

The Future of International Arbitration in Australia – a Victorian Supreme Court Perspective*

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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 New York, London, 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 *2010 International Arbitration Survey: Choices in International 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.

² Queen Mary, University of London, School of International Arbitration, *2010 International Arbitration Survey: Choices in International Arbitration*, sponsored by White & Case LLP (“*QM Survey*”).

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. 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.

Recently, 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 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

³ Including the Australian Centre for International Commercial Arbitration (ACICA), the Chartered Institute of Arbitrators (Australian Branch) and the Institute of Arbitrators and Mediators Australia (IAMA).

each 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 emerging position in Australia.

2. The arbitral environment

The *Queen Mary – 2010 International Arbitration Survey: Choices in International Arbitration* (“the *QM Survey*”) provides a “checklist” for assessing the attractiveness, or otherwise, of a jurisdiction as a seat for arbitrations. The *QM Survey* found that the most important factor influencing the choice of the seat for arbitration was the “formal legal infrastructure” at the seat.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 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

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 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*, 17.

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. 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 ACICA has played a leading role in raising the profile of arbitration in Australia, supporting the process and educating arbitrators.

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 legislation required attention; though the domestic legislation had also become very dated as a result of developments in legislation elsewhere.⁷ 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.

⁶ See www.acica.org.au.

⁷ 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 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.

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”.⁸ 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 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 eighteenth 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.⁹ 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

⁸ 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.

⁹ J Oldham, *English Common Law in the Age of Mansfield* (2004, University of North Carolina Press), 68 – 72.

“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.

3. The role of governments and legislatures in supporting arbitration

There are two primary ways in which legislatures and government 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.

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, 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 Australian Commercial Disputes Centre (“ACDC”). It is 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.¹⁰

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. These efforts were directed to updating, modernising and clarifying existing arbitration law and practice, as well as promoting 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 into line with Singapore and Hong Kong.

The choice of the Model Law as the basis for the CAA¹¹ will assist with achieving a great deal of uniformity between the international and domestic regimes. As both the IAA¹² and the CAA apply the Model Law provisions, with some additions and adaptations to accommodate their particular contexts, judgments under one regime can and will inform judgments under the other. State and Territory Supreme Court judges, when making decisions under the CAA, will need to be more aware of the impact of their judgments on the interpretation of the IAA, as they have jurisdiction under both regimes.¹³ 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. Given that, at least initially, it is likely that there will be more decisions under the CAA than the IAA, it would seem that Australia’s Model Law jurisprudence will be developed, at first, by the State and

¹⁰ The Hon. Marilyn Warren AC, 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.

¹¹ The SCAG model *Commercial Arbitration Bill* 2010 (“the CAA”).

¹² The *International Arbitration Act* 1974 as amended in 2010 (“the IAA”) and

¹³ A position which is reinforced, and required, by s 2A of the CAA (see below).

Territory Supreme Courts, as the Federal Court of Australia, which has jurisdiction under the IAA has no jurisdiction in the domestic regime. There was some controversy surrounding the question whether the Federal Court should be given exclusive jurisdiction under the IAA during the process of review which led to the amending legislation.¹⁴ At the time this issue was being discussed the only context was the proposed amendments to the IAA and not also the effect of applying the Model Law domestically in terms of the CAA; which raises the variety of additional considerations to which reference has been made.

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. The role of courts in arbitration

The judiciary plays an essential role in supporting and promoting arbitration. The majority of courts in developed arbitral jurisdictions are vested with at least some degree of supervisory, supportive and enforcement jurisdiction over all forms of arbitration. Over the last few years, there has been a significant increase in the number of specialist arbitration lists or courts in the Asia-Pacific region.

In August 2010, Bombay's High Court announced the creation of a court dedicated to arbitration-related applications. In China, a similar practice has arisen where a lower court decision not to enforce an award is, in practice, automatically referred to a higher court to review, and if not enforced it must, consequently, be reviewed by the Supreme People's Court. All of these efforts are aimed at ensuring that specialisation in the resolution of arbitral disputes leads to consistent and predictable outcomes in

¹⁴ The issue was raised in the Commonwealth of Australia Attorney General's Department 'Review of the International Arbitration Act 1974, Discussion Paper, November 2008 in section H.

line with global arbitration jurisprudence and international conventions and obligations. The Court of First Instance of the High Court of Hong Kong and the High Court of Singapore have been achieving these results for some time. The Dubai International Financial Centre Court has similar goals and has a good relationship with the DIFC-LCIA Arbitration Centre.

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 Australian IAA, as amended in 2010. On 1 January 2010, the new Arbitration List of the Commercial Court in the Victorian Supreme Court began operation. I am pleased to be the judge in charge of the list, which is the only specialist arbitration list in Australia.¹⁵

All arbitration matters brought in the Victorian Supreme Court are to be heard in the Arbitration List of the Commercial Court. Arbitration matters are exempt from the usual Commercial Court fee, which applies because of the managed list and expeditious processes which are available. The operation of the arbitration list is set out in *Practice Note 2 of 2010 – Arbitration Business*.¹⁶ The Practice Note sets out procedural information as well as useful guidelines for those considering an application. Parties are encouraged to communicate directly with my 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.

¹⁵ The Federal Court of Australia has a panel of judges available to hear arbitration matters, but it has not established a separate list.

¹⁶ See Appendix I.

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. Given that the legislation governing Australia's arbitral regime is relatively new, there will be great importance placed upon court decisions interpreting these provisions, which are largely based on the Model Law. It is essential that consistent interpretation and application is given to both the international and the domestic legislative provisions – contained in the IAA and the CAA, respectively – not only to conform with international thinking and arbitral practice (particularly having regard to the Model Law's international heritage), but also to assist in developing sound arbitration law expertise and to promote Australia's reputation as an arbitration-friendly jurisdiction.

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.¹⁷ 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 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.

¹⁷ Noting in this respect that the Victorian Supreme Court Arbitration List (List G) is available 24 hours per day, seven days per week and hearings can and do take place outside court hours as required.

Liaison between courts and with arbitration users

If the objectives of the IAA and the CAA are to be fully realised, the courts need to communicate with and receive feedback from commercial arbitration stakeholders. Specialist courts with arbitration lists are particularly well placed to do this as they are in contact with the relevant parties and practitioners to the greatest extent possible. An Arbitration Users' Group for the Supreme Court of Victoria is being established. I expect that this Users' Group will be especially useful in discussing and developing the procedures for commencing and disposing of applications under the IAA and the CAA. This consultation may lead to further improvements to the Arbitration Business Practice Note.¹⁸ I would expect that other courts will establish similar consultative mechanisms.

The courts in a federal state like Australia, where the jurisdiction is spread between a number of different courts, need to liaise with each other to develop and share their arbitration expertise and experience. The existence of specialist arbitration lists will help in this regard by directing arbitration business to particular judges within a court who can then share their knowledge and experience with the arbitration judges from other courts. This consultation between judges of the Federal Court and the judges of the State and Territory Supreme Courts will be essential if, as I expect, the majority of Model Law decisions are initially made under the CAA. This process is being assisted by the ACICA Judicial Liaison Committee which was established in late October 2010. This Committee is chaired by a former Chief Justice of the High Court of Australia, the Hon Murray Gleeson AC. The Committee includes the judges hearing arbitration-related cases from the Supreme Courts and the Federal Court, as well as representatives from ACICA. It aims to promote uniformity in the rules and procedures relating to arbitration in Australia – particularly concerning the enforcement of arbitration agreements and awards, as well as the appointment of arbitrators, and the provision of interim measures or other assistance in support of arbitration.

Raising the expectations on arbitrators and practitioners

In order to achieve the general objectives discussed, courts need, and value, assistance from parties and their representatives. Solicitors and counsel are able to provide

¹⁸ Practice Note No. 2 of 2010 – Arbitration Business.

significant assistance to the courts in applying the Model Law provisions, as applied by the IAA or as adopted by the CAA, in a manner consistent with international and domestic jurisprudence. Assistance by reference to commentaries and case law in submissions informed by comprehensive research, including consideration of the broader policy considerations underlying the legislation – policy considerations which may have an international dimension, for the purposes of both the IAA and the CAA – is essential. The existence of a specialist arbitration list with a specialist judge or judges can provide a focus for arbitrators and arbitration practitioners, both for the purpose of educating arbitrators and practitioners in this respect and providing an understood level of knowledge and expectation having regard to the expertise of the court.

Decisions in the Arbitration List

The Arbitration List has attracted a significant amount of work since it began operation nearly eighteen months ago. During that time I have handed down judgments in six arbitration matters,¹⁹ some quite significant, and dealt with a variety of other applications. Each case that has gone to judgment has raised a different issue regarding the extent to which the Court can intervene or assist in arbitration decisions or processes, including enforcement – both issues of procedure and substance. Four of the decisions were made under the Victorian *Commercial Arbitration Act* 1984, which is the current domestic commercial arbitration legislation. However, the principles in those cases are still very relevant in examining the relationship between the Court and arbitration more generally. *Arnwell Pty Ltd v Teilaboot Pty Ltd & Ors*²⁰ raised issues regarding court intervention in procedural decisions made by an arbitral tribunal. *Oakton Services Pty Ltd v Tenix Solutions*²¹ was a successful application to stay court proceedings in favour of arbitration as there was an arbitration agreement in place. *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor*²² involved an application

¹⁹ *Arnwell Pty Ltd v Teilaboot Pty Ltd & Ors* [2010] VSC 123; *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor* [2010] VSC 139; *Oakton Services Pty Ltd v Tenix Solutions IMES Pty Ltd* [2010] VSC 176; *Winter v Equuscop Pty Ltd* [2010] VSC 419; *Altain Khuder LLC v IMC Mining Inc & Anor* [2011] VSC 1; *Altain Khuder LLC v IMC Mining Inc & Anor (No 2)* [2011] VSC 12.

²⁰ [2010] VSC 123.

²¹ [2010] VSC 176.

²² [2010] VSC 139 (“*Thoroughvision*”).

for leave to appeal an arbitral award under section 38 of the *Commercial Arbitration Act* and an application to set aside an award for misconduct under section 42 of that Act on the basis of insufficient reasons provided in the award. I found that there was no manifest error of law on the face of the award for the purposes of sub-section 38(5)(b)(i) and that there was no misconduct on the part of the arbitrator for the purposes of section 42 on the basis asserted. This required examination of the quality of reasons required of an arbitrator under sub-section 29(1)(c) of the *Commercial Arbitration Act* 1984 in the context of a decision of the Victorian Court of Appeal²³ and a recent decision of the New South Wales Court of Appeal²⁴ in that area.

Section 29 of the *Commercial Arbitration Act* 1984 provides:

(1) Unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator or umpire shall-

(a) make the award in writing;

(b) sign the award; and

(c) include in the award a statement of the reasons for making the award.

(2) Where an arbitrator or umpire makes an award otherwise than in writing, the arbitrator or umpire shall, upon request by a party within seven days after the making of the award, give to the party a statement in writing signed by the arbitrator or umpire of the date, the terms of the award and the reasons for making the award.

The equivalent provision under the Model Law is Article 31 – Form and contents of award:

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

²³ *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346.

²⁴ *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

The Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd* found that the reasons contained in the arbitral award were not of an acceptable standard. The critical aspects of the Court's reasons are as follows:²⁵

“50. We do not accept those submissions either. As already noted, the requirement to give reasons arose out of s 29(1)(c) of the Commercial Arbitration Act 1984.²⁶ The extent of that requirement is informed by the purposes of the Act. As Giles J observed in *R P Robson Constructions v D & M Williams*,²⁷ the Act fundamentally altered the approach to the provision of reasons in commercial arbitration, by taking away the jurisdiction to set aside an award on the ground of error on the face of the award and replacing it with a right to seek leave to appeal on any question of law arising out of the award which the court considered could substantially affect the rights of one or more of the parties. In order to enable the court to see whether there has been an error of law, s 29 provides that the award must be in writing and that the arbitrator must include a statement of reasons. And in order to be utile, the requirement is for reasons sufficient to indicate to the parties why the arbitrator has reached the conclusion to which he or she has come. To that extent, the requirement is no different to that which applies to a judge. Of course it is understood that arbitrators may not always be skilful in the expression of their reasons. Consequently, it is accepted that a court should not construe an arbitrator's reasons in an overly critical way. But it is necessary that an arbitrator deal with issues raised and indicate the evidence upon which he or she has come to his or her conclusion. Accordingly, if a party has relied on evidence or material which the arbitrator has rejected, it is ordinarily necessary for the arbitrator to assign reasons for its rejection.

51. Counsel for the appellant relied on an observation in the second edition of Mustill and Boyd²⁸ to the effect that an award need not set out the evidence from which an arbitrator has deduced his findings of fact because the findings of fact are not open to review and therefore a statement of the evidence will not serve any useful function. But, in our view, counsel's reliance on that observation is misplaced in this context. It was directed to the sort of reasons required to be given in response to an order made under s 1(5) of the Arbitration Act 1979 (Eng).²⁹ That section expressly limited the power to order reasons to requiring an arbitrator:

to state the reasons for his award in sufficient detail to enable the court, should an appeal be brought under the section, to consider any question of law arising out of the award.³⁰

...

²⁵ *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 (Buchanan, Nettle and Dodds-Streton JJA)

²⁶ And also out of the Deed but it was common ground that the scope of the obligation imposed under the Deed was relevantly the same as under the Act.

²⁷ (1990) 6 Building and Construction Law 219, 221-2.

²⁸ Lord Mustill & Stewart C Boyd QC, *The Law and Practice of Commercial Arbitration in England*, (2nd ed, 1989), 377.

²⁹ Which is no longer the law in England. See the commentary on s 52 of the *Arbitration Act 1996* (Eng) in Lord Mustill and Stewart C Boyd, QC, *Commercial Arbitration: 2001 Companion volume to the Second Edition* (2001), 335-336.

³⁰ Emphasis added.

53. Counsel for the appellant argued that, even if that were so, the judge in this case was in error in assimilating the duty imposed on the arbitrators to the duty which applies to judges to the extent of concluding that ‘the arbitrators were under a duty to give reasons of a standard which was equivalent to the reasons to be expected from a judge deciding a commercial case’.³¹ Counsel submitted that the judge also erred in concluding that subjective matters (such as the background and experience of the arbitrator and the parties’ respective counsel and solicitors) were determinative of the standard of the reasons required to be delivered in an arbitration, as reflected by his reference to the following circumstances:

- (a) The arbitration was a large commercial arbitration involving many millions of dollars.
- (b) It was attended with many of the formalities of a legal proceeding, including the exchange of points of claim and defence and of substantial witness statements.
- (c) The hearing occupied 15 sitting days.
- (d) In addition to oral argument, substantial submissions were made by the parties.
- (e) The arbitrators were obviously chosen for their legal experience and were retired judges of superior courts.
- (f) Both sides were represented by large commercial firms of solicitors and very experienced Queen’s Counsel.

54. In our view, the judge did not err as alleged. The arbitrators’ decision in the present case called for reasons of a judicial standard. As with reasons which a judge is required to give, the extent to which an arbitrator needs to go in explaining his or her decision depends on the nature of the decision.

...

57. As has been noticed, what is needed to satisfy that requirement will depend upon the particular circumstances of the case. If a dispute turns on a single short issue of fact, and it is apparent that the arbitrator has been chosen for his or her expertise in the trade or calling with which the dispute is concerned, a court might well not expect anything more than rudimentary identification of the issues, evidence and reasoning from the evidence to the facts and from the facts to the conclusion.³² Byrne J captures the point in this dictum in his Honour’s judgment in Schwarz:³³

In what are often called trade arbitrations, the parties and the Arbitrators are all engaged in a particular trade. In such an arbitration the reasons may be expressed in the jargon of the trade or they may ignore matters which will be well known to the participants. Such an award which may appear deficient to an outsider, may nonetheless satisfy the fundamental purpose of the statement of reasons. It cannot be the case that an award should be drafted only with an eye to informing an appeal court which may be unfamiliar with the trade and its practices.³⁴

³¹ *BHP Billiton Limited v Oil Basins Limited* [2006] VSC 402 (Unreported, Hargrave J, 1 November 2006) [23].

³² Lord Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (1st ed, 1982) 552.

³³ *Peter Schwarz (Overseas) Pty Ltd v Morton* [2003] VSC 144.

³⁴ *Ibid* [35].

Contrastingly, however, in complex commercial arbitrations, it may appear that the determination of the dispute demands reasons considerably more rigorous and illuminating than the mere *ipse dixit* of a ‘look-sniff’³⁵ trade referee. And in cases like the present, which involve an intellectual exchange with reasons and analysis advanced on either side, conflicting expert evidence of a significant nature and substantial submissions, the parties to the dispute are almost certain to be left in doubt as to the basis on which an award has been given unless the reasons condescend to an intelligible explanation of why one set of evidence has been preferred over the other; why substantial submissions have been accepted or rejected; and, thus, ultimately, why the arbitrator prefers one case to the other. Hence, in our view, the reasons in this case should have been of that standard.³⁶

The New South Wales Court of Appeal considered this decision in *Gordian Runoff Ltd v Westport Insurance Corporation*:³⁷

“207 With great respect, it is far from clear that the UNCITRAL Model Law required more stringent reasons than required under the 1979 Act and, if so, to what extent. The words of s 29(1)(c), which reflect the expression in the Model Law, Art 31(2), which was based on the UNCITRAL Arbitration Rules, Art 32(3) and which is now reflected in the *Arbitration Act 1996* (Eng) (the “1996 Act”), s 52(4), should be viewed against the context of the compromise embodied in the Model Law and against the background of international commercial arbitration.

208 The compromise in the Model Law was not between those who thought arbitrators’ reasons should reach the standard of detail of a judge in the common law system and those who thought some lesser standard was called for. Rather, it was a compromise between national laws requiring reasons and those not requiring any reasons: see HM Holtzmann and J E Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989, Kluwer) at 837-838; First Working Group Report on the Model Law A/CN.9/216 at para 80; Seventh Secretariat Note A/CN.9/264, Art 31 para 3; P Binder *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd Ed, 2010, Sweet & Maxwell) at 354.

209 There is no record in the discussions leading to the framing of the Model Law of a desire of any nation to raise the standard **required** of arbitrators to those of judges in the common law systems giving reasons, in particular, in circumstances where issues of fact and law were appealable by way of rehearing.

...

213 A perusal of the contemporary writings on commercial arbitration, in particular international commercial arbitration does not identify any express support for the standard of reasons in Art 31(2) to be that of a judge in a common law system. (See generally: Binder *op cit* at [6-074]; A Redfern & M Hunter *Law and Practice of International Commercial Arbitration* (4th Ed, 2004, Sweet & Maxwell) at 381-384;

³⁵ *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping* [1981] AC 909, 919.
³⁶ Cf. *Eckersley v Binnie* (1988) 18 Construction Law Reports 1, 77-78 (Bingham, LJ); *Archibald v Byron Shire Council* (2003) 129 Local Government and Environmental Reports of Australia 311, 323 (Sheller, JA); Jacobs, *Commercial Arbitration Law and Practice*, Vol 1B (update 80), [28.109].
³⁷ [2010] NSWCA 57.

A Walton & M Vitoria *Russell on the Law of Arbitration* (20th Ed, 1982, Stevens & Sons Ltd) at 291-292; Mustill & Boyd *op cit* at 377-379; Holtzmann & Neuhaus *op cit* at 837-838; E Gaillard & J Savage (Eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999, Kluwer Law International) at 590 and 763; M Rubino-Sumartano *International Arbitration Law* (1990, Kluwer Law and Taxation Publishers) at 437; J Lew et al *Comparative International Commercial Arbitration* (2003, Kluwer Law International) at 648-649; Jacobs *op cit* at [28.20]; Poudret & Besson *op cit* at 666-673; J Parris *Arbitration Principles and Practice* (1983, Granada) at 141; P Rowland *Arbitration Law and Practice* (1988, Institute of Chartered Accountants in England and Wales in association with Sweet & Maxwell) at 75-76; A Tweedale & K Tweedale *Arbitration of Commercial Disputes: International and English Law and Practice* (2005, Oxford University Press) at 341-342 and 866-867; J Tackaberry & A Marriott *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* Vol 1 (4th Ed, 2003, Sweet & Maxwell) at 347-348; R Merkin *Arbitration Law* (2004, LLP) at 718-720; Lord Bingham "Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award" (1988) 4 *Arbitration International* 2, 141 at 152-154 and (1997) 16 *The Arbitrator* 19; Sir Harry Gibbs "Reasons for Arbitral Awards: the John Keays memorial lecture, Sydney 7th September 1988" (1988) 7 *The Arbitrator* 3, 95-130; P Gilles & N Selvadurai "Reasoned awards: How extensive must the reasoning be?" (2008) 74 *Arbitration* 125-132).

...

216 The underlying difference between arbitration and court litigation should be borne in mind at all times: see in particular the article by Lord Bingham "Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award" *op cit*. Though courts and arbitration panels both resolve disputes, they represent fundamentally different mechanisms of doing so. The court is an arm of the state; its judgment is an act of state authority, subject generally in a common law context to the right of appeal available to parties. The arbitration award is the result of a private consensual mechanism intended to be shorn of the costs, complexities and technicalities often cited (rightly or wrongly, it matters not) as the indicia and disadvantages of curial decision making.

217 That some difficult and complex arbitrations tend to mimic the procedures and complexities of court litigation may be a feature of some modern arbitration, but that can be seen perhaps more as a failing of procedure and approach rather than as reflecting any essential character of the arbitral process that would assist in a conclusion (erroneous in principle) that arbitrations should be equated with court process and so arbitrators should be held to the standard of reasons of judges.

...

219 The Model Law, Art 31(2) and the CA Act, s 29(1)(c) do not say that the arbitrator must deal with every substantial argument put forward by the contending parties. Nor do they state that the arbitrator should state the evidence from which he or she draws his or her findings of fact and give reasons for preferring some evidence over other evidence.

...

222 The above is sufficient to explain why I disagree with the view of the Court in *Oil Basins* if that conclusion can be taken from the reasons that the legal obligation of an arbitrator to give reasons is to be equated with a judge in the common law

system. It is unnecessary to discuss the particular requirements of individual circumstances other than those obtaining in this case, or the many cases on the adequacy of arbitrators' reasons in the context of particular facts, such as *Transcatalana de Comercio SA v Incobrasa Industrial Commercial Brasileira SA (The 'Vera')* [1995] 1 Lloyd's Rep 215; *Universal Petroleum Co Ltd v Handels und Transport GmbH* [1987] 1 Lloyd's Rep 517; *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277; *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84; *World Trade Corp Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm); *Protech Projects Construction (Pty) Ltd v Al-Kharafi & Sons* [2005] 2 Lloyd's Rep 779; *Petroships Pte Ltd v Petec Trading & Investment Corp of Vietnam (The 'Petro Ranger')* [2001] 2 Lloyd's Rep 348; *Hawk Shipping Ltd v Cron Navigation Ltd* [2003] EWHC 1828 (Comm); and *Torch Offshore LLC v Cable Shipping Inc* [2004] 2 Lloyd's Rep 446."

My decision in *Thoroughvision* required consideration of and reference to both these Victorian and New South Wales Court of Appeal decisions. *Thoroughvision* was referred to (though not named) in an article in the legal section of the *Australian Financial Review*³⁸ on 30 April 2010 which said that I suggested the New South Wales Court of Appeal approach in relation to the quality of reasons that an arbitrator must give was preferable. This is something of an oversimplification because clearly the Victorian decision is binding in Victoria within the ambit of the issues decided. Consequently, it may be helpful to set out what I did say in *Thoroughvision*:³⁹

"54 In my opinion, it is clear from the authorities that a principle of proportionality applies with respect to the nature and extent of reasons which an arbitrator is obliged to provide in an arbitration award. An example of a case in which very extensive and comprehensive reasons were required is *Oil Basins Ltd v BHP Billiton Ltd*.⁴⁰ This was, however, an arbitration that involved 15 hearing days, an arbitral tribunal of three, conflicting and substantive expert evidence and substantial submissions. The present arbitration is, on the other hand, an arbitration confined with respect to the proper construction of the MOU. Further, as indicated, the Deed of Arbitration requires that the arbitration be conducted in accordance with the overriding objective referred to in that Deed, adopting procedures suitable to the determination of the type of issues involved and at the same time avoiding unnecessary delay and expense so as to provide a fair, expeditious and cost effective process for the determination of these issues.

55 It is well established that the reasons need show only that the arbitrator grasped the main contentions advanced by the parties, and communicated to the parties, in broad terms, the reasons for the conclusions reached.⁴¹ The reasoning process must be exposed so that the reader of the award can understand how and why

³⁸ James Eyers, 'Battle for arbitration continues' *Australian Financial Review* (30 April 2010) 42.

³⁹ *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor* [2010] VSC 139 at [58]–[58].
⁴⁰ (2007) 18 VR 346 at 367, [57] (Buchanan, Nettle and Dodds-Streton JJA).

⁴¹ See *UCATT v Brain* [1981] IRLR 224 at 228 (Donaldson LJ); and see *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 at 364-8 [50] to [59] (Buchanan, Nettle and Dodds-Streton JJA); and *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.

the conclusion was reached;⁴² It is clear that reasons need not be elaborate or lengthy, provided that these requirements are met.⁴³ The decision of the Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd*⁴⁴ confirms that an arbitrator must address each issue raised for decision within the scope of the arbitration agreement.⁴⁵ However it does not follow that the position outlined on the basis of the authorities to which reference has been made is rendered any different, or that the nature and extent of reasons is not to be fashioned by reference to the nature of the matters in dispute and, proportionately, having regard to the complexity of the issues, the importance, monetary or otherwise, of the arbitration proceedings and the nature of the arbitral proceedings, expeditious or otherwise, as agreed between the parties.”

...

“58 The present arbitration is, as indicated, to be distinguished from the very substantial, complex and lengthy arbitration proceeding the subject of the *Oil Basins* appeal. Additionally, this is not a case where, as in *Oil Basins*, the Arbitrator has omitted to deal with an entire and substantial issue, possibly, of critical significance to the arbitration. In this context I do not take the view that there is any relevant inconsistency for present purposes in the decisions of the Victorian and New South Wales Courts of Appeal in *Oil Basins* and *Gordian Runoff*, respectively.”⁴⁶”

*Winter v Equuscorp*⁴⁷ was an unsuccessful attempt to appeal from a domestic commercial arbitration award.

My decisions in *Altain Khuder* have been discussed by Mr Peter Megens and are subject to appeal. Accordingly I will not say anything further about these decisions.

5. Arbitration clauses

A fundamental way that parties and their legal advisers can assist arbitrators and the courts is clear drafting of arbitration clauses. The Model Arbitration Clause for Contracts included in the Annex to the UNCITRAL Arbitration Rules (as amended in 2010) is an excellent starting point.

⁴² *Davidson v Fish* [2008] VSC 32 at [12] (Pagone J); and see *Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 at [18] (Heerey, Stone and Edwards JJ).

⁴³ See *Stefan v General Medical Council* [1999] 1 WLR 1293 at 1304.
⁴⁴ (2007) 18 VR 346.

⁴⁵ See (2007) 18 VR 346 at 364 (Buchanan, Nettle and Dodds-Streton JJA).

⁴⁶ I am strengthened in this view by the conditional language adopted by Allsop P with respect to the extent of inconsistency between these decisions (see [2010] NSWCA 57 at [222] and [224]).

⁴⁷ [2010] VSC 419

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note. Parties should consider adding:

(a) The appointing authority shall be ... [name of institution or person];

(b) The number of arbitrators shall be ... [one or three];

(c) The place of arbitration shall be ... [town and country];

(d) The language to be used in the arbitral proceedings shall be”

To increase certainty parties should include a clause that states the applicable law to be applied to the substance of the dispute.

ACICA recommends the following clause:

Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia [**or choose another city**]. The language of the arbitration shall be English [**or choose another language**]. The number of arbitrators shall be one [**or three, or delete this sentence and rely on Article 8 of the ACICA Arbitration Rules**].

6. Conclusion

Recent legislative reforms in Australia, both on a Federal and State level, add to its attractiveness as an arbitral seat. The 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 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, 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. However, this will all be for nothing if legal advisors do not start making use of Australia's competitive advantages to capture some of the dispute resolution work in the region.