governments of Australia, Singapore and Hong Kong, all independently reviewed their respective arbitration legislation. Most recently, in 2025, both Singapore and Hong Kong have considered changes to their respective arbitration legislation, to enhance efficiency and user-friendliness. These ongoing efforts were and are continually directed to updating, modernising and clarifying existing arbitration law and practice, as well as promoting

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11 The Hon. Marilyn Warren AC, then Chief Justice of Victoria 'Victoria's Commitment To Arbitration Including International Arbitration And Recent Developments', remarks at the Australian Centre for International Commercial Arbitration reception at the Melbourne Office of Mallesons Stephen Jacques on 13 May 2010.

the individual jurisdiction as an attractive seat for future arbitrations. As a result of its reviews in relation to international and domestic commercial arbitration, Australia chose to adopt the majority of the 2006 amendments to the Model Law, bringing it in line with Singapore and Hong Kong.

All three jurisdictions now have provisions largely consistent with the 2006 Model Law, including provisions modernising the form requirement for an arbitration agreement, designating a prescribed appointing authority and governing the grant of interim measures. Nevertheless, with the exception of these jurisdictions, the enactment of the *International Arbitration Amendment Act* 2010 made Australia one of few jurisdictions then to implement (with amendments) the 2006 revisions to the Model Law. In 2026, there are now approximately 40 countries which have implemented the 2006 revision to the Model Law.[12]

The revised *International Arbitration Act* in both Australia and Singapore came into effect on 6 July 2010 and 1 January 2010, respectively. The updated Hong Kong Arbitration Ordinance commenced operation on 1 June 2011. The Australian uniform *Model Commercial Arbitration Bill* 2010 applies the Model Law provisions, with some adaptations, to domestic commercial arbitration. It has since been implemented in all states and territories. New South Wales was the first state to adopt the new uniform commercial arbitration legislation in the *Commercial Arbitration Act* 2010 (NSW), which commenced operation on 1 October 2010. Victoria followed suit shortly after, enacting the *Commercial Arbitration Act* 2011 (Vic), which commenced operation on 1 May 2012. This Act replaced the former *Commercial Arbitration Act* 1984.

As indicated, and as will be discussed, the Model Law, as amended in 2006, forms the basis of both the *International Arbitration Act* 1974 (Cth) ('the IAA'), as amended in 2010,[13] and the uniform *Commercial Arbitration Acts* ('the CAA'). The position that

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12 For the full list and current status of the adoption of the Model Law, see the UNCITRAL website: <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

13 Extensive amendments were made by the *International Arbitration Amendment Act* 2010 as a result of the review of the then existing Australian international arbitration legislation, the *International Arbitration Act* 1974. In relation to the review, see Commonwealth of Australia Attorney General's Department '*Review of the International Arbitration Act 1974*' (Discussion Paper, November 2008).

the IAA, which provides for international arbitration,[14] and the CAA, which provides for domestic arbitration, are national legislation in the first instance and state and territory legislation in the second which does, to a great extent, reflect the realities of the division of legislative powers in the Australian federation – a notion that may cause a degree of puzzlement to those who live and work in unitary states.[15] The use of the amended Model Law as the basis of both the international and domestic commercial arbitration legislation in Australia provides legislation which is based on current international consensus and accepted practice and which is well understood internationally. Consequently, the Australian legislation, at both levels, became immediately accessible and understandable internationally – particularly as it has been interpreted and administered by the Australian courts on the basis of accepted international jurisprudence.[16] In terms of substance, the Model Law is an internationally drafted and accepted arbitration regime that is very supportive of commercial arbitration. It has been enacted in over 60 nation states. It allows parties the freedom to decide how they want their disputes resolved with minimal court intervention, but with maximum court support. Consequently, the Model Law is the arbitration law against which all other arbitration laws tend to be judged.

The choice of the Model Law as the basis for the CAA does assist with achieving uniformity between the international and domestic regimes. As both the IAA and the CAA apply the Model Law provisions, with some additions and adaptations to accommodate their particular contexts, judgments under one regime can and do inform

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14 As s 16 of the IAA applies the Model Law, as amended in 2006, arbitration is 'international' if the provisions of Article 1(3) of the Model Law are applicable. As to the meaning of 'commercial' in the context of the expression 'international commercial arbitration' as used in Article 1(1) of the Model Law, reference should be made to *UNCITRAL Model Law on International Commercial Arbitration 1985 – With amendments as adopted in 2006* (United Nations, Vienna, 2008), 1 footnote 2.

15 Consequently, it may assist to clarify some points arising from this federal structure. The IAA is national legislation of the national (federal) parliament, the Parliament of the Commonwealth of Australia. The CAA is national uniform legislation but is, nevertheless, the legislation of the individual state and territory parliaments. The reference to the territories in this paper is a reference to the mainland territories only (ie. the Australian Capital Territory (ACT) and the Northern Territory of Australia (NT)); though the IAA does apply throughout Australia and all its territories, mainland and external (see IAA, s 16). References to Australian legislation is a more general reference to both the national and the state and territory legislation operating within Australia. Similarly, a reference to Australian courts is a general reference to the Federal Court of Australia and to the state and territory Supreme Courts.

16 See, eg, *Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49; *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 418 ALR 539; *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* (2024) 419 ALR 126; *CCDM Holdings LLC v Republic of India* [2026] HCA 9.

judgments under the other. State and Territory Supreme Court judges, when making decisions under the CAA, also need to be aware of the impact of their judgments on the interpretation of the IAA, as they have jurisdiction under both regimes.[17] Additionally, international and domestic parties are likely, and entitled, to assume that a decision on similar or identical provisions under one regime will be found to apply with equal force under the other regime. Consequently, decisions under the CAA will also be considered in determining whether Australia is an attractive seat for international arbitrations.

Similarly, the Hong Kong Arbitration Ordinance provides for a unitary regime, removing the distinction between domestic and international arbitrations. Singapore, however, continues to maintain a distinction between domestic and international arbitrations, the former operating under the *Arbitration Act* (Chapter 10), and the latter under Singapore's *International Arbitration Act* (Chapter 143A). Nonetheless, Singapore's domestic Arbitration Act relies heavily on Model Law provisions, and thus the provisions of the domestic Act are largely similar to those of the international regime.

4. Key legislative provisions – the *International Arbitration Act* 1974 (as amended in 2010) – and the *Commercial Arbitration Act* 2010

The Australian IAA applies the Model Law, as amended in 2006, to international commercial arbitrations and the CAA applies this version of the Model Law domestically – with some optional provisions (internationally) and adaptations (domestically).

Interpretation

(a) Interpretation provisions

It is essential that the Supreme Courts of the States and Territories and the Federal Court interpret the Model Law, as applied by the IAA and the CAA, consistently and in accordance with the legislative purpose and the provenance of the provisions. Were this

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17 A position which is reinforced, and required, by s 2A of the CAA (see below).

not to occur, the present legislative reforms would not, ultimately, be successful in promoting and developing international and domestic commercial arbitration in Australia. It is to this end the IAA provides various interpretative provisions, which may assist in this respect. It is to these that I now turn.

International Arbitration Act – matters to which the court must have regard – objects of the Act

A court or authority in exercising the functions and powers listed in section 39(1) must, in doing so[18]

> have regard to:
>
> (a) the objects of the Act; and
>
> (b) the fact that:
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> (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
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> (ii) awards are intended to provide certainty and finality.

The extensive list in section 39(1) seems to cover most, if not all, situations where a court or authority[19] will be applying or interpreting the IAA, the Model Law, the New York Convention or arbitration agreements and awards. A court or authority is directed to have regard to the objects of the IAA, rather than obliged to apply the objects of the Act or the other considerations. Nevertheless, this probably makes little practical difference.

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18 IAA, s 39(2).

19 See IAA s 18:

> (1) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(3) of the Model Law.
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> (2) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(4) of the Model Law.

The functions referred to in Articles 11(3) and 11(4) of the Model Law are the appointment of arbitrators. ACICA has now been prescribed as an ‘authority’ for the purpose of these provisions. See section ‘Relevant Courts’ below for further details.

The objects of the IAA are set out in section 2D, as follows:

> The objects of this Act are:
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> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
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> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
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> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
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> (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and
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> (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
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> (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

The Parliamentary intention and objective is made quite clear by the combination of both sections 39 and 2D – the efficient settlement of disputes by encouraging the use of arbitration in the context of international trade and commerce. Regard should also be had to Article 2A of the Model Law, as amended in 2006, which provides:

> (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
>
> (2) Questions concerning matters governed by the Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Commercial Arbitration Act[20] – Paramount object of Act

The paramount object of the CAA 'to facilitate the fair and final resolution of commercial disputes without unnecessary delay or expense' is an addition to the Model Law. The CAA is to be interpreted 'so that (as far as practicable) the paramount object is achieved.'[21] While this section is aimed more at parties and arbitrators, it is also a reminder to judges interpreting and applying the Act that one of the main advantages

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20 References to sections in the CAA are to the Victorian *Commercial Arbitration Act* 2011. As discussed above, the national framework of the CAA has resulted in each state adopting the same, identical Commercial Arbitration Act.

21 CAA, ss 1AC(1), (3).

of commercial arbitration, in the domestic context, is the ability of parties and arbitrators to tailor arbitration procedures for the most efficient resolution of the dispute. Sometimes parties will want an arbitration that is just as formal as a court proceeding and sometimes they will want a 'look and sniff' arbitration, and between these extremes lies the spectrum of possible arbitration procedures. If parties agree to procedures which are less formal than court proceedings, courts should not interfere with this choice. The same applies if the parties have clearly agreed to procedures which replicate full, traditional, litigation. The problems always arise when there is a mismatch of expectations and reality, where a party or parties and the arbitrator see themselves at different points on the 'spectrum'. This is an issue to which arbitrators must direct their attention, and is a matter which many arbitration rules specifically require that they do give their attention and ensure that procedures are appropriate to the nature and value of the dispute.[22] This is also an issue addressed in the IAA as a matter to which the courts must have regard.

(b) Consistency in the interpretation of the IAA and the CAA

The most important provision for the achievement of consistency between interpretation of the IAA and the CAA is found in section 2A of the CAA:

> 2A (1) Subject to section 1AC, in the interpretation of this Act, regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the International Arbitration Act 1974 of the Commonwealth) to international commercial arbitrations and the observance of good faith.
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> …
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> (3) Without limiting subsection (1), in interpreting this Act, reference may be made to the documents relating to the Model Law of—
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> (a) the United Nations Commission on International Trade Law, and
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> (b) its working groups for the preparation of the Model Law.

[22] See, for example, ACICA Expedited Arbitration Rules, rr 3 'Overriding Objective' and 14.1.

Even if this provision did not contain this express exhortation, the courts would nevertheless be expected to interpret the two Acts consistently unless there was a good reason not to do so.

(c) Having regard to the international origin and the need to promote uniformity

Consistency of interpretation is important, but only if the interpretation is both consistent and in accordance with accepted international jurisprudence with respect to the Model Law. As indicated previously, it is critically important that the IAA and the CAA are not treated as standalone pieces of legislation devoid of the international jurisprudence.[23]

The IAA and the CAA apply or are based on the Model Law that has been adopted in over 80 countries.[24] The Model Law and the New York Convention are, by their very nature, international. They are instruments which have been drafted internationally and which were intended by the drafters to apply to international disputes, between entities from different countries. Arbitrations are usually seated in a neutral country, and the arbitration award may be sought to be enforced in any country where the party liable, the award debtor, has assets; though far more easily if that country is a party to the New York Convention. Without uniformity of application, the international commercial arbitration system would not be a system at all. It would encounter similar difficulties as arise when trying to resolve international commercial disputes in national courts and, ultimately, seeking to enforce judgments internationally. It is beneficial to all countries which have adopted the Model Law (or similarly supportive arbitration laws) and the New York Convention if a harmonised system is maintained.

In a practical sense, this means that Australian courts should have regard to decisions of overseas courts applying and interpreting the Model Law. In my view, the IAA and the CAA encourage this approach as the interpretative provisions specifically direct judges to have regard to the international origins of the provisions applied by the IAA,

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23 And see s 2A of the CAA, set out above, which requires this approach from the CAA perspective.

24 Noting that not every country which has adopted the Model Law has done so with the amendments adopted in 2006.

and to the desirability of the uniform application of these provisions internationally.[25] The same result is contemplated with respect to the Model Law provisions adopted in the CAA provisions.[26]

(d) Principle of comity

The High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* reaffirmed the principle that[27]

> Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.[28]

This principle would appear to apply to both the CAA as uniform national legislation and the IAA as national legislation. The application of this principle is likely to be important in the international commercial arbitration context because of the dearth of High Court authority under the IAA and in relation to the Model Law provisions. It is also important in the domestic arbitration context and will assist further in the development of international arbitration jurisprudence as decisions on the CAA provisions feed interpretation of the IAA and the Model Law provisions generally, as discussed previously.

Model Law covers the field

The previous section 21 of the IAA allowed parties to agree to have their dispute settled in accordance with a law other than the Model Law. This allowed parties to opt out of the Model Law. The 2010 amendments to the IAA repealed this section; particularly with the objective of making it clear that when parties choose arbitral rules, they are not automatically opting out of the operation of the Model Law. In other words, arbitral rules and the Model Law can coexist. This clarification was made necessary by the decision in *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461.

However, by repealing section 21, the IAA may compromise party autonomy by not allowing parties to opt out of the Model Law in favour of another law. Parties wishing

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25 See IAA, s 2D.
26 See CAA, s 2A.
27 (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).
28 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

to conduct an international commercial arbitration in Australia may want to apply another law or rely on a set of arbitration rules which exclude the Model Law. There seems little reason to inhibit them from doing this. In some situations such a choice will create an extra level of complexity, but arbitrators in international arbitrations are often required to apply laws from more than one country and from a variety of sources.

Section 21 of the IAA also makes it clear that when the IAA applies to an arbitration, the State and Territory acts have no residual operation.

Writing requirement

The 1985 Model Law provides that 'an arbitration agreement shall be in writing'.[29] The writing requirements for an arbitration agreement are relaxed in the 2006 Model Law where two options are provided for the formal requirements of an arbitration agreement.[30] Option I still requires the arbitration agreement to be in writing, but this can include a contract that is formed orally (or by other means) and only evidenced in writing. Option II only requires an agreement between the parties and seemingly requires no formalities. The IAA adopts Option I. Consequently, an arbitration agreement must be in writing or evidenced in writing.[31] This is a more liberal approach than the current writing requirement in the IAA and is more liberal than most of the countries that have not adopted the 2006 Model Law.

Article II of the New York Convention is also important when considering formal requirements. An award that does not comply with these formal requirements may suffer difficulties in enforcement as the New York Convention will not apply. Article II of the New York Convention requires an arbitration agreement in writing. This can be interpreted in a number of ways, but at its most strict could require a signed written agreement. Even if this interpretation of the New York Convention is adopted, parties seeking to enforce an arbitration award in Australia based on an arbitration agreement only evidenced in writing may ask for the more liberal approach in the IAA to be applied under Article VII(I) of the New York Convention. Article VII(I) allows a party to rely on a provision of law in the country where enforcement is sought if it is different

29 1985 Model Law, Art 7.
30 2006 Model Law, Art 7.
31 See ss 3(1) and (4) of the IAA.

to the New York Convention.[32] In the present example, a party could possibly rely on the more liberal writing requirement.

Arbitration clauses often form a part of long, detailed, highly negotiated contracts. Consequently, formal requirements are usually satisfied. However, issues of formality may be more likely to arise when parties agree, separately to the main contract, that arbitration will be used.

Domestically, the CAA also adopts Option I for formal validity.[33] It does not suffer from complications of enforcement discussed below, as the New York Convention is not required for the enforcement of domestic commercial arbitration awards.

Court assistance and supervision

(a) Relevant Courts

Courts are given certain functions under the Model Law. The functions include the appointment of arbitrators (Arts 11(3) and (4)), the removal of arbitrators (Arts 13(3) and 14), decisions on arbitral jurisdiction (after the tribunal has already decided) (Art 16(3)), and the setting aside of arbitral awards (Art 34(2)).

Under section 18 of the IAA, these functions can be performed by the relevant state or territory Supreme Court or by the Federal Court. This gives parties a choice of forum and will place pressure on the courts to provide efficient court procedures. As discussed below, the Arbitration List of the Supreme Court of Victoria is designed to provide an efficient and expeditious service in support of commercial arbitration; domestic and international. It has been argued that giving jurisdiction to multiple courts will create inconsistency in the interpretation of national legislation. This should be able to be avoided by courts having regard to the interpretation provisions of the IAA in the context of the international character of the Model Law, by the establishment of

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32 In this respect reference should also be made to the *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*, being the 'Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the [New York Convention]', contained in Part Three of the *Model Law on International Commercial Arbitration 1985 – with amendments as adopted in 2006* (United Nations, Vienna, 2008), 39–40.

33 CAA, s 7.

specialist arbitration lists and with the assistance of the ACICA Judicial Liaison Committee.

There is provision in section 18 of the IAA for an authority to be prescribed for the purpose of appointing arbitrators under Articles 11(3) and (4) of the Model Law. ACICA has been prescribed as the sole default appointing authority in relation to Articles 11(3) and (4).[34] In my opinion, this is a very desirable development as courts are not necessarily well placed for deciding which arbitrator will be best suited to a particular dispute. It is a decision desirably left to the parties themselves or, in the absence of agreement, a professional body like ACICA, which has a greater knowledge of arbitrators and their expertise. It also saves the parties the cost and of applying to a court to appoint an arbitrator when third party assistance is required. It is a step towards the systems in place in the popular arbitration centres of Hong Kong[35] and Singapore.[36]

In relation to domestic arbitrations, the Supreme Court of the relevant state or territory is the court appointed to perform the various facilitative and supervisory functions under the CAA.[37] Other courts can be given jurisdiction to perform these functions if the parties agree. In New South Wales, both the District Court and the Local Court are available to the parties if they agree either before or after their dispute has arisen.

(b) Stay of court proceedings

If parties have agreed to arbitrate their disputes, they should be held to that agreement. Under Article 8 of the Model Law, if a party to an arbitration agreement files a claim in a court, the other party has a right to apply for a stay of the court proceedings in favour of arbitration. A court will grant a stay unless the arbitration agreement is 'null and void, inoperative or incapable of being performed'. If there is a valid arbitration agreement, the court must grant a stay.

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34 *International Arbitration Regulations* 2020 (Cth), s 6.

35 The Hong Kong International Arbitration Centre is appointed under ss 24(2)–(3) of the *Arbitration Ordinance* (Hong Kong).

36 The President of the Singapore International Arbitration Centre is appointed under Article 8(2) of the *International Arbitration Act* (Singapore).

37 CAA, s 6.

The IAA applies these Model Law provisions internationally,[38] as does the CAA domestically.[39]

(c) Specific court assistance provisions

International Arbitration Act – Additional provisions

The *International Arbitration Amendment Act* 2010 ('IAA Amendment Act') adds to the list of optional provisions available in Division 3 Part III ('Optional Provisions') of the IAA. The optional provisions are:

- Parties may obtain subpoenas (s 23)
- Failure to assist arbitral tribunal (s 23A)
- Default by party to an arbitration agreement (s 23B)
- Disclosure of confidential information (ss 23C-23G)
- Death of a party to an arbitration agreement (s 23H)
- Evidence (s 23J)
- Security for costs (s 23K)
- Consolidation of arbitral proceedings (s 24)
- Interest up to making of award (s 25)
- Interest on debt under award (s 26)
- Costs (s 27)

All of the optional provisions supplement the Model Law and are generally facilitative of arbitration. Most of them apply on an opt-out basis. This is important because parties may not give specific thought to the optional provisions when drafting the arbitration agreement, and they may be unwilling to give more power to the arbitral tribunal once a dispute has arisen. The confidentiality provisions (sections 23C to 23G) as originally enacted only applied on an opt-in basis but amendments to the IAA in 2015 changed the position with respect to the application of the confidentiality provisions to an opt-out

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38 IAA, s 16.
39 CAA, s 8.

basis. The provisions concerning consolidation of arbitral proceedings, on the other hand, continue to apply on an opt-in basis only (section 24).

Commercial Arbitration Act

There is a number of ways in which the court can assist the parties and the arbitral tribunal in reaching an efficient resolution of the dispute. Under section 27 of the CAA, the court may assist the arbitral tribunal in taking evidence if requested by the arbitral tribunal or a party with approval from the arbitral tribunal. Under section 27A of the CAA, the court may also issue subpoenas requiring a person to attend to give evidence or to produce documents to the arbitral tribunal. If an arbitral tribunal has ordered a person to attend to give evidence or provide documents, and that person has failed to comply, the court may order that person to comply with the arbitral tribunal's orders.

(d) Interim Measures

International Arbitration Act

Prior to the 2010 amendments, the IAA adopted Article 17 of the 1985 Model Law, which stated that the arbitral tribunal may 'order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.'

The fundamental problem with this provision was that there is no procedure within the Model Law for a party to have an interim measure granted by an arbitral tribunal enforced by a court. Enforcement provisions under the 1985 Model Law only apply to 'awards', which, at the very least, must finally determine some of the issues in dispute.

In practice, interim measures ordered by an arbitral tribunal are often complied with as it is not prudent tactics to ignore the arbitral tribunal that is to decide the issues of substance, and also because the same interim measure can be applied for from a court under Article 9 of the Model Law. The latter option may raise *res judicata* issues if it puts the court in the position of having to determine something already dealt with by the arbitral tribunal. Parties may be better off avoiding this possible complication and applying directly to a court, rather than applying to the arbitral tribunal.[40] This means, however, that parties would not be able to have the entire matter dealt with by an arbitral tribunal.

The 2006 amendments to the Model Law avoid these complications by the creation of an enforceable interim measure regime. The IAA adopts all these amendments in relation to interim measures apart from Article 17B, which gives arbitral tribunals the power to grant *ex parte* interim measures. Article 17H(1) allows interim measures to be enforced by a court subject to the limited grounds for refusing enforcement set out in Article 17I. Section 18B of the IAA specifically prevents arbitral tribunals from making *ex parte* interim measure orders, known as preliminary orders, under Article 17B of the Model Law. The major criticism of *ex parte* orders in arbitration is that they run counter to the consensual nature of arbitration. This criticism may be overstated as Article 17B of the Model Law is an opt-out provision, which can be excluded by party agreement. Under the Model Law, if parties do not wish to have the option of *ex parte* preliminary orders available, then, consistently with the principle of party autonomy, they can exclude them.

Commercial Arbitration Act

Although parties to an arbitration agreement are not to make substantive claims in court, they can still apply to a court for an interim measure of protection. The types of interim measures sought are usually injunctions to preserve the status quo, freezing orders etc. Arbitral tribunals, under section 17, also have the power to order interim measures. Under section 17H, interim measures made by an arbitral tribunal are enforceable by the court. Enforcement can only be refused on the limited grounds provided for in section 17I. Parties to an arbitration are likely to comply with interim measures ordered by the arbitral tribunal as they risk costs consequences in court in the event that such recourse is made necessary by non-compliance.

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40 Clyde Croft and Bronwyn Lincoln, 'The role of the courts; enforcement of arbitration awards and anti-arbitration injunctions' in K E Lindgren (ed) *International Commercial Litigation and Dispute Resolution* (2010) 76.

(e) Appointment of and challenge to arbitrators and arbitrators unable to act

The Model Law provides parties with broad autonomy in making provision for the appointment of arbitrators, by agreement directly or through an agreed procedure. The position is similar with respect to challenges. In these respects, reference should be made to Articles 11 to 13 of the Model Law, provisions which are applied to international arbitrations by the IAA. Nevertheless, a party wishing to avoid arbitration has an incentive to avoid or delay the appointment or challenge process, or processes. In order to avoid any resulting deadlock, the court, or possibly an 'other authority' such as ACICA, as discussed above, is given a supervisory role when agreement is not reached or when arbitrators are challenged – together with power to appoint or to decide any challenge. Similar provisions apply under Article 14 of the Model Law where an arbitrator becomes *de jure* or *de facto* unable to perform his or her functions or for other reasons fails to act without undue delay. These provisions are applied by the IAA.[41] Similar provisions, which are taken from the Model Law, apply under the CAA.[42]

(f) Determination of preliminary point of law by the Court – domestic arbitrations only

Commercial Arbitration Act

Section 27J of the CAA, which is an addition to the Model Law, allows a party to apply to the court for a determination on a preliminary point of law. This can only occur with the consent of the arbitrator or all the other parties; so it is not a provision likely to be abused. Delays may arise, however, if the determinations made by the court are appealed on a regular basis; but this is unlikely under the new legislative regime.

(g) Setting aside and appealing awards – domestic arbitrations only

Commercial Arbitration Act

Section 34 of the CAA, which is based on the Model Law, sets out the very limited grounds under which a party can apply to have an award set aside. The grounds do not

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41 See IAA, s 16, which applies the Model Law.

42 See ss 11 to 15 of the CAA; which also contain specific provisions to the effect that decisions by the court in this respect, within its powers, are final.

cover errors of law or fact by the arbitral award, but rather deal with situations where there was no power to issue the award in the first place. Among other things, an award can be set aside because the dispute is not covered by the arbitration agreement; there is not a properly constituted tribunal; the arbitration agreement is void; or the award is in conflict with the public policy of the state. The grounds are very narrow, and are unlikely to be successfully relied upon on a frequent basis. Similar grounds apply under the enforcement provisions in section 36 of the CAA.

In the domestic context, the grounds in section 34 of the CAA (based on Article 34 of the Model Law) were thought, at least potentially, to be too narrow. Consequently there is a broader appeal right given under section 34A of the CAA. This section is an addition to the Model Law provisions, which are reflected in section 34 of the CAA. Section 34A of the CAA allows an appeal on a question of law if the parties agree that such an appeal may be made and the court grants leave. This section is the high point of the court's supervisory role and goes further than the grounds set out in section 34. Although section 34A does go further than section 34, the appeal right is still restricted. Determinations of fact cannot be subject to appeal, but, of course, there is often difficulty in separating a question of law from a question of fact. The decision of the tribunal must be 'obviously wrong' or the question must be one of 'general public importance' and the arbitral decision is open to 'serious doubt'. These tests are somewhat similar to those under the *Commercial Arbitration Act* 1984 (Vic), but they appear to be more constrained and should be seen as at least incorporating the more restrictive approach to appeals contained in the *Nema guidelines*.[43]

For completeness, it is noted that in relation to international arbitrations, there is no appeal right conferred under the IAA over and above any right with respect to court supervision provided for in the Model Law.

Confidentiality

International Arbitration Act

The optional provisions added by the IAA Amendment Act in sections 23C to 23G were directed at addressing a perceived deficiency in Australia in relation to the

43 See *Pioneer Shipping Ltd v BTP Tioxide Ltd ('The Nema')* [1982] AC 724 at 742; and see JA Sharkey and JB Dorter, *Commercial Arbitration* (1986, LBC), 268–274.

confidentiality of arbitral proceedings as a result of the decision in *Esso Australia Resources Ltd v Plowman*,[44] where the High Court of Australia decided that arbitrations were private but not confidential.

Section 23C prohibits parties and the arbitral tribunal from disclosing confidential information[45] except as provided for by the Act. Section 23D specifies the situations when confidential information can be disclosed such as by consent of all the parties, for the purpose of obtaining professional advice or when required to disclose by a court. Section 23E gives the arbitral tribunal the power, on application of a party, to allow disclosure of confidential information in circumstances outside section 23D. Sections 23F and 23G give the court the power to prohibit disclosure or allow disclosure, respectively, after an application under section 23E has already been made.[46] The court must apply a public interest test – does the public interest lie in preserving confidentiality or in disclosure?

In 2015, the IAA was further amended so that the confidentiality provisions in section 23C now operate on an opt-out rather than opt-in basis.[47]

These sections give some protection, but considering the international perception of the treatment of confidentiality in Australia, it may have been desirable to adopt a more comprehensive approach such as that adopted in sections 14A to 14I of the *Arbitration Act* 1996 (New Zealand). The IAA confidentiality provisions are based on sections 14B to 14E of the New Zealand Act. However, the New Zealand provisions go further and make the distinction between privacy and confidentiality. Under section 14A, arbitrations must be private. In sections 14F to 14I, the New Zealand Act establishes a regime which allows for the possibility of court proceedings relating to an arbitration being conducted in private. A party must apply for the court proceedings to be conducted in private (section 14F(2)(a)) and state their reasons for doing so

44 (1985) 183 CLR 10.

45 Confidential information is defined in s 15(1) of the IAA. In summary, it includes information relating to the arbitral proceedings such as pleadings, evidence, transcripts, submissions, rulings and awards.

46 If the arbitral tribunal's mandate has finished then a party can apply directly to the court – s 23G(3)(a) IAA, as amended by s 18 of the *International Arbitration Amendment Act* 2010.

47 See s 22(3) IAA, as amended by *Civil Law and Justice (Omnibus Amendments) Act* 2015 (Cth) s 62.

(section 14G). The court needs to balance the public interest and must consider the factors set out in section 14H. These are:

(a) the open justice principle;

(b) the privacy and confidentiality of arbitral proceedings;

(c) any other public interest considerations;

(d) the terms of any arbitration agreement between the parties to the proceedings; and

(e) the reasons stated by the applicant under section 14G(b).

Considering that confidentiality has always been one of the most important claimed benefits of commercial arbitration, it did seem surprising that the confidentiality provisions of the IAA were originally applied on an opt-in rather than an opt-out basis. Additionally, any issues or problems with respect to confidentiality can be alleviated by practitioners being aware of these problems seeking to ensure that the parties do not opt out of the confidentiality provisions and also choose arbitration rules that provide for confidentiality and deal with confidentiality issues in a reasonable and practical way.

Commercial Arbitration Act

Confidentiality is one of the key benefits for parties choosing domestic arbitration. For this reason, it was important that specific confidentiality provisions be added to the Model Law provisions which are adopted domestically by the CAA. Again, this is especially the case in Australia given the concerns about confidentiality as a result of the decision in *Esso Australia Resources Ltd v Plowman*.[48] The confidentiality provisions in sections 27E to 27I of the CAA apply, crucially, on an opt-out basis. The court can make orders allowing or disallowing disclosure of confidential arbitral information if the mandate of the arbitral tribunal is terminated or the arbitral tribunal has already ruled on the disclosure of the information.

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[48] (1985) 183 CLR 10.

Reasonable opportunity to present case

Article 18 of the Model Law states 'each party shall be given a *full* opportunity of presenting his case' [emphasis added]. In situations where a party seeks to delay arbitration proceedings, it may rely on this provision to argue that it can present evidence and submissions no matter how costly, lengthy and unnecessary they may prove to be. Although it might be said, and with considerable force, that this view conflicts with the objectives and approach of the Model Law and the IAA, it is at least arguable, particularly before an arbitral tribunal.

To remove doubt, the IAA[49] and the CAA[50] 'amended' the 'full opportunity' provision in the Model Law to provide for a 'reasonable opportunity'. This will encourage parties to consider the flexibility of arbitral procedure. Clearly there needs to be proportionality between the complexity of the dispute and the procedures adopted.

Enforcement of foreign awards

Section 8(1) of the IAA states that '[s]ubject to this Part, 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'. Section 8(3A) of the IAA now provides, specifically, that the court may only refuse to enforce a foreign award if the circumstances mentioned in section 8(5) or (7) of the IAA apply. These subsections are based on Article 34(2) of the Model Law and Article V of the New York Convention. Thus, the only basis upon which a court can refuse enforcement of a foreign award is on a ground or grounds set out in sections 8(5) and (7). As discussed below in relation to the *Khuder* judgments, there is no onus on the enforcing party to prove anything other than the formal requirements under Article IV of the New York Convention; provisions which are reflected in section 9 of the IAA. It is then for the party resisting enforcement to establish, affirmatively, that any of the defensive provisions of section 8(5) or (7) apply. It follows that the burden of proof in this respect falls on the resisting party, the award debtor.

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49 Section 18C.
50 Section 18.

Public Policy

Under Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, an award may be set aside or refused enforcement, respectively, if it is in conflict with public policy. This position is reflected in section 8(7)(b) of the IAA, which provides for the refusal of enforcement when enforcement would be contrary to public policy.

Section 8(7A) of the IAA provides that:

> To avoid doubt and without limiting paragraph [8](7)(b), the enforcement of a foreign award would be contrary to public policy if:
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award.

This formulation is also applied to *Part II – Enforcement of Foreign Awards* of the IAA, and also the enforcement of interim measures under Article 17I(1)(b)(ii) of the Model Law.[51]

These provisions would not, however, appear to add a great deal to the interpretation of the provisions of either the Model Law or the New York Convention insofar as they relate to enforcement and public policy. Nevertheless, it does appear that sections 8(7A) and 19[52] of the IAA are narrow rather than expansive provisions. Having regard to these provisions, and also to section 2D of the IAA, which sets out the objectives of the IAA, it would appear that 'public policy' is likely to be defined, and applied, narrowly in Australia.[53]

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51 IAA, s 19.

52 Section 19 of the IAA contains provisions similar to s 8(7A) with respect to interim measures of protection.

53 See *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535, [105]; *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199; *Sauber Motorsport AG v Giedo Van Der Garde BV* (2015) 317 ALR 786, [8]; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, [73]. See also John J Hockley, Clyde Croft, William KQ Ho and Kieran Hickie, *Australian Commercial Arbitration* (LexisNexis, 2nd ed, 2020), [34.70], [36.70].

Immunity of arbitrators

The IAA has adopted a similar approach to that found in section 74 of the United Kingdom *Arbitration Act* 1996. Section 28 of the IAA provides:

> (1) An arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator.
>
> (2) An entity that appoints, or fails or refuses to appoint, a person as arbitrator is not liable in relation to the appointment, failure or refusal if it was done in good faith.

This immunity of arbitrators for acts or omissions done in good faith is broader than previous immunity given to arbitrators in Australia.[54] The protection also extends to entities that appoint arbitrators (e.g. a nominating or appointing body such as ACICA). This is a move in line with international practice and will be a factor considered in the choice of Australia as an arbitral seat.

Immunity is provided for domestically in section 39 of the CAA. These provisions are substantially the same effect as section 28 of the IAA; but the immunity also extends to the arbitrator acting as a 'mediator, conciliator or other non-arbitral intermediary'.

The role of courts in arbitration

The specialist Arbitration List of the Commercial Court of the Supreme Court of Victoria

The Supreme Court of Victoria is vested with broad jurisdiction to assist with most aspects of both domestic and international commercial arbitration. As noted previously, the Federal Court of Australia only has jurisdiction with respect to international arbitration, as defined in the IAA, as amended in 2010.[55] On 1 January 2010, the new Arbitration List of the Commercial Court in the Victorian Supreme Court began

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54 Cf, s 51 of the *Commercial Arbitration Act* 1984 (Vic).

55 The Federal Court of Australia has a panel of judges available to hear arbitration matters, but it has not established a separate list.

operation. Since then, other specialist arbitration lists have been established in NSW[56] and WA.[57]

All arbitration matters brought in the Victorian Supreme Court are to be heard in the Arbitration List of the Commercial Court. The operation of the arbitration list is set out in *Practice Note SC CC 3 – Commercial Arbitration Business*.[58] The Practice Note sets out procedural information as well as useful guidelines for those considering an application. Parties are encouraged to communicate directly with the judge's Associates before filing an application at the Registry. There are a number of advantages to this approach. First, the parties can seek to clarify any procedural or administrative issues. Secondly, enquiries are made with Associates who have experience in handling arbitration related enquiries. Thirdly, and most importantly, parties are given a very early opportunity to suggest when the application should be heard. This is essential given the expedition of matters that the Arbitration List aims to achieve. In fact, given the priority put on hearing arbitration related matters quickly, the parties have often asked for a more relaxed timetable than has been offered to them.

Benefits of specialist lists

It is clear that there are substantial benefits that flow from providing a specialist list, with a specialist judge or judges. A court that has established an arbitration list is likely to be more aware of the specific issues that arise in the arbitration context. Also, a consistent body of arbitration related decisions can be developed by judges that have an interest and expertise in arbitration.

As part of so doing, courts need to ensure that any procedures to be applied with respect to the making of and dealing with applications under both the IAA and the CAA are clear and easily accessible. In this context, procedure must also include listing procedures and expedition.[59] Specialist courts with arbitration lists assist in this respect. The procedural approach to applications under the IAA and the CAA will have a major impact on the way that Australian arbitration law is viewed. For example, staying court

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56 Commenced on 1 February 2010 (Practice Note SC Eq 09 – Commercial Arbitration List)

57 Commenced on 29 April 2014 (Consolidated Practice Directions, 10 December 2025).

58 See Appendix I.

59 Noting in this respect that the Victorian Supreme Court Arbitration List is available 24 hours per day, seven days per week and hearings can and do take place outside court hours as required.

proceedings in favour of an arbitration is a pro-arbitration step, but if it takes an excessive time for the stay application to be heard and determined, the arbitration process has probably been thwarted anyway. Procedural consistency and expediency is far more likely to be achieved when there are specialist arbitration lists and judges; as the experience in leading commercial arbitration centres such as London, Singapore and Hong Kong shows. Specific arbitration practice notes and rules are essential to this process.

Approach of the Australian Courts

In the years since the application of the Model Law to international and domestic arbitrations through the IAA and the CAA, the courts have embraced the approach of the new regime and have had regard to and emphasised its international provenance.

Despite the support shown for arbitration, the legal framework establishing international and domestic arbitration was potentially threatened in the most significant case before the High Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*.[60] This case arose from an application by a party seeking to enforce an Australian arbitration award rendered in its favour in the Federal Court of Australia. The unsuccessful party sought to challenge the enforcement of the award. When the Federal Court rejected the challenge, the unsuccessful party sought special leave from the High Court to appeal the Federal Court decision on the basis that the legislative framework of international arbitration in Australia was not constitutionally valid.

The facts of the case are relatively simple and are set out in the joint-judgments of Hayne, Crennan, Kiefel and Bell JJ:

> 61. Under the agreement, TCL granted Castel the exclusive right to sell in Australia air conditioners manufactured by TCL. In July 2008 Castel submitted to arbitration in Australia a dispute arising from contractual claims against TCL, seeking damages. Following a hearing, on 23 December 2010 an arbitral tribunal constituted by Dr Gavan Griffith AO QC, the Honourable Alan Goldberg AO and Mr Peter Riordan SC ('the tribunal') made an award which upheld Castel's claims and required TCL to pay Castel a sum of $3,369,351. On 27 January 2011, the tribunal made a further award that TCL pay Castel $732,500 in respect of the costs of arbitration.

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60 (2013) 251 CLR 533.

> 62. TCL failed to pay Castel the amounts owing under the arbitral awards. On 18 March 2011, Castel applied to the Federal Court to enforce the arbitral awards. TCL opposed their enforcement on the ground that the Federal Court lacked jurisdiction and on the alternative ground that, if the Federal Court did have jurisdiction, the arbitral awards should not be enforced as to do so would be contrary to public policy because of an alleged breach of the rules of natural justice by the tribunal. TCL also applied in separate proceedings in the Federal Court to set aside the arbitral awards on the basis that they were contrary to public policy because of that alleged breach of the rules of natural justice.
>
> 63. On 23 January 2012, Murphy J ruled that the Federal Court had jurisdiction under the IA Act to enforce the arbitral awards. Subsequently, his Honour rejected TCL's claims of a breach of the rules of natural justice by the tribunal.

TCL's contention rested upon the adoption of Articles 35 and 36 of the Model Law in the IAA.[61] These articles effectively require a court to enforce an international award unless enforcement of the award falls within the narrowly defined exceptions. A court is not permitted to refuse enforcement of an international award on the basis that the award, on its face, contains an error of law. TCL argued that the requirement under the IAA was incompatible with the *Commonwealth of Australia Constitution Act* ('Australian Constitution'). Chapter III of the Australian Constitution specifically provides that —'[t]he judicial power of the Commonwealth shall be vested … in federal courts', which includes the Federal Court.

TCL's first argument was that section 16 of the IAA (which gave force to Articles 5, 6, 8 and 35 of the Model Law), together with section 7 and Part III of the IAA, were constitutionally invalid as they were inconsistent with the requirements in Chapter III of the Australian Constitution that Australian courts exercise independent judicial power. TCL contended that the relevant provisions of the IAA sought to remove this independence, and that enforcement of the award in the manner envisaged by the IAA meant that the Federal Court was exercising judicial power without any independent judicial process. Consequently, courts would be required to give 'judicial imprimatur' to an award despite its legal flaws. The High Court rejected this argument; unanimously holding that arbitral power is not judicial power. In other words, judicial power operates regardless of the parties' consent whereas arbitral power is dependent on it. Thus, in

[61] The IAA gives effect to both the Model Law (as adopted in 2006) and the New York Convention.

enforcing an arbitral award, a court is merely enforcing an agreement between the parties.

TCL's second argument was that the IAA imbues arbitrators with Commonwealth judicial power, which is not compatible with Chapter III of the Australian Constitution. Again, after carefully exploring the differences between judicial and arbitral power, the High Court rejected the argument.

The High Court's unanimous decision was welcomed by the Australian arbitration community; indeed, the Attorneys-General of four Australian states appeared (as well as ACICA, the Institute of Arbitrations and Mediators Australia and the Chartered Institute of Arbitrators (Australia)), arguing for the constitutional validity of the IAA. The proceeding had very much hung like the 'Sword of Damocles' over the efforts of the Australian government and the arbitration stakeholders to promote arbitration in Australia. The strong unanimous and pro-arbitration findings of the High Court (consisting of six of the seven justices) confirm that Australia sits well within international standards and norms for the enforcement of awards. It also reinforces the legislative measures taken to position Australia as a pro-arbitration jurisdiction.

As I have discussed, the *QM Survey* reflected upon a number of matters relevant to the seat's attractiveness:

1) Support for arbitration by local courts and judiciary

2) Neutrality and impartiality of the local legal system

3) Track record in enforcing agreements to arbitrate and arbitral awards

In my view, these matters overlap and can be broken down into the following categories which encapsulates the life-cycle of a court's function vis-à-vis an arbitral proceeding:

1. Avoiding delay and expediting the resolution of arbitration matters before the court.

2. Respecting party autonomy and enforcing properly constituted arbitration agreements.

3. Exercising restraint against interference with arbitral tribunal functions and enforcing *Kompetenz-Kompetenz*.

4. Assiduous avoidance of merits review.

Although this paper is not, and cannot be, anything like a comprehensive review of the Australian cases, a few examples serve to demonstrate the presence of these factors in the Australian context.

Avoiding Delay and Expedition

One of the most apt examples of a court's role in avoiding delay and expediting the resolution of arbitral matters arose in *Giedo van der Garde BV v Sauber Motorsport AG* (the '*Sauber* case').[62]

The *Sauber* case concerned a Dutch Formula 1 race car driver seeking to be reinstated as a driver for the Sauber F1 Team. The applicant driver, Mr van der Garde, and the company set up to manage his interests sought enforcement in Victoria of a Swiss arbitral award. The critical dispositive provision of the award required Sauber to—

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

Two days after the rendering of the award, van der Garde's Australian representatives contacted my Associates in accordance with the Arbitration Practice Note. The matter was listed for the hearing of an urgent *ex parte* application the following day (a Thursday), at which van der Garde sought orders permitting substituted service of the Originating Application on Sauber in Switzerland. I made orders for substituted service and listed the substantive application for hearing on the following Monday, the Labour Day public holiday, less than a week before the first race of the Formula One season, the Australian Grand Prix at Albert Park in Melbourne.

At the hearing, Sauber sought to resist enforcement on public policy grounds arguing that the critical dispositive provision was too uncertain to constitute an order of the court. In support of this submission, Sauber argued that the subject of an order of the court 'must be able to ascertain in precise terms what it is that they must do, or refrain from doing', where default may ground an action for contempt.[63] In addition to this uncertainty argument, Sauber submitted that enforcement would be futile because the

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62 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792.

63 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792, 795 [7].

award did not require Sauber to take any positive step to reinstate van der Garde as one of its drivers.

I delivered my judgment and written reasons one day after the hearing. In allowing the application and enforcing the award, I found that the critical dispositive provision was not too vague or uncertain, nor was enforcement futile; noting that the court was available to assist the parties in the event of any 'doubt or difficulty' in this regard.[64] The Court of Appeal affirmed this approach, finding that 'all concerned [were] well aware of the nature of the dispute and its resolution', and that there was 'no demonstrated lack of utility in the award as to render it against public policy to enforce it as an order of the court'.[65]

The entire process, from the applicant filing its urgent *ex parte* application, to hearing, to the delivery of my judgment, and finally to appeal, and the delivery of the Court of Appeal's decision, took eight days. The existence of a dedicated Arbitration List which was and is available 'around the clock' to service the needs of commercial parties ensured that this matter was promptly resolved prior to the commencement of the Formula One season. A commercial agreement was subsequently reached by the parties which involved Mr van der Garde relinquishing his driving seat for the Australian Grand Prix. This proceeding reflects the need, in certain circumstances, for courts to deliver expedited outcomes for parties in arbitral proceedings. The absence of swift justice in this proceeding would have resulted in no justice at all.

Enforcing Arbitration Agreements

In the recent decision of *Downer Utilities Australia Pty Ltd v Murra Warra Asset Co Pty Ltd*,[66] the court was asked to determine which party had properly commenced its arbitration under the parties' contract. This case was the first time an Australian court had considered the operation of a hybrid arbitration clause, which provided that:

> Arbitration pursuant to this clause 42.5 will be conducted by the Resolution Institute in accordance with the ICC Rules of Arbitration current at the time of the reference to arbitration and as otherwise set out in this clause.

64 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792, 797 [22].
65 *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786, 789–90 [12]–[13].
66 [2026] VSC 48.

One party purported to commence an arbitration with the ICC, whilst the other attempted to commence a competing arbitration with the RI. Both parties, however, agreed that the arbitration agreement was not pathological, and therefore, the only dispute as between the parties was which of their arbitrations had been properly commenced.

I ultimately concluded that the parties' arbitration agreement provided for the RI to conduct the arbitration applying the ICC Rules, as modified in order to exclude ICC specific administrative functions, such as that of the ICC Court or the ICC Secretariat.

In the absence of any known Australian jurisprudence on the application of hybrid arbitration clauses, I turned to a number of leading international cases, reflecting the international nature of arbitration as envisaged by the Model Law. Adopting the decisions of these leading cases, I noted that:[67]

> As a definitional starting point, hybrid arbitration clauses are agreements which state that the arbitration rules of one arbitral institution are to be administered by another arbitral institution. There are mercifully few cases considering hybrid arbitration clauses and, at present it appears, none from Australia. Noting that they are of limited precedential value given the differences in the wording of arbitration clauses and of different countries' approaches to contractual interpretation, a common theme emerging from the case law is that such clauses are upheld, if possible, on the basis of party autonomy, but with the observation that such clauses present practical difficulties to parties when a dispute arises for arbitration …
>
> Indeed, as Carlos Molina Esteban has remarked, 'virtually all cited decisions consider that hybrid arbitration is a bad idea since it creates problems in terms of certainty and litigiousness' and, aptly, '[h]ybrid arbitration is undoubtedly a bad choice, but parties are entitled to make bad choices'.
>
> … The cases also stress party autonomy, with the crucial issue being whether there is a clear agreement to arbitrate their disputes (in which event, the courts will endeavour to make the parties' agreement work).

This decision, the first of its kind in Australia, recognises that, notwithstanding the obvious difficulties which arise from a hybrid arbitration agreement, Australian courts will, where possible, endeavour to uphold party autonomy and make the parties' agreement work. This necessarily promotes confidence in parties seeking to arbitrate their disputes that Australian courts will not wrestle away this decision in favour of litigation, in circumstances where the parties have clearly expressed an intention to be bound by arbitration, despite the difficulties in properly construing that agreement.

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67 [2026] VSC 48, [13]–[15].

Restraint from interfering with arbitral tribunal functions

In another recent decision of *Oil Basins Ltd v Esso Australia Resources Pty Ltd*,[68] a proceeding involving two mammoth multinational resources companies, I applied the *Kompetenz-Kompetenz* principle and granted a stay over the court proceeding, deferring the question of jurisdiction to the arbitral tribunal.

The parties' dispute arose from a historical Royalty Agreement made over 60 years ago. Under that agreement, Oil Basins received the right to a royalty payment from Esso Australia and BHP ('the Producers'). Over the years, a number of disputes arose as to the proper amount of royalty payable under the Royalty Agreement, and those disputes were referred to and resolved by arbitration. In 1994, a Settlement Agreement was entered into by the parties following a dispute over the calculation of royalties in 1990. The Amended Settlement Agreement, which contained the parties' arbitration clause, was the subject matter of this present dispute. A disagreement arose as to whether the treatment of certain depreciation and decommissioning issues were arbitrable under the Amended Settlement Agreement, and Oil Basins commenced proceedings seeking a declaration that the depreciation and decommissioning issues were not arbitrable. In response, the Producers sought an order under section 7 of the IAA staying the proceeding.

Section 7 provides that:

> …
>
> 1) Subject to this Part, where:
>
> > a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
> >
> > b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;
>
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.
>
> …

68 (2025) 78 VR 388.

> 5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Section 16 of the IAA provides that the Model Law has the force of law in Australia.

In support of its stay application, the Producers relied, *inter alia*, on article 16 of the Model Law, which provides that:

> Article 16: *Competence of the arbitral tribunal to rule on its jurisdiction*
>
> 1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, 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.

Article 5 of the Model Law, titled 'Extent of court intervention' states that '[i]n matters governed by this Law, no court shall intervene except where so provided in this Law.'

Applying the principles of a number of prior decisions concerning the scope of the court's power to stay the proceeding under section 7(2), I ordered a stay as to the whole of the proceeding, and determined that the question of the arbitral tribunal's jurisdiction should be determined, in the first instance, by the tribunal itself.

I held that the court may be prepared to hear jurisdictional challenges where such a challenge was strictly confined to a short question of law which, once determined, would be dispositive. This proceeding, however, involved a number of factual and legal complexities and, accordingly, it was incumbent on the court to exercise the *Kompetenz-Kompetenz* principle, and allow the arbitral tribunal to resolve the jurisdictional question:[69]

> [I]t is clear that where the issues raised involve factual matters a court should defer to the jurisdiction of the arbitral tribunal and the application of the *Kompetenz–Kompetenz* doctrine now embedded in that jurisdiction.
>
> …
>
> The arbitration agreement the subject of this application (whether contained in the Settlement Agreement or otherwise) is couched in a suite of complex provisions in a suite of complex documents and the subject of a long history of various amendments and arbitral awards and determinations. Having regard to these matters it would, in my view, be absurd to suggest the possibility of, in effect, a summary determination of a discrete and narrow question of law

69 (2025) 78 VR 388, [61]–[62].

> devoid of consideration of any factual matters or context which might be approached within a possible *Dell* 'exception'.
>
> …
>
> In the present circumstances, to the extent that it may be said that the arbitration agreement (whether contained in the Settlement Agreement or otherwise) is subject to any proviso issues relating to it, borrowing from the words of Lyons J, of 'some legal and/or factual complexity' such that any proviso issue is a matter for the arbitral tribunal. This position is also, in my view, consistent with the authorities to which reference has been made as to the respect to be paid to and support for the jurisdiction of the arbitral tribunal and, particularly, the operation and application of the doctrine of *Kompetenz-Kompetenz*.

This decision was upheld on appeal, save as to costs.[70] At the time of writing, an application for special leave to appeal has been sought at the High Court of Australia.

In my view, the decision to stay the proceeding and defer the matter of jurisdiction to the arbitral tribunal reinforces Australia's position as a pro-arbitration seat, where domestic courts are reluctant to intervene in matters requiring complex factual and legal evidence, otherwise in the purview of the arbitral tribunal. The application of the *Kompetenz-Kompetenz* doctrine in this proceeding provides for the arbitral tribunal to resolve all matters concerning its jurisdiction, placing the parties' dispute firmly within the arbitration process, as contemplated by the agreement to arbitrate.

Assiduous avoidance of merits review – resisting the temptation of domesticity

Taking a step back in time, in 2015, I first used the phrase 'temptation of domesticity' to describe the intuitive appeal of approaching matters for determination through the prism of legal doctrines and principles with which the court is most familiar. Though more than 10 years have passed since I first cautioned against the 'temptation of domesticity', those remarks are, in my view, still highly relevant today.

The temptation for any court to succumb to domesticity and apply principles it knows most well, in Australia's case, the common law, has the potential to interfere with broader, long-term objectives, and diminish that country's standing as a choice of seat and a hub for international arbitration.

In the 2015 case of *Robotunits Pty Ltd v Mennel*, the defendant, Mr Mennel, sought orders that proceedings commenced by the plaintiff, Robotunits Pty Ltd, be stayed and

70 *Oil Basins Ltd v Esso Australia Resources Pty Ltd* [2026] VSCA 6.

that the parties be referred to arbitration.[71] The proceedings in question involved a claim for the return of money which Robotunits claimed that Mennel, its former managing director, had wrongly caused it to pay to his bank account. Mennel sought a stay and referral to arbitration in reliance on an arbitration agreement contained in a shareholders agreement to which he and Robotunits were parties.

In resisting the application, Robotunits submitted that, in order to constitute a 'matter' under that section, the assertions giving rise to the dispute between the parties must be 'sustainable', in that they must have a reasonable prospect of success. Robotunits argued that Mennel's assertion that the shareholders agreement authorised some or all of the payments did not meet this sustainability requirement and so there was no matter—or dispute—to which the arbitration agreement could apply. Upon reviewing the authorities, including from Hong Kong, Singapore and England, I found that neither the IAA, nor the equivalent article in the Model Law—Article 8—imposed a threshold requirement of this kind. I noted that:[72]

> to find otherwise would be to succumb to the temptation of 'domesticity' … by allowing the determination of whether to stay proceedings and refer the parties to arbitration to be coloured by the merits of the case.

Moreover, in relation to the role of the courts in applications of this kind, I observed that:[73]

> Even though the merits of the case are necessarily yet to be canvassed by an arbitration tribunal, courts are no more entitled to delve into the merits of the case in the context of a stay application, th[a]n they are in the context of enforcement or setting-aside proceedings.

By declining to embark on a merits review of the proceeding and apply common law principles to the proceeding, this ensures that the party autonomy is respected and the agreement to arbitrate is enforced. It also ensures that the broader, long term objectives of promoting domestic and international arbitration are adhered to.

6. Conclusion

As has been discussed, parties entering into arbitration agreements consider a variety of factors before selecting an arbitral seat. Legislative reforms in Australia, both on a

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71 (2015) 297 FLR 300.
72 *Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300, 321 [42].
73 *Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300, 306 [14].

Federal and State level, over the last 20 years, have added to its attractiveness in this respect. These reforms ensure that the domestic and international arbitral regimes in Australia are unified, and hence bolster both international and domestic arbitrations, with the promise of consistent, uniform interpretation. Nonetheless, the importance of impartial, efficient, accessible, supportive and 'arbitration friendly' courts cannot be overstated.

In this context, all involved in arbitration have a role to play. The continued support of legislatures and governments is essential in ensuring international best practice in arbitral legislation, and the provision of financial assistance to arbitral centres and institutions where necessary. Crucial also is the role of arbitrators and arbitral institutions in adopting flexible, timely, and innovative processes to maximise efficiency of arbitral disputes (and minimise unnecessary costs). From the perspective of the judiciary, a significant degree of specialisation and development of expertise is undoubtedly of benefit. Specialist arbitration lists, like the Arbitration List in the Supreme Court of Victoria and other Australian courts, are a major step forward in this respect.

Building, and maintaining, a reputation as a strong arbitral jurisdiction requires constant reinforcement, with positive and proactive measures by legislatures, governments, arbitral bodies, arbitration practitioners, as well as the judiciary. Given the growth of arbitration across the globe in recent years, the way in which these arbitral disputes are handled will influence the ongoing development of commercial arbitration and its fundamentally important support for international trade and commerce.

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Appendix I

Supreme Court of Victoria

Practice Note SC CC 3

Commercial Arbitration Business

1. ***INTRODUCTION***

1.1 The Chief Justice has authorised the issue of the following Practice Note.

1.2 The purpose of this Practice Note is to describe and provide guidance on the procedures to be followed in the Arbitration List.

1.3 This revised Practice Note revises and replaces the Practice Note issued on 30 January 2017.

2. ***COMMENCEMENT***

2.1 This Practice Note was reissued on 22 March 2021, replaces the earlier version issued on 30 January 2017, and will apply to all proceedings commenced in the Arbitration List filed on or after 22 March 2021.

3. ***DEFINITIONS***

3.1 In this Practice Note:

Arbitration Rules means the *Supreme Court (Chapter II Arbitration Amendment) Rules* 2014 (No 205/2014)

New York Convention means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

UNCITRAL means the United Nations Commission on International Trade Law

The Model Law means the UNCITRAL *Model Law on International Commercial Arbitration* 1985

4. *COURT SUPPORT FOR ARBITRATION*

4.1 The Court is supportive of the wishes of disputants to resolve all or part of their dispute by arbitration and will assist parties in a variety of ways, including –

(a) assistance and support for the arbitration process (e.g. subpoenas to witnesses or for production of documents, interim measures of protection (injunctive relief or otherwise) and orders with respect to the constitution of the arbitral tribunal);

(b) recognition and enforcement of arbitration awards and orders of arbitral tribunals (to the extent permitted under the statutory or other bases of the arbitration process);

(c) determination of discrete questions of law which arbitrators or parties are able to refer to the Court (depending on the statutory or other bases of the arbitration process); and

(d) expeditious hearing and determination of appeals from domestic (Australian) arbitration processes (to the extent permitted under the statutory or other bases of the arbitration process).

4.2 Court assistance and support is provided for all arbitration proceedings, international or domestic (Australian), and whether conducted under the *International Arbitration Act* 1974 (Cth) or the *Commercial Arbitration Act* 2011 (Vic). Enforcement or other proceedings with respect to arbitration conducted under these statutory provisions or under legislation in other jurisdictions (international and other Australian jurisdictions) are also available in the Court, subject to the provisions of the *International Arbitration Act* 1974 or the *Commercial Arbitration Act* 2011, to the extent applicable. All applications under the provisions of these Acts are provided for under the Arbitration Rules.

5. *INTERNATIONAL ARBITRATION*

5.1 The *International Arbitration Act* 1974 (s 18) confers jurisdiction on the Court to provide assistance and support with respect to the matters specified in Article 6 of the UNCITRAL *Model Law* –

(a) appointment of a sole or presiding arbitrator failing agreement by the parties or co-arbitrators (Article 11(3));

(b) appointment of an arbitrator or arbitrators where the appointment procedure agreed by the parties fails (Article 11(4));

(c) deciding on challenges to an arbitrator or arbitrators (Article 13(3));

(d) termination of the mandate of an arbitrator as a result of a failure or impossibility to act (Article 14);

(e) determining whether the arbitral tribunal has jurisdiction (Article 16); and

(f) setting aside arbitral awards on the limited grounds specified in Article 34.

5.2 In addition to providing assistance and support under Article 6 of the *Model Law*, the *International Arbitration Act* 1974 confers jurisdiction on the Court to –

(a) enforce foreign arbitral agreements by staying a proceeding or part of a proceeding that is before the Court which invites the determination of a matter capable of settlement by arbitration which is subject to such an agreement (section 7(2));

(b) make interim or supplementary orders for the preservation of the rights of the parties or in relation to any property for the purpose of providing effective enforcement of arbitration agreements (section 7(3));

(c) enforce foreign arbitral awards to which the New York Convention applies (section 8);

(d) recognition and enforcement of interim measures of protection (*Model Law*, Articles 17H, 17I and 17J);

(e) issuing subpoenas for the attendance of a person before the arbitral tribunal for examination or further production of documents or for assistance to the arbitral tribunal in the taking of evidence (sections 23 and 23A); and

(f) prohibiting or allowing the disclosure of confidential information (sections 23F and 23G).

5.3 It is noted that the jurisdiction of the Court to provide interim measures of protection (e.g. interlocutory injunctive relief for the preservation of assets or evidence, *Mareva* injunctions, search orders and the like) in parallel with the arbitration process is recognised in Article 9 of the *Model Law*.

6. *DOMESTIC (AUSTRALIAN) ARBITRATION*

6.1 Domestic (Australian) arbitration is currently subject to the operation of the substantially uniform commercial arbitration acts of the various States and Territories. The Victorian legislation is contained in the *Commercial Arbitration Act* 2011.

6.2 The *Commercial Arbitration Act* 2011 confers jurisdiction on the Court to provide assistance and support for the arbitration process in a variety of matters and circumstances, including –

(a) reference to arbitration (section 8);

(b) appointment of a sole or presiding arbitrator failing agreement by the parties or co-arbitrators (section 11(3));

(c) appointment of an arbitrator or arbitrators where the appointment procedure agreed by the parties fails (section 11(4));

(d) deciding on challenges to an arbitrator or arbitrators (section 13(4));

(e) termination of the mandate of an arbitrator as a result of a failure or impossibility to act (section 14);

(f) determining whether the arbitral tribunal has jurisdiction (section 16(a));

(g) recognition and enforcement of interim measures (sections 17H and 17I);

(h) Court ordered interim measures (section 17J);

(i) enforcement of an order or directions of an arbitral tribunal (section 19(6));

(j) Court assistance in the taking of evidence in arbitral proceedings (section 27);

(k) Court assistance in issuing subpoenas requiring a person to attend before the arbitral tribunal for examination or for production of documents to the arbitral tribunal (sections 27A and 27B);

(l) prohibition of the disclosure of confidential information (section 27H);

(m) allowing the disclosure of confidential information (section 27I);

(n) determination of a preliminary point of law (section 27J);

(o) assessment of costs of an arbitration (other than the fees and expenses of an arbitrator) (section 33B);

(p) orders in relation to the costs of an abortive arbitration (section 33D);

(q) application for setting aside as exclusive recourse against arbitral award (cf Model Law, Article 34) (section 34);

(r) appeal on a question of law (with party agreement and leave of the Court) (section 34A); and

(s) recognition and enforcement of arbitral awards (sections 35 and 36).

6.3 Maintenance of arbitration proceedings, rather than Court proceedings, with respect to matters the subject of an arbitration agreement and Court assistance and support for the arbitration process in the form of interim measures of protection are expressly provided for in sections 8 and 9 of the *Commercial Arbitration Act* 2011, as follows:

> **8. Arbitration agreement and substantive claim before Court** (cf *Model Law* Art. 8)
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
>
> **9. Arbitration agreement and interim measures by Court** (cf *Model Law* Art. 9)
>
> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the measure.

7. *PROCEDURAL MATTERS*

7.1 All applications under the International Arbitration Act 1974 must be commenced in accordance with the Arbitration Rules and in the prescribed form of application.

(a) an application to enforce a foreign award pursuant to the International Arbitration Act 1974 (section 8) must comply with the requirements of Rule 9.04 (Form 2-9B). An application to enforce a domestic (Australian) award pursuant to the Commercial Arbitration Act 2011 must comply with the requirements of Rule 9.21 (Form 2-9Y);

(b) an application to set aside a foreign award pursuant to Article VI of the New York Convention or Article 34 of the Model Law (see Part II and sections 16 and 20 of the International Arbitration Act 1974) must comply with the requirements of Rule 9.10 (Form 2-9K). An application to set aside a domestic (Australian) award pursuant to section 34 of the Commercial Arbitration Act 2011 must comply with the requirements of Rule 9.19 (Form 2-9W);

(c) an application under section 27J of the Commercial Arbitration Act 2011 for leave to apply for determination of a question of law arising in the course of a domestic (Australian) arbitration must comply with the requirements of Rule 9.18 (Form 2-9V); and

(d) an application for leave to appeal against a domestic (Australian) award under section 34A of the Commercial Arbitration Act 2011 must comply with the requirements of Rule 9.20 (Form 2-9X); and

(e) an application for leave to issue a subpoena:

(i) under section 23 of the International Arbitration Act 1974 must comply with the requirements of Rule 9.06 (Forms 2-9E, 2-9F or 2-9G); and

(ii) under section 27A of the Commercial Arbitration Act 2011 must comply with the requirements of Rule 9.14 (Forms 2-9P, 2-9Q or 2-9R).

Applications for leave to issue a subpoena will usually be dealt with on the papers ex parte. Nothing in this Practice Note affects:

A. the obligation on the issuing party to serve an copy of the subpoena to produce on each other party as soon as practicable after the subpoena has been served on the addressee under r 42.05(2) of Chapter I; and

B. the right of a party or of any person with a sufficient interest to apply, in the proceeding, to set aside the subpoena on notice to the issuing party under r 42.04 of Chapter I.

8. *COMMERCIAL COURT – ARBITRATION PROCEEDINGS*

8.1 The Chief Justice has appointed the Hon. Justice Riordan and the Hon. Justice Lyons to manage as the judges in charge of the Commercial Court – Arbitration List. All arbitration proceedings, any applications in arbitration proceedings, and any urgent applications with respect to arbitration matters, should be directed at first instance to the Hon. Justice Riordan's Associates (telephone (03) 8600 2503 or (03) 8600 2504 or email chambers.riordanj@supcourt.vic.gov.au). Failing this, parties should refer to the procedure set out in SC CC 1.

8.2 Arbitration matters arising in proceedings already allocated to the Technology, Engineering and Construction List (TEC List) will continue to be managed within that List, though they may be transferred to the Arbitration List in accordance with the usual practice applied in the Commercial Court with respect to the transfer of matters between Lists in that Court. The same position applies with respect to the possibility of transfer of arbitration matters from the Arbitration List to the TEC List.

8.3 Any changes in these arrangements will be notified from time to time on the Commercial Court section of the Supreme Court website.

AMENDMENT HISTORY

30 January 2017: This Practice Note was issued on 30 January 2017 and replaced Practice Notes 2 of 2010 and 7 of 2006. It was amended on 22 March 2021.

Vivienne Macgillivray
Executive Associate to the Chief Justice
22 March 2021