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RESISTING THE TEMPTATION OF DOMESTICITY — THE COURTS' ROLE IN PROMOTING ARBITRATION IN AUSTRALIA*

The Hon. Justice Clyde Croft AM[1]

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I would like to thank my former Associate, Mr Chao Yi Cheng, LLB (Hons), BComm (Monash) for his invaluable assistance in the preparation of this paper.

1 B Ec LLM (Monash), PhD (Cambridge), FAAL, LFACICA, LFIAMA, JFAMINZ, FCIArb – Supreme Court of Victoria – Commercial Court – Judge in charge of the Arbitration List – Academic Bencher of the Inner Temple, London – Academic Fellow, Falcon Chambers, London.

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I. Introduction

I am honoured to be invited to deliver the CIArb Australia Annual Lecture for 2026.

It is great to be with so many of you all today, and to see so many new and familiar faces. International and domestic arbitration has grown tremendously in the last few decades, and I am encouraged by the number of young legal professionals here today, who I have no doubt will continue to foster the growth of arbitration in the coming decades. This growth would not be possible without institutions such as the Chartered Institute of Arbitrators Australia, which has done much to increase the overall literacy of Australian legal practitioners on the conduct of arbitral proceedings. Finally, I want to express my thanks to Gianna Totaro, CEO of the Australian CIArb branch, the organisers of this event, and to Freehills for agreeing to host this event tonight.

Having been asked to deliver this lecture early this year, I pondered for some time on the topics I should speak on. The annual lectures of past years have been delivered by highly esteemed judges, lawyers and arbitration practitioners across Australia, and overseas, and have encapsulated a wide variety of nuanced topics.

In light of a number of significant decisions I delivered earlier this year and over the last several years, I would like to today discuss the important role of the courts in arbitral proceedings. In particular, the focus of my lecture today will be on the 'temptation of domesticity', a term I used in 2015 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.

As I will explain, the state of Australia's arbitration regime necessitates an international judicial approach. A temptation to succumb to domesticity and apply Australian or common law principles has the potential to interfere with broader, long-term objectives, and diminish Australia's standing as a choice of seat and a hub for international arbitration. Instead, Australian courts should have regard to reasoned decisions of courts in other countries,

particularly those in our region, where their arbitration law shares a common basis with ours in the New York Convention[2] and the Model Law.[3]

Since the establishment of the specialist Arbitration List in the Commercial Court of the Supreme Court of Victoria in 2010, I have delivered 45 arbitration decisions which have included a number of high profile proceedings and involved novel areas of law. In 2015, I delivered judgment days before the Formula One season was due to get underway in an urgent enforcement proceeding reinstating a driver for the Sauber F1 Motorsport Team.[4] Over the last two years, I determined two prominent arbitral proceedings: granting a stay in *Oil Basins Ltd v Esso Australia Resources Pty Ltd* (‘***Oil Basins***’),[5] determining that the doctrine of *Kompetenz-Kompetenz* required the arbitral tribunal decide first on the question of its jurisdiction before the court’s intervention, and considered the operation of a hybrid arbitration clause in *Downer Utilities Australia Pty Ltd v Murra Warra Asset Co Pty Ltd* (‘***Downer Utilities***’),[6] the first such decision in Australia. Most recently, in *Zoo Property Wealth Builder Pty Ltd v Australia Red Hill Real Estate Group Pty Ltd* (‘***Zoo Property***’),[7] I considered the scope of the Court’s appointment powers in the face of challenges to the validity of the arbitration agreement, and the enforcement powers in *Simple Investments v Bradley St Development Vic Pty Ltd* (‘***Simple Investments***’),[8] in the context of a claimed denial by the award debtor of procedural fairness.

In the 21st century, arbitration has become a growing, popular alternative to traditional litigation, as a method of dispute resolution which promotes party autonomy. Whilst courts invariably have a smaller role to play in arbitrations, these decisions, and those of other Australian courts, are crucial to the continued uptake of arbitration and to Australia’s standing as a desirable seat for arbitral proceedings.

It is to this matter I now turn.

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2 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) (‘**the New York Convention**’).

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

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

5 [2025] VSC 34.

6 [2026] VSC 48.

7 [2026] VSC 509.

8 [2026] VSC 510.

II. QM Survey

In 2025, the Queen Mary University of London released its International Arbitration Survey, titled '*The Path Forward: Realities and Opportunities in Arbitration*', its 14th major empirical survey of this kind.[9] The survey illustrates that parties do consider various factors in choosing a favourable seat or law to govern the contract, a phenomenon known today as 'forum shopping'.

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, 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.

This is not, however, to say that the courts are a public relations vehicle for arbitration — rather, given the benefits of private arbitration to the parties as well as the economy at large, it is the court's role to facilitate and encourage the parties' adoption and implementation of their arbitration agreement.

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.

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

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[9] 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***').

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.

Central to the findings of the *QM Survey* are the responses to questions about the desirability of particular arbitration seats. In each of the three most preferred seats globally, London, Singapore and Hong Kong, interviewees referred consistently to the important role of the judiciary, their pro-arbitration approach, efficiency, and a reliable track record in supporting arbitration and upholding awards.[10] Indeed, this is no recent phenomenon, with past surveys conducted by the Queen Mary University of London indicating that the most common answers to the seat's attractiveness were:[11]

1) Support for arbitration by local courts and judiciary;

2) Neutrality and impartiality of the local legal system; and

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

With regards to the neutrality and impartiality of the Australian legal system, our courts certainly cannot be faulted on that score. Accordingly, the remaining matters to be considered are 1) the support for arbitration by our courts; and 2) our 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 encapsulate the stages of a court's function *vis-à-vis* an arbitral proceeding:

1) Respecting party autonomy and enforcing properly constituted arbitration agreements;

2) Exercising restraint against interference with arbitral tribunal functions and enforcing *Kompetenz-Kompetenz*;

3) Resisting the temptation of domesticity;

4) Avoiding delay and expediting the resolution of arbitration matters before the court;

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10 *QM Survey*, 8.

11 Queen Mary, University of London, School of International Arbitration, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, sponsored by White & Case LLP, 10. See also Queen Mary, University of London, School of International Arbitration, *2018 International Arbitration Survey: The Evolution of International Arbitration*, sponsored by White & Case LLP, 10-1; Queen Mary, University of London, School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, sponsored by White & Case LLP, 14; Queen Mary, University of London, School of International Arbitration, *2010 International Arbitration Survey: Choices in International Arbitration*, sponsored by White & Case LLP, 18.

5) Limiting the scope for challenging an arbitral award according to legislation; and

6) Applying appropriate costs consequences to certain unsuccessful proceedings.

I turn now to a number of my judgments over the years for the purpose of illustrating these points.

III. Party Autonomy & Enforcing Arbitration Agreements

The natural first step of an arbitral proceeding is the interpretation of the parties' arbitration agreement, and the valid commencement of an arbitration proceeding in accordance with that agreement. Mercifully, the widespread adoption of arbitration both globally, and domestically, has seen increased experience and expertise in the drafting of arbitration clauses — the effect of which is a decline in matters before the courts seeking interpretation of a poorly or ambiguously drafted arbitration agreement. As I turn to shortly, that is not however to say that the courts have no role in interpreting and enforcing the parties' arbitration agreement.

Downer Utilities Australia Pty Ltd v Murra Warra Asset Co Pty Ltd

In a decision delivered earlier this year, *Downer Utilities*,[12] the Court was tasked with determining which party had properly commenced its arbitration under the parties' contract. The parties' dispute arose from the development of the first stage of a wind farm project in regional Victoria, and in late 2025, the parties purportedly commenced competing arbitrations with different arbitral institutions.

Unhelpfully, however, the drafters of the contract must have never attended one of many CIArb training lectures on drafting arbitration clauses — the result of which was a hybrid clause which sought to have the Resolution Institute conduct the parties' arbitration in accordance with the International Chamber of Commerce ('**ICC**') Rules — the very first hybrid arbitration clause considered by a court of this country:

> **42.5 Arbitration**
>
> a) 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.
>
> b) The seat of the arbitration will be Melbourne, Australia and the proper law of the arbitration will be the State of Victoria.

[12] [2026] VSC 48.

c) The parties agree that:

(i) they have entered into the arbitration agreement under this clause 42 for the purposes of achieving a just, quick and cheap resolution of any Dispute;

(ii) any arbitration conducted pursuant to this clause will not mimic court proceedings of the seat of the arbitration and the practices of those courts will not regulate the conduct of the proceedings before the arbitrator;

(iii) in conducting the arbitration, the arbitrator must take into account the matters set out in clauses 42.5(c)(i) and 42.5(c)(ii);

(iv) where the amount in dispute is less than $25,000,000 one arbitrator will be appointed by agreement between the parties; and

(v) where the amount in dispute is $25,000,000 or more three arbitrators will be appointed by agreement between the parties.

d) If the parties fail to agree the on the arbitrator(s) in accordance with 42.5(c)(iv) or 42.5(c)(v) (as relevant) within 10 Business Days after the relevant Arbitration Notice was delivered, either party may notify the Resolution Institute that they have been unable to agree the arbitrator(s) and the Resolution Institute must promptly provide the parties with:

(i) where the amount in dispute is less than $25,000,000 and one arbitrator is to be appointed, a list of not less than 6 potential arbitrators; and

(ii) where the amount in dispute is $25,000,000 or more and three arbitrators are to be appointed, a list of not less than 10 potential arbitrators.

One party purported to commence an arbitration with the ICC, whilst the other attempted to commence a competing arbitration with the Resolution Institute. 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 Resolution Institute 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,[13] I turned to a number of leading international authorities, reflecting the international nature of arbitration as envisaged by the Model Law — a matter I will turn to further concerning

[13] Noting that in *Robotunits Pty Ltd v Mennel* (2015) 49 VR 323, I considered the operation of what the parties agreed was a 'pathological' arbitration clause, which was rendered operable by judicial assistance (see especially 328, [8]–[9]).

the 'temptation of domesticity'. Adopting the decisions of these leading authorities, I noted that:[14]

> 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, where the parties have clearly intended and agreed to have their dispute resolved by arbitration.[15] 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.

The Court's role in enforcing arbitration agreements applies equally to challenges to the validity of the arbitration agreement. In those cases, Courts must exercise appropriate caution to preserve the arbitral tribunal's jurisdiction, and only determine matters necessarily required to render a decision on whether a valid agreement exists to commence an arbitral proceeding. This is perhaps best illustrated in the recent case of *Zoo Property*.

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14 [2026] VSC 48, [13]–[15] (citations omitted).

15 This is consistent with my previous decision in *Robotunits Pty Ltd v Mennel* (2015) 49 VR 323, 326 [9], where I held: 'By cl 15.2, each party has agreed "irrevocably and unconditionally" to submit to arbitration. These are strong words evincing a clear intention to submit disputes between the parties, which fall within the scope of the arbitration agreement, to arbitration. For these reasons, I am of the opinion that the arbitration agreement is operable, and is capable of forming the basis of the orders Mennel seeks.'

Zoo Property Wealth Builder Pty Ltd v Australia Red Hill Real Estate Group Pty Ltd

In *Zoo Property*, the parties' appointment of an arbitrator had stalled due to a challenge to the validity of the contract and, accordingly, the arbitration agreement contained within. An application was commenced in the Supreme Court seeking the Court's curial powers to appoint an arbitrator pursuant to s 11 of the *Commercial Arbitration Act 2011* (Vic) ('**CAA**') in absence of agreement. The application was resisted on two grounds: that the signature to the agreement was a forgery or, in the alternative, that the agreement was invalid and of no effect by reason of the doctrine of *non est factum*. Hearing was initially set down for three days, with the parties intending to lead both lay and expert evidence on the question of forgery and *non est factum*. In order to avoid the unnecessary costs and expense for the parties, I indicated that I would determine the preliminary question of whether the challenge to the arbitration agreement was a matter for the Court's determination, or the tribunal's, following appointment. On that basis, the application was truncated to a single half-day hearing.

I made the appointment having been satisfied that s 11 of the CAA required only a *prima facie* determination by the Court of the existence of an arbitration agreement before the appointment power could be exercised. I determined that substantive disputes over the validity of the agreement are a matter for the arbitral tribunal, as consistent with the doctrine of *Kompetenz-Kompetenz*:[16]

> Section 11 is, as the Applicant contends, narrower than the referral provisions from which the Respondent's authorities come. Where the Act intends a court to examine the arbitration agreement before acting, it says so, and says to what standard. Thus s 8(1) directs referral 'unless it finds that the agreement is null and void, inoperative or incapable of being performed'. Section 11 confers the appointment power without any proviso, and makes the resulting decision final. It must be observed, and as a matter of significance, that no like finality attaches to a decision under s 8. That differentiation is deliberate: the Model Law and the legislature withheld from the appointing court the very examination the Respondent asks it to undertake. The appointment decision is a gateway, not a trial. The tribunal rules on its own jurisdiction, 'including any objections with respect to the existence or validity of the arbitration agreement', and the Court has the last word through s 16(9) and ss 34 and 36.

[16] *Zoo Property* [2026] VSC 509, [23].

In arriving at this conclusion, I made reference to the approach of the drafters of the Model Law, which was highly relevant given the international provenance of the CAA. Having regard to the analytical commentary on the draft Model Law, it was apparent that the drafters intended that questions of jurisdiction be matters for the tribunal, and which the court's role should necessarily be confined:[17]

> The drafters classed the functions in arts 11, 13 and 14 as 'of a more administrative nature and where speed and finality are particularly desirable', such that a State 'may entrust these administrative functions even to a body outside its court system'. It follows that a function that may be committed to an arbitral institution cannot have been intended to carry a curial trial of contested execution. The Commission also recorded why court intervention was confined: 'resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often a source of abuse of the arbitral proceedings than it was a protection against abuse'. Thus s 11 is not a vehicle for the collateral trial of a respondent's defences to the claim it apparently agreed to arbitrate; particularly having regard to the 'light touch' approach to whether there was such an agreement, as discussed in these reasons.

As Australian courts had, on the parties' account of the existing body of authorities, not traversed this issue, I had regard to a number of prominent Hong Kong and Singaporean decisions exercising the power to appoint under art 11 of the Model Law.[18] I concluded by finding that each of the text of the Model Law, its purpose, drafting history, decades of authority and commentary aligned with the approach that a court exercising its power to appoint under art 11 (s 11) need only ask whether the arbitration agreement *prima facie* exists, and nothing more.[19]

The court's role is accordingly, in this respect, not to be the 'vehicle for the collateral trial' of a party's challenge to the arbitration agreement. It operates to respect party autonomy and enforce the *prima facie* existence of an arbitration agreement, leaving those jurisdictional matters and challenges to validity solely to the arbitral tribunal at first instance.

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17 *Zoo Property* [2026] VSC 509, [25].
18 *Zoo Property* [2026] VSC 509, [26]–[28], [34]–[35].
19 *Zoo Property* [2026] VSC 509, [31].

IV. Restraint Against Interference

The second step of an arbitral proceeding involves casting the confines of the arbitral tribunal's jurisdiction in accordance with the parties' arbitration agreement. In my experience, this step frequents the most amount of *attempted* judicial intervention, with parties often seeking the court's assistance to limit the arbitrability of certain issues. To this end, the doctrine of *Kompetenz-Kompetenz* is of particular importance, and the court's restraint in interfering with matters otherwise subject to the arbitral tribunal's remit in determining its jurisdiction is significant.

Oil Basins Ltd v Esso Australia Resources Pty Ltd

The Court's role is perhaps most aptly accounted for in the 2025 decision of *Oil Basins*.[20] In this proceeding, which involved two mammoth multinational resources companies, I applied the *Kompetenz-Kompetenz* principle and granted a stay over the court proceeding, referring 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 s 7 of the *International Arbitration Act 1974* (Cth) ('**IAA**') staying the proceeding.

Section 7 provides that:

> 2) 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

[20] (2025) 78 VR 388.

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.

…

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 s 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 — in line with the Full Federal Court decision of *Hancock Prospecting Pty Ltd v Rinehart*,[21] and termed the 'Hancock Discretion'. 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:[22]

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21 (2017) 257 FCR 442 (Allsop CJ, Besanko and O'Callaghan JJ).

22 (2025) 78 VR 388, [61]–[62].

> [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 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 — an issue I turn to in short order.[23] At the time of writing, an application for special leave to appeal has been granted by the High Court of Australia, and the proceeding is due to be heard in early November.

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 manner provides for the arbitral tribunal to resolve *almost* all matters concerning its jurisdiction, placing the parties' dispute firmly within the arbitration process, as contemplated by the agreement to arbitrate.

V. Resisting the Temptation of Domesticity

The 'temptation of domesticity', which I now turn to, does not fit neatly into any stage of the arbitral proceeding. Rather, it may arise at various different stages — at its inception, through a challenge to the arbitral tribunal's jurisdiction, to its conclusion, through an opposition to enforcement of the arbitral award.

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

In short, the 'temptation of domesticity' describes the intuitive appeal of approaching matters for determination through the prism of legal doctrines and principles with which the court is most familiar. In the case of Australian courts this, at the very least, means considering matters through a common law lens, if not going so far as to apply common law doctrines and equitable principles expressly. Like all temptation, such an approach is attractive in the short-term, but ultimately has the potential to interfere with broader, longer-term objectives. Chief among these long-term objectives is the promotion of international uniformity in international commercial arbitration practice. Australia's attractiveness as a seat depends, in part, on the consistency of decisions of its courts, both in respect of other prior domestic decisions, as well as reasoned decisions of courts of other countries — particularly those in our region — where their arbitration law shares a common basis with ours in the New York Convention and the Model Law.

Accordingly, it has been my longstanding view that our courts must continue to resist the temptation to approach issues arising from arbitral proceedings using principles not found in the international instruments upon which these proceedings are founded. These principles may be foreign and peculiar to other legal systems, and affect Australia's desirability as a seat of choice in international arbitration.

Robotunits Pty Ltd v Mennel

To illustrate this point, we must turn back time to 2015. In the case of *Robotunits Pty Ltd v Mennel*,[24] the defendant, Mr Mennel, sought orders that proceedings commenced by the plaintiff, Robotunits Pty Ltd, be stayed and that the parties be referred to arbitration. The proceedings in question involved a claim for the return of money which Robotunits claimed that Mr Mennel, its former managing director, had wrongly caused it to pay to his bank account. Mr 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 s 7(2) of the IAA, 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 Mr 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

[24] (2015) 49 VR 323.

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[25]

> 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:[26]

> 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, than they are in the context of enforcement or setting-aside proceedings. This is an important illustration of the need for courts to resist the temptation of 'domesticity' in approaching matters involving Model Law and/or New York Convention based legislation. In other words, courts must resist the temptation to approach such matters through the prism of principles and doctrines not found in the Model Law or the New York Convention, and which may be peculiar to a particular domestic jurisdiction.

By declining to embark on a merits review of the proceeding and apply common law principles to the proceeding, I ensured that party autonomy was respected and the agreement to arbitrate was enforced. This decision also ensured that the broader, long-term objectives of uniformity and the promotion of international arbitration were maintained.

Indian Farmers Fertiliser Cooperative Ltd v Gutnick

That is not however to say that Australian courts are to refrain completely from considering domestic or common law. This is perhaps best illustrated by another 2015 decision I rendered in *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* ('***Gutnick***').[27]

The applicants — Indian Farmers Fertiliser Cooperative Ltd, and its subsidiary, Kisan International Trading Fze — sought enforcement in Australia of an arbitral award rendered under the SIAC Rules.[28] In the arbitration, the respondents, Joseph Gutnick, and Legend International Holdings Inc, were found by a three member tribunal to have induced, by fraudulent misrepresentation, the purchase of certain shares in Legend. Among other awards and orders, the tribunal made a declaration that the relevant agreements 'are rescinded'. The tribunal also made express orders that the respondents pay the applicants the purchase price of the shares with interest. The juridical seat and venue of the arbitration was Singapore, and the

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25 *Robotunits Pty Ltd v Mennel* (2015) 49 VR 323, 344 [42].
26 *Robotunits Pty Ltd v Mennel* (2015) 49 VR 323, 329 [14] (citations omitted).
27 (2015) 304 FLR 199; see also *Indian Farmers Fertiliser Cooperative Ltd v Gutnick (No 2)* [2015] VSC 770 (stay application).
28 *Arbitration Rules of the Singapore International Arbitration Centre* (4th ed, 2010).

governing law of the agreements was that of England — a position which gave rise to a somewhat unusual state of affairs to which I now turn.

Before me, the respondents sought to resist enforcement of the award on public policy grounds. Specifically, the respondents argued that the tribunal's awards and orders entitled the applicants to have their money back and yet keep the shares. As a consequence, it was argued that the award offended a "'universal' and 'cardinal' principle that a plaintiff is not to be compensated for more than their loss', and therefore that enforcement would be 'contrary to a universal bedrock principle of justice and morality.'[29] In other words, it was argued that enforcement would be contrary to public policy because the award allowed for double recovery by the applicants. In line with the respondents' submissions, I was prepared to accept that enforcement of an award which allows for double recovery would likely be contrary to public policy.[30] However, I found that the award did not in fact allow for double recovery and so I enforced the award and entered judgment against the respondents in the sum of USD40.4 million with interest:[31]

> Nevertheless — if it were necessary for me to decide this point — I would be prepared to accept that, where an arbitral award allows for double recovery, or where enforcement would result in double recovery, fundamental principles of justice and morality may be engaged. I would be inclined to the view that the language used by the highest legal authorities to describe the principle that a claimant cannot recover more than has been lost — such as the language used by the High Court in *Haines v Bendall* — reveals something about the nature of that principle. Indeed, if expressions such as 'cardinal concept' and 'the one principle that is absolutely firm and which must control all else' do not help identify a fundamental principle of justice and morality, I would struggle to think of what might. I note, however, that none of this means that enforcement of an arbitral award may be refused on public policy grounds merely because the award offends a legal principle which at some point or another was described in powerful language. Public policy considerations will only be engaged where fundamental principles of justice and morality are raised by the prospect of enforcement.

The Court of Appeal, comprising then Chief Justice Warren and Justices Santamaria and Beach, refused leave to appeal, upholding my decision and finding that:[32]

> When the tribunal made its award declaring that the agreements had been rescinded, it did not declare that the respondents were entitled to retain ownership of the shares; nor did it say anything that implied such an entitlement. It is plain from the award that the respondents' case was a conventional claim for rescission involving the return of what was purchased with a refund of the purchase price. The arbitral tribunal accepted those claims and made an award and order accordingly. As the judge put it, 'the declaration of rescission in the award necessarily entails the avoidance of the transactions from the

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29 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 229 [100].
30 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 214 [39], 231 [105].
31 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 231 [105] (citations omitted).
32 *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* (2016) 49 VR 732, 744 [30].

> beginning and the restoration of the parties to their previous positions'. With respect, we agree. Far from being contrary to public policy, we consider that the award conforms with the public policy of Australia.

In the course of its judgment, the Court of Appeal referred to my characterisation of the proper approach to be taken by the Court to the consideration of the parties' submissions and noted that the parties had accepted that approach.[33] The question of the proper approach to be taken was particularly interesting and somewhat unusual because the relevant aspects of the governing law of the contract happened to align with the domestic law of the enforcement jurisdiction. Moreover, the governing law, being English law, was informed by Australian case law with respect to rescission and the converse was also true. Indeed, the relevant aspects of the governing law also happened to align with the domestic law of the seat of the arbitration, namely Singapore.[34]

This state of affairs made it particularly important to clearly define the Court's role in order to explain why a significant portion of the judgment discusses rescission — a domestic, common law doctrine not found in the Model Law or the New York Convention. As I explain in the judgment, this discussion was a consequence of the need to 'read and understand the award … in the context of its governing law.'[35] In the context of this case, this was necessary in order to 'determine what effect the award may or may not have' had, and, more specifically, 'in order to ascertain whether the [award allowed] for double recovery'.[36]

As a result, my consideration of the operation of the doctrine of rescission in English law does not demonstrate that I succumbed to the temptation of domesticity because these references were made *only* — and for that matter, *necessarily* — by way of understanding the tribunal's declaration that the agreements were rescinded. Accordingly, this detailed discussion of rescission does not inform the question of whether enforcement would have been contrary to public policy — it only goes to the question of whether the award provided for double recovery. I explained that:[37]

> An interesting and somewhat unusual additional layer to the question of the proper approach to take here is that the relevant aspects of the governing law of the contract – specifically, the English law of rescission – happen to align with the domestic law of the enforcement jurisdiction, namely Australia. Moreover, the governing law, English law, is informed by Australian case law with respect to rescission and the converse is

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33 *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* (2016) 49 VR 732, 740 [20].
34 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 216 [47].
35 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 216 [44].
36 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 216 [44].
37 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 216–7 [47]–[49] (citations omitted).

> also true. The Respondents noted that the relevant aspects of the English law of rescission also happen to align with the domestic law of the seat of the arbitration, namely Singapore. Consequently, the relevant case law applicable in terms of the governing law is in relevant respects something of an amalgam of the case law of England, Australia and Singapore.
>
> This means that the same case law is relevant to both of the propositions that the Respondents must establish in order to show that enforcement would be contrary to public policy …
>
> As a result of this somewhat unusual state of affairs, the references to English and Australian case law in the discussion that follows serve the dual purposes of (i) explaining the effect of the Award, and (ii) contributing to the content of the public policy ground for refusing enforcement. Critically, these references do not involve the application of a domestic, common law doctrine not found in the Model Law or the New York Convention – being the doctrine of rescission – to the question of whether to enforce the Award. Accordingly, these references do not indicate that I have been tempted by 'domesticity' or that I have otherwise adopted an approach that is inconsistent with the role of the Court under the Act.

Accordingly, resisting the 'temptation of domesticity' should not be taken as prohibition on Australian courts to consider and interpret domestic or common law principles. In the *Gutnick* proceeding, it was apparent that some, limited and targeted regard to the law of rescission was required, and entirely appropriate, having regard to the parties' choice of English law, and the concerns regarding double recovery.

Rather, resisting the temptation of domesticity requires Australian courts refrain from determining matters arising from arbitral proceedings by virtue of domestic or common law principles in circumstances where those considerations do not arise from the parties' arbitration agreement, and no equivalent international authorities, derived from the Model Law, the New York Convention, or otherwise, empowers such consideration.

VI. Expediting Arbitral Disputes

I turn now to a consequential and necessary feature of arbitration, which has both enhanced and hindered its popularity as an alternative dispute resolution mechanism over the last 20 years: expedition. The 2025 *QM Survey*,[38] and its predecessors,[39] indicate that efficiency and expedition are two central features of importance for parties seeking to have their claims resolved by arbitration. The proliferation of delays in the arbitral process over the last decade

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[38] See 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, 3, 15–9.

[39] See, eg, Queen Mary, University of London, School of International Arbitration, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, sponsored by White & Case LLP, 13–4, Queen Mary, University of London, School of International Arbitration, *2018 International Arbitration Survey: The Evolution of International Arbitration*, sponsored by White & Case LLP, 7–8, 37–8.

can, if left unresolved, diminish parties' confidence in having their disputes resolved by arbitration.

Accordingly, when an arbitral proceeding finds itself on the doorsteps of the judicial system, it is imperative that courts endeavour to resolve these proceedings expeditiously.

Whether the court is engaged at an early stage of the arbitral proceeding, for instance, in relation to the appointment of an arbitrator, or a challenge to the tribunal's jurisdiction, or at a late stage, during enforcement, an efficient and expedient determination of the parties' dispute ensures that the judicial process is not used as a mechanism to unduly delay the resolution of a dispute, or obviate a party's obligation to meet an adverse arbitral award.

Take for instance a party's application to the court to determine the arbitral tribunal's jurisdiction, and a cross-application for a stay of proceedings to have the matter determined by the arbitral tribunal. Whilst the proceeding is before the court, the tribunal is encumbered, and in most cases, cannot meaningfully progress the parties' dispute to a final hearing. Suppose the court ultimately stays the court proceedings and refers the jurisdictional matter to the tribunal — this is considered a pro-arbitration step and, in the context of a pro-arbitration jurisdiction, is often desirable. However, if the time in which it takes the court to hear and determine the stay application is unduly long, the arbitration process and the effect of the stay has, in many respects, been thwarted — the party which sought the court to determine the jurisdictional matter, whether intentionally or not, would have caused major delays to the arbitral process and prevented the possibility of an expeditious resolution.

In this regard, the introduction of the specialist Arbitration List in the Victorian Supreme Court, which I helmed from its inception in 2010 until 2019, as well as similar specialist Arbitration Lists in other states,[40] serve to promote expedition in a number of ways.

First, the parties are able to seek to clarify any procedural or administrative issues at an early stage. *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. In my experience, 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, indicating that the court is willing to do its utmost to ensure expediency where possible.

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[40] The Supreme Court of NSW and WA have each established its own specialist Arbitration Lists.

Giedo van der Garde BV v Sauber Motorsport AG

One of the most apt examples of court expediency arose in the 2015 decision of *Giedo van der Garde BV v Sauber Motorsport AG* (the '***Sauber* case').[41]

The *Sauber* case concerned a Dutch Formula One 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, Mr 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 Mr 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.[42] In addition to this uncertainty argument, Sauber submitted that enforcement would be futile because the award did not require Sauber to take any positive step to reinstate Mr 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.[43] The Court of Appeal affirmed this approach, finding that 'all concerned [were] well aware of the nature of the dispute and its

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41 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792.
42 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792, 795 [7].
43 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792, 797 [22].

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'.[44]

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.

Though proceedings like this, where such urgent expediency is required, are indeed rare, it 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.

On a broader scale, this and other arbitral proceedings before the court emphasise the critical importance of ensuring, where possible, expediency in the court process — whether that be to ensure the parties are given an early opportunity to have their dispute heard and determined, or ensuring that administrative and procedural steps prior to the final hearing are not hindered by court imposed delays.

VII. Limiting the Scope of Challenges to Awards

I turn finally to the court's involvement at the tail end of the arbitral process — obtaining enforcement of an arbitral award. It must be recognised, and is perhaps needless to say, that enforcement arises at a critical stage of the arbitral process: the parties, or at least one or some of them, having gone to great expense and time to obtain an award now seek to have the award enforced by the court.

Of course, there are justifiable reasons the award debtor may seek to resist or challenge the basis of an award. These reasons usually arise out of a perceived bias by the arbitrator/s, a denial of procedural fairness or natural justice, or the scope of the arbitral decision extending beyond the field of the parties' arbitration agreement.

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44 *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786, 789–90 [12]–[13].

The court's function, and its power, to refuse enforcement of certain defective awards is therefore a useful mechanism to ensure integrity in the arbitral process. However, this function must operate within the proper scope of the court's power, vested by the IAA and the CAA, and the limited scope in which it may refuse to enforce an award. Indeed, it is of paramount importance to recognise that a court's role in this regard is not to proverbially allow the disappointed party a 'second bite at the cherry', and itself conduct an extensive merits review of the decision rendered by the arbitral tribunal. Nor is the court's function to supplant the arbitral tribunal, and substitute the award with a decision the court would have rendered had it been in the tribunal's shoes. An award is not defective merely by reason that the court itself would not come to that conclusion, or that it would not have cast the award in the precise terms rendered by the tribunal.

At times, this may present as a difficult challenge to the courts, but party autonomy in this regard must be respected — the parties having chosen to have their dispute determined by arbitration, and in many cases having agreed to the composition of the arbitral tribunal, cannot figuratively 'have its cake and eat it too'.

Indeed, this is recognised by the limited scope to challenge an arbitration award prescribed by the IAA and CAA, which set out seven bases upon which the court may refuse to enforce an award:[45]

> a) a party to the arbitration agreement was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of the State or Territory where the award was made;
>
> b) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the party's case;
>
> c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
>
> d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the State or Territory where the arbitration took place;

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45 *International Arbitration Act 1974* (Cth) s 8; *Commercial Arbitration Act 2011* (Vic) s 36.

e) the award has not yet become binding on the parties or has been set aside or suspended by a court of the State or Territory in which, or under the law of which, that award was made;

f) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

g) the recognition or enforcement of the award would be contrary to the public policy of this State.

AKN v ALC

Perhaps the most apt enunciation of the court's role in determining whether to enforce an arbitral award arises from the Singaporean Court of Appeal decision of *AKN v ALC*[46] — the Singaporean arbitration law also having been modelled off the UNCITRAL Model Law and as I have discussed above, the international provenance of arbitration requires Australian courts to consider, and in some instances, heed, the decisions of superior foreign courts, such as those in Singapore, Hong Kong and England.

In that decision, the Chief Justice of Singapore, Menon CJ, said:[47]

> A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law and the [International Arbitration Act (Singapore, cap 143A, 2002 rev ed)].
>
> In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts' perspective, the parties to an arbitration do not have a right to a 'correct' decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.
>
> In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration.

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46 [2015] SGCA 18.

47 [2015] SGCA 18, [37]–[39] (emphasis added).

Contrary to Public Policy

Whilst consideration of each avenue upon which the court may refuse to enforce an award would require far greater time than what I have been allocated today, I wish to briefly speak on perhaps the most controversial and widely debated basis: contrary to public policy.

Without embarking on a doctrinal analysis of each and every case which has considered this ground, I wish only to emphasise the narrow scope of the 'contrary to public policy' ground.

Hebei Import & Export Corporation v Polytek Engineering Company Ltd

In the seminal Hong Kong Court of Final Appeal decision of *Hebei Import & Export Corporation v Polytek Engineering Company Ltd*,[48] which has been widely endorsed by Australian courts,[49] Sir Anthony Mason said:[50]

> [T]he object of the [New York] Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced. In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of art V, notably art V(2)(b) relating to public policy, have been given a narrow construction. It has been generally accepted that the expression 'contrary to the public policy of that country' in art V(2)(b) means 'contrary to the fundamental conceptions of morality and justice' of the forum.

Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)

In a similar vein, the 2012 Federal Court decision in *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* reinforced the narrow scope of this ground, not least because a broad approach would lead, undesirably, to the ground being readily adopted as a means of avoiding enforcement:[51]

> Clearly the pro-enforcement bias of the convention, as reflected in the IAA, requires that the public policy ground for refusing enforcement not be allowed to be used as an escape route for a defaulting award debtor. That ground should not be made available too readily, lest it undermine the purpose of encouraging and facilitating the enforcement of foreign arbitral awards embodied in the convention and in the IAA. As

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48 [1999] 2 HKC 205.

49 See, eg, *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* [2014] FCA 414 (Pagone J); *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 (Allsop CJ, Middleton and Foster JJ); *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199 (Croft J); *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223 (Gleeson J); *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* (2021) 290 FCR 298 (Allsop CJ, Middleton and Stewart JJ).

50 *Hebei Import & Export Corporation v Polytek Engineering Company Ltd* [1999] 2 HKC 205, 233 [99] (emphasis added).

51 *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535, 555 [90] (Foster J) (emphasis added).

> previously observed, arbitration facilitates international trade and commerce by providing an efficient and certain dispute resolution process to commercial parties. If the enforcement of awards is to be subjected to the vagaries of the entire domestic public policy of the enforcement jurisdiction, there is the potential to lose all of the benefits of certainty and efficiency that arbitration provides and which international traders seek.

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd

In *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* ('***TCL***'),[52] a proceeding concerning an alleged denial of natural justice, the Full Federal Court was at pains to emphasise that a party alleging that the denial of natural justice was 'contrary to public interest' must be able, in short compass, to identify the prejudice it had suffered. The ground for refusing to enforce the award was not to be used as a means of re-examining, in-depth, the arbitral tribunal's factual and legal findings:[53]

> Arts 34 and 36 should be seen as requiring the demonstration of real practical injustice or real unfairness in the conduct of the reference or in the making of the award. The rules of natural justice are part of Australian public policy. The assessment as to whether those rules have been breached by reference to established principle is not a matter of formal application of rules disembodied from context, or taken from another statutory or human context. The relevant context is international commercial arbitration. No international arbitration award should be set aside for being contrary to Australian public policy unless fundamental norms of justice and fairness are breached. … It suffices to say that no international award should be set aside unless, by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered by an international commercial party in the conduct and disposition of a dispute in an award. It is likely that real prejudice, actual or potential, would be a consideration in the evaluation of any unfairness or practical injustice.
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> …
>
> In most, if not all, cases a party who says that it has suffered such unfairness or practical injustice should be able to demonstrate that without the kind of detailed re-examination of the facts that occurred in this case. Applications involving review, enforcement and recognition under Arts 34, 35 and Art 36 (or Art V of the New York Convention) should not be permitted to be used (or hijacked) to undertake, in substance, a rehearing of factual or legal reasoning under the guise of a complaint about a breach of the rules of natural justice based on the 'no evidence rule'. Unfairness or practical injustice in the conduct of international commercial arbitration should, if it exists, be able to be expressed shortly and, likewise, demonstrated tolerably shortly. It will not be demonstrated as a result of a detailed factual analysis of evidence regularly and fairly brought forward involving asserted conclusions of facts different to those reached by the arbitrator. If a party can demonstrate that it has been, in essence, denied the opportunity to be heard on an important and material issue as revealed by such a finding made without material, real unfairness or real practical injustice may be shown. That was not the case here.

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52 (2014) 232 FCR 361.

53 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 394 [111], 395 [113] (Allsop CJ, Middleton and Foster JJ) (emphasis added).

TCL and the cases before it make clear that the 'contrary to public policy' ground must necessarily be cast in a narrow scope. The enlargement of this ground would adversely affect parties' confidence in their ability to enforce the outcome of their arbitral proceedings, and engender greater uncertainty for international commerce and systems of trading. Importantly, Australian courts have been steadfast in recognising attempts of disguising what, in essence, is a 'backdoor' merits review of the arbitral tribunal's decision in an application to resist enforcement under the 'public policy ground', and have consistently maintained the narrow, limited scope where court intervention is justified.

Moreover, in determining these 'challenges' on the basis of public policy, Australian courts have maintained fundamental international norms of justice and fairness, and have avoided applying domestic, common law principles or doctrines not found in the Model Law or the New York Convention, thereby evading the temptation of domesticity. This, in my opinion, is desirable, and must continue to be maintained for the preservation of Australia's standing as a pro-arbitration jurisdiction.

VIII. Applying Appropriate Costs Consequences

Finally, I wish to speak briefly on the costs consequences associated with a party's failed attempts to resist a stay application or the enforcement of an arbitral award.

Those familiar with the field of arbitration will recognise that Australia does not presently have a different costs regime for parties who unsuccessfully resist a stay application or the enforcement of an arbitral award. Indeed, costs in the context of the Australian jurisdiction follows the event and, in most cases, are payable by the unsuccessful party on a standard basis. The usual principles for the court to exercise its discretion to award indemnity costs apply equally in Australia to arbitral proceedings before the court. This often requires the successful party to show 'exceptional' circumstances, or the existence of some 'special or unusual feature', such as the pursuit of a proceeding or a defence for an ulterior motive or where it can be demonstrated that a party has engaged in particular misconduct which has increased time and costs.[54] The high evidentiary threshold required imposes an onerous obligation on the party seeking indemnity costs,[55] and is seldom reached. Though this position is undoubtedly founded on the bedrock of legitimate policy considerations, its extension to arbitral proceedings, and the absence of a separate costs regime in arbitral proceedings before the court

[54] See, eg, *Colgate Palmolive Co & Anor v Cussons Pty Ltd* (1993) 46 FCR 225, 232–4.
[55] See *Han v Australian Kung Fu (Wu Shu) Federation Inc* [2011] VSC 498.

leaves, in my opinion, much to be desired in the context of Australia's standing as a pro-arbitration jurisdiction. Whilst it is certainly not my view that every unsuccessful party to a stay application or an enforcement proceeding ought to be saddled with indemnity costs, there are certainly many strong policy factors in favour of rendering indemnity costs the norm, rather than the exception, for unsuccessful parties in this regard.

Indeed, this is consistent with other pro-arbitration jurisdictions, not least in England and Hong Kong, two of the three most popular arbitration jurisdictions globally.

The English Position

In the 2007 English decision of *A v B (No 2)*, a proceeding arising from one party's attempt to invoke the English court's jurisdiction notwithstanding the existence of a valid arbitration agreement which governed the parties' dispute, Justice Colman determined that indemnity costs were payable by the party seeking to sidestep the parties' agreement:[56]

> In my judgment, provided that it can be established by a successful application for a stay or an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause that the breach has caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis.
>
> …
>
> The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court. In the ordinary way it can therefore normally be characterised as so serious a departure from 'the norm' as to require judicial discouragement by more stringent means than an order for costs on the standard basis …

Accordingly, the English position following *A v B (No 2)* in effect imposes a standard presumption that indemnity costs are payable by the unsuccessful party to a stay application unless exceptional circumstances arise to displace this position.

The Hong Kong Position

The English position has been closely followed and, in some respects, expanded, by Hong Kong. In the 2009 decision of *A v R*,[57] concerning an unsuccessful attempt to resist the enforcement of an arbitration award, the Hong Kong Court of First Instance determined that

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56 *A v B (No 2)* [2007] 1 Lloyd's Rep 358, 361 [11], 362 [15].

57 [2009] HKCFI 342.

indemnity costs are to 'normally' be applied to the party which has unsuccessfully challenged an award:[58]

> [I]n the absence of special circumstances, when an award is unsuccessfully challenged, the Court will henceforth normally consider awarding costs against a losing party on an indemnity basis.

In arriving at this conclusion, Justice Reyes articulated the policy considerations his decision was founded upon:[59]

> Parties should comply with arbitration awards. A person who obtains an award in his favour pursuant to an arbitration agreement should be entitled to expect that the Court will enforce the award as a matter of course.
>
> Applications by a party to appeal against or set aside an award or for an Order refusing enforcement should be exceptional events. Where a party unsuccessfully makes such application, he should in principle expect to have to pay costs on a higher basis. This is because a party seeking to enforce an award should not have had to contend with such type of challenge.
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> …
>
> If the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidising the losing party's abortive attempt to frustrate enforcement of a valid award. The winning party would only be able to recover about two-thirds of its costs of the challenge and would be out of pocket as to one-third. This is despite the winning party already having successfully gone through an arbitration and obtained an award in its favour. The losing party, in contrast, would not be bearing the full consequences of its abortive application.
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> Such a state of affairs would only encourage the bringing of unmeritorious challenges to an award. It would turn what should be an exceptional and high-risk strategy into something which was potentially 'worth a go'. That cannot be conducive to [The Civil Justice Reform] and its underlying objectives.

His Honour's decision was subsequently adopted by the Hong Kong Court of Appeal in *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd*[60] and *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)*.[61] In following Justice Reyes's decision in *A v R*, Vice-President Tang (with whom Justice of Appeal Fok and Justice Sakhrani agreed) said:[62]

> Experienced judges in charge of the Construction and Arbitration List have adopted the approach that, in proceedings arising out of or in connection with arbitral proceedings, in the absence of special circumstances, the court will normally consider it appropriate to order costs on an indemnity basis.

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58 [2009] HKCFI 342, [72] (Reyes J).
59 [2009] HKCFI 342, [67]–[71] (Reyes J) (emphasis added).
60 [2012] HKCA 332.
61 [2012] 1 HKC 491.
62 *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)* [2012] 1 HKC 491, [12].

Thus, the settled position in Hong Kong, much like that in England, is that a party which unsuccessfully invokes the court's powers to sidestep the enforcement of an award, or stand in the way of the parties' arbitration agreement, will ordinarily be met with indemnity costs.

The Singaporean Position

The approach in Singapore, however, differs to that of Hong Kong and England. In two 2021 Singaporean High Court decisions of *CDM v CDP*[63] and *BTN v BTP*,[64] the court declined to follow the decision of its Hong Kong counterpart, determining instead that the appropriate approach in the Singaporean common law system is to award standard costs as the default position. In reaching this conclusion, Justice Ang determined that the approach adopted by Hong Kong courts were at odds with the Singaporean costs rules:[65]

> In my view, the Hong Kong approach contradicts the costs principles set out in O 59 of our ROC. In Singapore, an unsuccessful application to set aside an arbitral award or to resist enforcement of the same is not treated as a category of exceptional circumstances in which indemnity costs may be ordered by a Singapore court under O 59. Separately, the Hong Kong court's approach in justifying indemnity costs is intended to give effect to the underlying objectives of its Civil Justice Reform, one of which is the cost effective and efficient resolution of a dispute (*A v R* at [69]; *Gao Haiyan* at [7] and [10]). While these considerations are also acknowledged in Singapore in variant forms when the court evaluates how the party conducted its case in the litigation, they are not absolute trumps. There are other factors in O 59 r 5 that must be considered.

Thus, on a comparative international approach, there is no uniform consistency for or against the adoption of indemnity costs in arbitral proceedings. The requisite question therefore is whether those policy considerations set out in *A v B (No 2)* and *A v R* are sufficient to warrant a departure from the ordinary costs rules in Australia. In my opinion, it does.

The Australian Position

Altain Khuder LLC v IMC Mining Inc & Anor (No 2)

In *Altain Khuder LLC v IMC Mining Inc & Anor (No 2)*,[66] I sought to adopt the principle applied in the Hong Kong decisions of *A v R*[67] and *Wing Hong Construction Ltd v Tin Wo Engineering Company Ltd*.[68] I was persuaded on those authorities that a category of special

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63 [2021] SGCA 45.
64 [2021] SGHC 38.
65 *BTN v BTP* [2021] SGHC 38, [9].
66 [2011] VSC 12.
67 [2009] HKCFI 342
68 [2010] HKEC 919.

circumstances should be established to require parties which unsuccessfully resisted the enforcement of an arbitration award to pay costs on an indemnity basis:[69]

> In my view, the considerations which moved Reyes J and Saunders J in the Hong Kong cases, to which reference has been made, apply with equal force in Victoria, both from an arbitration perspective and also from the perspective of legislation such as that contained in the Civil Procedure Act and in the Hong Kong CJR.
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> It should, however, be stressed that the finding of a category of special circumstances in this context does not mean that it would follow, inexorably, that a special costs order would be made. The award of costs is discretionary and the exercise of that discretion depends on the particular circumstances. Nevertheless in an arbitration context that discretion should be exercised against the backdrop of the considerations discussed.

This decision received general support in Hong Kong, with the Hong Kong Court of Appeal in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 2)* finding that:[70]

> As I have said we are bound by our previous decision, but since I now have the benefit of the Victorian decision, I would go on to consider, whether, if I were free to do so, I would decide this application differently.
>
> After careful consideration and with respectful recognition of the powerful reasons which supported the Victorian Court of Appeal decision, I remain of the view that this Court should nevertheless give effect to and recognise the practice of specialist judges in charge of the Construction and Arbitration List and order indemnity costs.

However, the decision received a less favourable result back home, with the Victorian Court of Appeal unanimously overturning this decision in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*.[71] In arriving at this conclusion, Chief Justice Warren CJ (as her Honour then was) said:[72]

> A decision to award indemnity costs against an unsuccessful party is dependant upon there being 'circumstances of the case … such as to warrant the court … departing from the usual course' of awarding costs on a party and party basis. Such a departure will only be countenanced in the presence of special circumstances. Unsuccessfully resisting enforcement of a foreign arbitral award is not an established category of special circumstances in Australia.

Oil Basins Limited v Esso Australia Resources Pty Ltd (No 2)

In the more recent decision of *Oil Basins Limited v Esso Australia Resources Pty Ltd (No 2)*,[73] I ordered indemnity costs against the party which had unsuccessfully resisted a stay application. I did so on the basis of the ordinary costs rule, with respect to indemnity costs generally, finding

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69 [2011] VSC 12, [20]–[21].
70 [2012] 4 HKLRD 569, [10]–[11] (Tang VP, Kwan and Fok JJA).
71 (2011) 38 VR 303 (Warren CJ, Hansen JA and Kyrou AJA).
72 (2011) 38 VR 303, 319 [55] (emphasis added).
73 [2025] VSC 257.

that the unsuccessful party had resisted the stay application in circumstances where it had 'no reasonable prospects of success'.[74]

Again, that decision to award indemnity costs was overturned by the Victorian Court of Appeal, which held that:[75]

> All but the last of the matters relied on by the judge were in substance his key reasons for rejecting OBL's case. Plainly enough, as Hansen JA and Kyrou AJA indicated in *IMC Solutions* in the passage set out above, the fact that a litigant fails to have its submissions accepted by the court is not, without more, a justification for an award of indemnity costs. In this case, we do not consider there was anything about OBL's submissions that made them unreasonable, perverse or otherwise so exceptional so as to justify an award of indemnity costs. In so far as the judge treated OBL's failure to have its submissions accepted as a justification for an award of indemnity costs, he acted on a wrong principle.
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> …
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> There was, in our opinion, no proper basis to conclude that an award of indemnity costs should be made against OBL in this case, and the exercise of the discretion as to costs miscarried. Leave to appeal in respect of costs should therefore be granted and the appeal against costs allowed. We will instead order that OBL pay the defendants' costs of the stay application on the standard basis, such costs to be taxed immediately in default of agreement.

The Australian position therefore continues to be that indemnity costs are the exception, rather than the norm in arbitral proceedings before the court, whether that be in the context of an unsuccessful resistance to a stay application or an unsuccessful attempt to resist enforcement. In this context, it is in the hands of the legislature to enact change to the current system.

Is Change Necessary or Desirable?

In my view, a failure by Australian courts and, by extension, the Commonwealth legislature, to adopt the same costs consequences which have been applied for more than a decade in England and Hong Kong threatens to undermine Australia's standing as a pro-arbitration jurisdiction.

It should come as no surprise to our audience members today that the ubiquitous consensus on arbitration is that the associated costs are high. As the *QM Survey* suggests,[76] this remains a persistent consideration for parties determining whether to pursue arbitration as a means of alternative dispute resolution. The requisite question in my opinion is, therefore, whether a

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74 [2025] VSC 257, [41]–[45].

75 *Oil Basins Ltd v Esso Australia Resources Pty Ltd* [2026] VSCA 6, [123], [128] (McLeish, Lyons and Kenny JJA) (citations omitted).

76 See 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, 3, 19.

party, which has respected its bargain, pursued its claims through the arbitral process, and sought enforcement of the tribunal's award, should be put to further expense to defend unsuccessful attempts by its opposing party to resist the tribunal's jurisdiction, or challenge its award. The absence of serious pecuniary consequences on a party which fails to establish its basis of challenging the tribunal's jurisdiction or its award is, as Justice Reyes put it, to require the winning party to 'subsidise the losing party's abortive attempt' to frustrate the arbitral process.[77]

For better or worse, and even if it is not the intent of the losing party to put its opponent to greater costs and increase delays in obtaining its award, the effect of the current system is to 'encourage' the losing party to have a figurative 'second bite at the cherry'. The absence of a risk that the losing party may have to pay 90–100% of its opponent's legal costs if it is ultimately unsuccessful in its attempt to frustrate the arbitral process renders this commercial decision one which otherwise would carry substantial financial peril, to an opportunity which may well be 'worth a go'.

In that regard, former Chief Justice of the Federal Court, the Honourable James Allsop AC, neatly encapsulates the policy considerations supporting the adoption of an indemnity costs approach:[78]

> The decision to enter into an arbitration agreement represents a bargain between the parties under which they consent to refer disputes to an arbitrator, along with the concomitant undertaking to accept and abide by the arbitral award. Commencing litigation to resist enforcement (if without foundation) may be viewed first and foremost as an abandonment of that contractual bargain. The United Kingdom is explicit in referring to this as a breach of contractual obligations. It may be said that there is a public policy interest in discouraging parties from abandoning promises made by way of contract. Distinguishing it from other kinds of proceedings, the very act of commencing (unsuccessful) litigation to resist enforcement is itself an attempt to subvert the dispute resolution agreed upon by the parties, a repudiation of a contractual undertaking that causes further, unnecessary damage to the innocent party.
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> In addition, delaying the realisation of the award will often have serious commercial consequences for the party entitled to the benefit of the award. This is what the UK and Hong Kong courts determine is an abuse of process, and the Honourable Murray Gleeson summarises: 'For some of them, the more expensive and dilatory the process the better.' It is unclear where Australian jurisprudence may draw the line between a 'standard' application to resist enforcement, and one that is manifestly in bad faith and therefore an abuse of process.
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> One reason, perhaps, for promoting the UK and Hong Kong approach is that this reinforces the arbitration process and gives a high degree of confidence that awards

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77 *A v R* [2009] HKCFI 342, [70].

78 *The Enforcement of International Arbitration, Awards and Public Policy* (An AMTAC and Holding Redlich Seminar, 10 November 2014), [74]–[76] (emphasis added).

> will be enforced. This is particularly important in the international commercial context, where arbitrations are the dominant form of dispute resolution.

Though his Honour's remarks were delivered more than a decade ago, the judicial landscape has not changed, and Australia faces the risk of maintaining a standard which increases the incidence of parties seeking judicial intervention, adversely affecting its reputation as a pro-arbitration seat.

IX. Conclusion

As arbitration continues its exponential growth both domestically and internationally, Australia's reputation as an arbitration friendly jurisdiction requires constant reinforcement, with positive and proactive measures by legislatures, governments, arbitral bodies, arbitration practitioners, as well as the judiciary.

Australian courts will continue to play a large role in the arbitral process, particularly with respect to the referral of proceedings to arbitration and the enforcement of a tribunal's award. The way in which arbitral disputes are handled by the courts will naturally influence the ongoing development of commercial arbitration and its fundamentally important support for international trade and commerce. Certainty in the curial process is critical to the ongoing growth of arbitration in Australia and, to that end, consistency and predictability amongst decisions of judges in Australian state, territorial and federal courts remain fundamental. It is my hope that future judges determining arbitral proceedings before the courts are able to maintain and build on the wealth of precedent on these topics. Only with considered, well-reasoned judgments which continue to maintain the international character of our arbitration legislation, resist against the temptation of domesticity, and protect party autonomy, will arbitration in Australia continue to flourish.

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