



Commercial Arbitration in Australia: The Past, the Present and the Future *

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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,

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*”).

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. 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,

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).

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 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.

This paper discusses these issues with reference to the international and domestic arbitration environment in Australia, and particularly the role of the specialist Arbitration List in the Commercial Court of the Supreme Court of Victoria.

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

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.

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 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.

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

It would, of course, be counterproductive to gloss over the fact that, at times, there has been a perception that the Australian courts have hindered effective commercial arbitration, both by intervening too much in the arbitral process and by interpreting the arbitral law in an interventionist rather than a supportive way. This perception, as well as many other factors, was one of the reasons that Australian commercial arbitration legislation required attention; though the domestic legislation had also become very dated as a result of developments in legislation elsewhere.⁸ Prior to the enactment of the then new, uniform, domestic commercial arbitration legislation in the mid-1980s commercial arbitration had been constrained very significantly by the case stated procedure which could be used, in effect, to force a retrial of the issues in an arbitration

⁶ See www.acica.org.au.

⁷ And see, in the litigation context, Justice Clyde Croft, 'AON and its implications for the Commercial Court', a paper presented at the Commercial Court CPD and CLE – *Aon Risk Services Australia Ltd v ANU* [2009] HCA 27: What does this mean for litigation and how will it affect trial preparation?' seminar on 19 August 2010, available at <http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/supreme+court/home/library/supreme++aon+and+its+implications+for+the++commercial+court>.

⁸ The domestic commercial arbitration legislation, prior to the enactment of the *Commercial Arbitration Act 2010* in New South Wales was uniform (or substantially uniform) legislation which flowed from the work of 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.

in the reviewing court. Naturally, the cost, expense and delay involved had the effect of making commercial arbitration very unattractive.

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

In defence of the courts it might be said that the legislatures could have included *The Nema* guidelines in the new Acts if this had been the legislative intent, but given the provenance of the legislation and the English case law I think it would have to be conceded that there were some “unfortunate” decisions. There were some problems with over intervention in the arbitration process by way of judicial review of awards and as a result of an increasing tendency for parties to challenge awards on the basis of, what is generally best described as, “technical misconduct”. This should not, however, overshadow the very effective and useful work of the courts in expediting and supporting arbitration through very “arbitration friendly” decisions on the operation of the arbitration legislation, and more generally. This is unsurprising and consistent with 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.¹⁰ More recently, the English, Singapore and Hong Kong courts, for

⁹ 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.

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

example, have been very supportive, as many of the Australian courts have been, and continue to be.

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

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

3. The role of governments and legislatures in supporting arbitration

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

In addition to the latter, financial assistance, governments across the globe have seen the need to support and encourage efforts to develop particular cities and jurisdictions in a manner favourable to arbitration. In the Asia-Pacific region, Singapore has led the field with Maxwell Chambers. Australia was quick to follow. August 2010 saw the opening of the Australian International Disputes Centre, 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.¹¹

Governments have also devoted a great deal of time and effort to reviewing and developing new legislation designed to produce an attractive arbitral climate, and to achieve something in the nature of ‘best practice’ arbitration law. There has been significant legislative activity in the Asia-Pacific region. In particular, the governments of Australia, Singapore and Hong Kong, all independently reviewed their respective arbitration legislation. 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

¹¹ 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.

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.

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

The revised *International Arbitration Act* in both Australia and Singapore came into effect on 6 July 2010 and 1 January 2010, respectively. The updated Hong Kong Arbitration Ordinance will commence operation on 1 June 2011. The Australian uniform *Commercial Arbitration Bill 2010*, which will apply the Model Law provisions, with some adaptations, to domestic commercial arbitration is to be implemented in all states and territories. New South Wales was the first state to adopt the new uniform commercial arbitration legislation in the *Commercial Arbitration Act 2010* (NSW), which commenced operation on 1 October 2010. It is anticipated that Victoria will enact this legislation in the near future. Consequently, the *Commercial Arbitration Act 1984* continues to apply in Victoria, pending its imminent replacement with the new legislation.

As indicated, and as will be discussed, the Model Law, as amended in 2006, forms the basis of both the *International Arbitration Act 1974* (Commonwealth of Australia) (“the IAA”), as amended in 2010¹³, and the soon to be adopted uniform *Commercial*

¹² Only Australia, Brunei Darussalam, Hong Kong, Costa Rica, Georgia, Ireland, Mexico, Mauritius, New Zealand, Peru, Rwanda, Singapore, Slovenia and Florida (USA) have implemented the 2006 version. For current adoption status, see UNCITRAL website: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

¹³ Extensive amendments were made by the *International Arbitration Amendment Act 2010* as a result of the review of the then existing Australian international arbitration legislation, the

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

International Arbitration Act 1974. In relation to the review, see Commonwealth of Australia Attorney General’s Department ‘*Review of the International Arbitration Act 1974, Discussion Paper*, November 2008.

¹⁴ As section 16 of the IAA applies the Model Law, as amended in 2006, arbitration is “international” if the provisions of Article 1(3) of the Model Law are applicable. As to the meaning of “commercial” in the context of the expression “international commercial arbitration” as used in Article 1(1) of the Model Law, reference should be made to *UNCITRAL Model Law on International Commercial Arbitration 1985 – With amendments as adopted in 2006*, (United Nations, Vienna, 2008), p1, footnote 2.

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

Consequently, the Model Law is the arbitration law against which all other arbitration laws tend to be judged.

The choice of the Model Law as the basis for the CAA will assist with achieving a great deal of uniformity between the international and domestic regimes. As both the IAA and the CAA apply the Model Law provisions, with some additions and adaptations to accommodate their particular contexts, judgments under one regime can and 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.¹⁶ 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 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.¹⁷ 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.

¹⁶ A position which is reinforced, and required, by s 2A of the CAA (see below).

¹⁷ 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.

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

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

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

Interpretation

(a) Interpretation provisions

It is essential that the Supreme Courts of the States and Territories and the Federal Court interpret the Model Law, as applied by the IAA and the CAA, consistently and in accordance with the legislative purpose and the provenance of the provisions. If this does not occur, the present legislative reforms will not be successful in promoting and developing international and domestic commercial arbitration in Australia. To this end, the IAA provides a number of interpretative provisions, which may assist in this respect. It is to these that I now turn.

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

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

“have regard to:

(a) the objects of the Act; and

(b) the fact that:

(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes;

and

(ii) awards are intended to provide certainty and finality.”

The extensive list in sub-section 39(1) seems to cover most, if not all, situations where a court or authority¹⁹ will be applying or interpreting the IAA, the Model Law, the New York Convention or arbitration agreements and awards. A court or authority is directed to have regard to the objects of the IAA rather than obliged to apply the objects of the Act or the other considerations. Nevertheless, this probably makes little practical difference.

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

“The objects of this Act are:

¹⁸ IAA, s 39(2).

¹⁹ See IAA s 18:

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

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

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

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

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

- (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith

(2) Questions concerning matters governed by the Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Commercial Arbitration Act²⁰ – Paramount object of Act

The paramount object of the CAA “to facilitate the fair and final resolution of commercial disputes without unnecessary delay or expense” is an addition to the Model Law. The CAA is to be interpreted “so that (as far as practicable) the paramount object is achieved.”²¹ While this section is aimed more at parties and arbitrators it is also a reminder to judges interpreting and applying the Act that one of the main advantages of commercial arbitration, in the domestic context, is the ability of parties and arbitrators to tailor arbitration procedures for the most efficient resolution of the dispute. Sometimes parties will want an arbitration that is just as formal as a court proceeding and sometimes they will want a “look and sniff” arbitration, and between these extremes lies the spectrum of possible arbitration procedures. If parties agree to procedures, which are less formal than court proceedings, courts should not interfere with this choice. The same applies if the parties have clearly agreed to procedures which replicate full, traditional, litigation. The problems always arise when there is a mismatch of expectations and reality, where a party or parties and the arbitrator see themselves at different points on the “spectrum”. This is an issue to which arbitrators must direct their attention, and is a matter which many arbitration rules specifically require that they do give their attention and ensure that procedures are appropriate to

²⁰ References to sections in the CAA are to SCAG’s Model Bill unless otherwise stated. The acronym, SCAG, refers to the Standing Committee of Attorneys-General. This is a committee comprising the Attorneys-General of the Commonwealth of Australia and each of the six states and two mainland territories (the Act and the NT). One of the roles of SCAG is the development of national uniform legislation, such as the CAA.

²¹ CAA, s 1AC(2)(b).

the nature and value of the dispute.²² This is also an issue addressed in the IAA as a matter to which the courts must have regard.

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

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

“2A (1) Subject to section 1AC, in the interpretation of this Act, regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) to international commercial arbitrations and the observance of good faith.

(3) Without limiting subsection (1), in interpreting this Act, reference may be made to the documents relating to the Model Law of:

(a) the United Nations Commission on International Trade Law,
and

(b) its working groups for the preparation of the Model Law.”

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

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

²² See, for example, Australian Centre for International Commercial Arbitration Expedited Arbitration Rules, r 3 “Overriding Objective” and r 13.1.

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

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

In a practical sense, this means that Australian courts should have regard to decisions of overseas courts applying and interpreting the Model Law. In my view, the CAA and the IAA encourage this approach as the interpretative provisions specifically direct judges to have regard to the international origins of the provisions applied by the IAA, and to the desirability of the uniform application of these provisions internationally.²⁴

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

²⁴ See IAA, s 2D.

The same result is contemplated with respect to the Model Law provisions adopted in the CAA provisions.²⁵

(d) Principle of comity

The High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* reaffirmed the principle that:²⁶

Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.²⁷

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

Model Law covers the field

The previous section 21 of the IAA allowed parties to agree to have their dispute settled in accordance with a law other than the Model Law. This allowed parties to opt out of the Model Law. The 2010 amendments to the IAA repealed this section; particularly

²⁵ See CAA, s 2A.

²⁶ (2007) 230 CLR 89 at 150 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ.

²⁷ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

with the objective of making it clear that when parties choose arbitral rules they are not automatically opting out of the operation of the Model Law. In other words arbitral rules and the Model Law can coexist. This clarification was made necessary by the decision in *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461.

However, by repealing section 21 the IAA may compromise party autonomy by not allowing parties to opt out of the Model Law in favour of another law. Parties wishing to conduct an international commercial arbitration in Australia may want to apply another law or rely on a set of arbitration rules which exclude the Model Law. There seems little reason to inhibit them from doing this. In some situations such a choice will create an extra level of complexity, but arbitrators in international arbitrations are often required to apply laws from more than one country and from a variety of sources.

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

Writing requirement

The 1985 Model Law provides that 'an arbitration agreement shall be in writing'.²⁸ The writing requirements for an arbitration agreement are relaxed in the 2006 Model Law where two options are provided for the formal requirements of an arbitration agreement.²⁹ Option I still requires the arbitration agreement to be in writing, but this can include a contract that is formed orally (or by other means) and only evidenced in writing. Option II only requires an agreement between the parties and seemingly requires no formalities. The IAA adopts Option I. Consequently, an arbitration agreement must be in writing or evidenced in writing.³⁰ This is a more liberal approach than the current writing requirement in the IAA and is more liberal than most of the countries that have not adopted the 2006 Model Law.

²⁸ 1985 Model Law, Art 7.

²⁹ 2006 Model Law, Art 7.

³⁰ See sub-sections 3(1) and 3(4) of the IAA.

Article II of the New York Convention is also important when considering formal requirements. An award that does not comply with these formal requirements may suffer difficulties in enforcement as the New York Convention will not apply. Article II of the New York Convention requires an arbitration agreement in writing. This can be interpreted in a number of ways, but at its most strict could require a signed written agreement. Even if this interpretation of the New York Convention is adopted, parties seeking to enforce an arbitration award in Australia based on an arbitration agreement only evidenced in writing may ask for the more liberal approach in the IAA to be applied under Article VII(I) of the New York Convention. Article VII(I) allows a party to rely on a provision of law in the country where enforcement is sought if it is different to the New York Convention³¹. In the present example, a party could possibly rely on the more liberal writing requirement.

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

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

³¹ In this respect reference should also be made to the *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*, being the Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the [New York Convention], contained in Part Three of the *Model Law on International Commercial Arbitration 1985 – with amendments as adopted in 2006* (United Nations, Vienna, 2008), pp 39 and 40.

Court assistance and supervision

(a) Relevant Courts

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

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

There is provision in section 18 of the IAA for an authority to be prescribed for the purpose of appointing arbitrators under Articles 11(3) and (4) of the Model Law. ACICA has been prescribed as the sole default appointing authority in relation to Articles 11(3) and (4).³² In my opinion this is a very desirable development as courts are not necessarily well placed for deciding which arbitrator will be best suited to a particular dispute. It is a decision desirably left to the parties themselves or, in the absence of agreement, a professional body like ACICA, which has a greater knowledge of arbitrators and their expertise. It also saves the parties the cost and of applying to a

³² *International Arbitration Regulations 2011* (Commonwealth of Australia).

court to appoint an arbitrator when third party assistance is required. It is a step towards the systems in place in the popular arbitration centres of Hong Kong³³ and Singapore.³⁴

In relation to domestic arbitrations, the Supreme Court of the relevant state or territory is the court appointed to perform the various facilitative and supervisory functions under the CAA³⁵. Other courts can be given jurisdiction to perform these functions if the parties agree. In New South Wales both the District Court and the Local Court are available to the parties if they agree either before or after their dispute has arisen.

(b) Stay of court proceedings

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

The IAA applies these Model Law provisions internationally,³⁶ as does the CAA domestically.³⁷

³³ The Hong Kong International Arbitration Centre is appointed under section 34C(3) *Arbitration Ordinance* (Hong Kong).

³⁴ The Chairman of the Singapore International Arbitration Centre is appointed under Article 8(2) *International Arbitration Act* (Singapore).

³⁵ CAA, section 6.

³⁶ IAA, section 16.

³⁷ CAA, section 8.

(c) Specific court assistance provisions

International Arbitration Act – Additional provisions

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

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

All of the optional provisions supplement the Model Law and are generally facilitative of arbitration. Most of them apply on an opt-out basis. This is important because parties may not give specific thought to the optional provisions when drafting the arbitration agreement, and they may be unwilling to give more power to the arbitral tribunal once a dispute has arisen. The confidentiality provisions (sections 23C to 23G) only apply on an opt-in basis; as do the provisions concerning consolidation of arbitral proceedings (section 24).

Commercial Arbitration Act

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

(d) Interim Measures

International Arbitration Act

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

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

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

and applying directly to a court, rather than applying to the arbitral tribunal.³⁸ This means, however, that parties would not be able to have the entire matter dealt with by an arbitral tribunal.

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

Commercial Arbitration Act

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

³⁸ Clyde Croft and Bronwyn Lincoln, 'The role of the courts; enforcement of arbitration awards and anti-arbitration injunctions' in K E Lindgren (ed) *International Commercial Litigation and Dispute Resolution* (2010) 76.

measures ordered by the arbitral tribunal as they risk costs consequences in court in the event that such recourse is made necessary by non-compliance.

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

The Model Law provides parties with broad autonomy in making provision for the appointment of arbitrators, by agreement directly or through an agreed procedure. The position is similar with respect to challenges. In these respects reference should be made to Articles 11 to 13 of the Model Law, provisions which are applied to international arbitrations by the IAA. Nevertheless,, a party wishing to avoid arbitration has an incentive to avoid or delay the appointment or challenge process, or processes. In order to avoid any resulting deadlock the court, or possibly an “other authority” such as ACICA, as discussed above, is given a supervisory role when agreement is not reached or when arbitrators are challenged – together with power to appoint or to decide any challenge. Similar provisions apply under Article 14 of the Model Law where an arbitrator becomes *de jure* or *de facto* unable to perform his or her functions or for other reasons fails to act without undue delay. These provisions are applied by the IAA.³⁹ Similar provisions, which are taken from the Model Law, apply under the CAA.⁴⁰

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

Commercial Arbitration Act

Section 27J of the CAA, which is an addition to the Model Law, allows a party to apply to the court for a determination on a preliminary point of law. This can only occur with the consent of the arbitrator or all the other parties; so it is not a provision likely to be

³⁹ See IAA, section 16, which applies the Model Law.

⁴⁰ See sections 11 to 15 of the CAA; which also contain specific provisions to the effect that decisions by the court in this respect, within its powers, are final.

abused. Delays may arise, however, if the determinations made by the court are appealed on a regular basis; but this is unlikely under the new legislative regime.

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

Commercial Arbitration Act

Section 34 of the CAA, which is based on the Model Law, sets out the very limited grounds under which a party can apply to have an award set aside. The grounds do not cover errors of law or fact by the arbitral award, but rather deal with situations where there was no power to issue the award in the first place. Among other things an award can be set aside because the dispute is not covered by the arbitration agreement; there is not a properly constituted tribunal; the arbitration agreement is void; or the award is in conflict with the public policy of the state. The grounds are very narrow, and are unlikely to be successfully relied upon on a frequent basis. Similar grounds apply under the enforcement provisions in section 36 of the CAA.

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

should be seen as at least incorporating the more restrictive approach to appeals contained in the *Nema guidelines*.⁴¹

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

Confidentiality

International Arbitration Act

The optional provisions added by the IAA Amendment Act in sections 23C to 23G were directed at addressing a perceived deficiency in Australia in relation to the confidentiality of arbitral proceedings as a result of the decision in *Esso Australia Resources Ltd v Plowman*⁴², where the High Court of Australia decided that arbitrations were private but not confidential.

Section 23C prohibits parties and the arbitral tribunal from disclosing confidential information⁴³ except as provided for by the Act. Section 23D specifies the situations when confidential information can be disclosed such as by consent of all the parties, for the purpose of obtaining professional advice or when required to disclose by a court. Section 23E gives the arbitral tribunal the power, on application of a party, to allow disclosure of confidential information in circumstances outside s 23D. Sections 23F and 23G give the court the power to prohibit disclosure or allow disclosure, respectively, after an application under section 23E has already been made.⁴⁴ The

⁴¹ 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.

⁴² (1985) 183 CLR 10.

⁴³ Confidential information is defined in subsection 15(1) of the IAA. In summary, it includes information relating to the arbitral proceedings such as pleadings, evidence, transcripts, submissions, rulings and awards.

⁴⁴ If the arbitral tribunal’s mandate has finished then a party can apply directly to the court - s 23G(3)(a) IAA Amendment Act.

court must apply a public interest test – does the public interest lie in preserving confidentiality or in disclosure?

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

- (a) the open justice principle;
- (b) the privacy and confidentiality of arbitral proceedings;
- (c) any other public interest considerations;
- (d) the terms of any arbitration agreement between the parties to the proceedings; and
- (e) the reasons stated by the applicant under section 14G(b).

As Australia has no private arbitral appeal mechanism⁴⁵ provisions that allow private court proceedings would be beneficial.

⁴⁵ Such as the private Arbitration Appeal Tribunal system established by the Arbitrators' and Mediators' Institute of New Zealand (for more information, see: http://www.aminz.org.nz/Category?Action=View&Category_id=172).

Considering that confidentiality has always been one of the most important claimed benefits of commercial arbitration it seems surprising that the confidentiality provisions of the IAA are applied on an opt-in rather than an opt-out basis. Nevertheless any problems with confidentiality can be alleviated by practitioners being aware of these problems and making sure the parties opt in to the confidentiality provisions and also choose arbitration rules that provide for confidentiality and deal with confidentiality issues in a reasonable and practical way.

Commercial Arbitration Act

Confidentiality is one of the key benefits for parties choosing domestic arbitration. For this reason, it was important that specific confidentiality provisions be added to the Model Law provisions which are adopted domestically by the CAA. Again, this is especially the case in Australia given the concerns about confidentiality as a result of the decision in *Esso Australia Resources Ltd v Plowman*.⁴⁶ The confidentiality provisions in sections 27E to 27I of the CAA apply, crucially, on an opt out basis. The court can make orders allowing or disallowing disclosure of confidential arbitral information if the mandate of the arbitral tribunal is terminated or the arbitral tribunal has already ruled on the disclosure of the information.

Reasonable opportunity to present case

Article 18 of the Model Law states ‘... each party shall be given a *full* opportunity of presenting his case.’ [Emphasis added]. In situations where a party seeks to delay arbitration proceedings it may rely on this provision to argue that it can present evidence and submissions no matter how costly, lengthy and unnecessary they may prove to be. Although it might be said, and with considerable force, that this view

⁴⁶ (1985) 183 CLR 10.

conflicts with the objectives and approach of the Model Law and the IAA, it is at least arguable, particularly before an arbitral tribunal.

To remove doubt the IAA⁴⁷ and the new CAA⁴⁸ “amended” the “full opportunity” provision in the Model Law to provide for a “reasonable opportunity”. This will encourage parties to consider the flexibility of arbitral procedure. Clearly there needs to be proportionality between the complexity of the dispute and the procedures adopted.

Enforcement of foreign awards

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

⁴⁷ Section 18C.

⁴⁸ Section 18.

Public Policy

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

Sub-section 8(7A) of the IAA provides that:

To avoid doubt and without limiting paragraph [8](7)(b), the enforcement of a foreign award would be contrary to public policy if:

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.

This formulation is also applied to *Part II – Enforcement of Foreign Awards* of the IAA, and also the enforcement of interim measures under Sub-article 17I(1)(b)(ii) of the Model Law.⁴⁹

These provisions would not, however, appear to add a great deal to the interpretation of the provisions of either the Model Law or the New York Convention insofar as they relate to enforcement and public policy. Nevertheless it does appear that sub-section 8(7A) and section 19⁵⁰ of the IAA are narrow rather than expansive provisions. Having regard to these provisions, and also to section 2D of the IAA, which sets out the objectives of the IAA, it would appear that “public policy” is likely to be defined, and applied, narrowly in Australia.

⁴⁹ IAA s 19.

⁵⁰ Section 19 of the IAA contains provisions similar to sub-section 8(7A) with respect to interim measures of protection.

Immunity of arbitrators

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

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

This immunity of arbitrators for acts or omissions done in good faith is broader than previous immunity given to arbitrators in Australia.⁵¹ The protection also extends to entities that appoint arbitrators (eg a nominating or appointing body such as ACICA). This is a move in line with international practice and will be a factor considered in the choice of Australia as an arbitral seat.

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

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

5. 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 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.⁵²

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*.⁵³ 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.

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

⁵² The Federal Court of Australia has a panel of judges available to hear arbitration matters, but it has not established a separate list.

⁵³ See Appendix I.

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.⁵⁴ 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.

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.

⁵⁴ 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.

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.⁵⁵ 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.

⁵⁵ Practice Note No. 2 of 2010 – Arbitration Business.

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 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,⁵⁶ 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

⁵⁶ *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 Equuscorp 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.

the Court and arbitration more generally. *Arnwell Pty Ltd v Teilaboot Pty Ltd & Ors*⁵⁷ raised issues regarding court intervention in procedural decisions made by an arbitral tribunal. *Oakton Services Pty Ltd v Tenix Solutions*⁵⁸ 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*⁵⁹ involved an application 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 Appeal⁶⁰ and a recent decision of the New South Wales Court of Appeal⁶¹ 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.

⁵⁷ [2010] VSC 123.

⁵⁸ [2010] VSC 176.

⁵⁹ [2010] VSC 139 (“*Thoroughvision*”).

⁶⁰ *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346.

⁶¹ *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.

(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.

(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:⁶²

"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 1984.⁶³ 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*,⁶⁴ 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

⁶² *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 (Buchanan, Nettle and Dodds-Streton JJA)

⁶³ 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.

⁶⁴ (1990) 6 Building and Construction Law 219, 221-2.

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 Boyd⁶⁵ 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).⁶⁶ 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.⁶⁷

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'.⁶⁸ 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

⁶⁵ Lord Mustill & Stewart C Boyd QC, *The Law and Practice of Commercial Arbitration in England*, (2nd ed, 1989), 377.

⁶⁶ 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.

⁶⁷ Emphasis added.

⁶⁸ *BHP Billiton Limited v Oil Basins Limited* [2006] VSC 402 (Unreported, Hargrave J, 1 November 2006) [23].

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.⁶⁹ Byrne J captures the point in this dictum in his Honour's judgment in Schwarz:⁷⁰

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.⁷¹

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'⁷² 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.⁷³

⁶⁹ Lord Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (1st ed, 1982) 552.

⁷⁰ *Peter Schwarz (Overseas) Pty Ltd v Morton* [2003] VSC 144.

⁷¹ *Ibid* [35].

⁷² *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping* [1981] AC 909, 919.

⁷³ 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

The New South Wales Court of Appeal considered this decision in *Gordian Runoff Ltd v Westport Insurance Corporation*:⁷⁴

“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.

311, 323 (Sheller, JA); Jacobs, *Commercial Arbitration Law and Practice*, Vol 1B (update 80), [28.109].
[2010] NSWCA 57.

⁷⁴

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; 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-Summartano *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*⁷⁵ 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*.⁷⁶

“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*.⁷⁷ 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.⁷⁸ The

⁷⁵ James Eyers, ‘Battle for arbitration continues’ *Australian Financial Review* (30 April 2010) 42.

⁷⁶ *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor* [2010] VSC 139 at [58]–[58].

⁷⁷ (2007) 18 VR 346 at 367, [57] (Buchanan, Nettle and Dodds-Streeton JJA).

⁷⁸ 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-Streeton JJA); and *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.

reasoning process must be exposed so that the reader of the award can understand how and why the conclusion was reached;⁷⁹ It is clear that reasons need not be elaborate or lengthy, provided that these requirements are met.⁸⁰ The decision of the Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd*⁸¹ confirms that an arbitrator must address each issue raised for decision within the scope of the arbitration agreement.⁸² 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.⁸³”

⁷⁹ *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).

⁸⁰ See *Stefan v General Medical Council* [1999] 1 WLR 1293 at 1304.
⁸¹ (2007) 18 VR 346.

⁸² See (2007) 18 VR 346 at 364 (Buchanan, Nettle and Dodds-Streeton JJA).

⁸³ 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]).

*Winter v Equuscorp*⁸⁴ was an unsuccessful attempt to appeal from a domestic commercial arbitration award.

The two most recent decisions were made under the IAA. These were the two judgments in *Altain Khuder LLC v IMC Mining Inc & Anor*⁸⁵, judgments which are significant for a number of reasons.

First, the case involved the interpretation of the requirements of sections 8 and 9 of the IAA (as amended in 2010) for enforcement of a foreign arbitral award (provisions which reflect Articles V and IV, respectively of the New York Convention). This legislation, as amended in 2010, had not been interpreted in this respect previously.⁸⁶

Secondly, it was a determination on the basis of various authorities from other jurisdictions, as reviewed (including *Dallah v Government of Pakistan* in the Supreme Court of the United Kingdom), that the party seeking enforcement need only comply with the formal requirements of Article IV of the New York Convention (reflected in section 9 of the IAA) without any burden of proving the substantive elements of these formal requirements. The argument in *Khuder* was that the plaintiff bore the burden of establishing that one of the parties against which enforcement was sought was a party to the arbitration agreement – though not formally named as such. The judgment was significant in finding that in the particular circumstances of the case the burden lay, rather, on the party resisting enforcement to establish one or more of the defences to enforcement provided for in section 8 of the IAA (provisions which apply the defences provided for in Article V of the New York Convention); and similarly in relation to public policy issues.

⁸⁴ [2010] VSC 419

⁸⁵ [2011] VSC 1 and [2011] VSC 12

⁸⁶ The enforcement provisions of the IAA have also been interpreted in a similar fashion by Foster J of Federal Court of Australia in *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 (22 February 2011) and *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* (No 2) [2011] FCA 206 (11 March 2011).

Thirdly, there was a discussion of principles such as *kompetenz kompetenz* and the applicable or proper law to be applied in relation to various issues in the context of the application.

Fourthly, the judgment confirmed procedural aspects of an application for enforcement in the context of arguments by the defendant resisting enforcement that an initial *ex parte* proceeding was not appropriate and that there had been lack of candour on the part of the plaintiff in its application *ex parte*. The initial *ex parte* application was for procedural orders which, if not responded to by the defendant, the award debtor, would result in an order for enforcement, by default.

Fifthly, in relation to costs, I considered and applied various Hong Kong High Court decisions to the effect that a party successfully seeking enforcement of a foreign arbitral award is entitled to full indemnity costs.⁸⁷ As this was the first time that the issue had been determined in this way in Australia, this decision gave rise to a new category of special costs circumstances in international arbitrations. In line with the policy objectives of the IAA, and the views expressed in the Hong Kong case of *A v R*, this will encourage parties resisting an award debt award to do so only where necessary and justified, rather than to simply 'have a go'. Nonetheless, as I made clear in the judgment, the finding of a special category does not mean that it inexorably follows that a special costs order will be made in every case. The provision of costs remains largely discretionary.

The unsuccessful party in the *Altain Khuder* cases, the award debtor, appealed the decisions to the Victorian Court of Appeal. At the time of writing the appeal has been heard but the decision reserved.

⁸⁷ See cases such as *A v R* [2009] 3 HKLRD 389.

6. Conclusion

As has been discussed, parties entering into arbitration agreements consider a variety of factors before selecting an arbitral seat. Recent legislative reforms in Australia, both on a Federal and State level, add to its attractiveness in this respect. These reforms ensure that the domestic and international arbitral regimes in Australia are unified, and hence bolster both international and domestic arbitrations, with the promise of consistent, uniform interpretation. Nonetheless, the importance of impartial, efficient, accessible, supportive and “arbitration friendly” courts cannot be overstated. In this context, all involved in arbitration have a role to play. The continued support of legislatures and governments is essential in ensuring international best practice in arbitral legislation, and the provision of financial assistance 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. Given the growth of arbitration across the globe in recent years, the way in which these arbitral disputes are handled will influence the ongoing development of commercial arbitration.

Appendix I



Practice Note No 2 of 2010

Arbitration Business

Court Support for arbitration

1. The Court is supportive of the wishes of disputants to resolve all or part of their dispute by arbitration and will assist parties in a variety of ways, including -
 - (a) assistance and support for the arbitration process (e.g. subpoenas to witnesses or for production of documents, interim measures of protection (injunctive relief or otherwise) and orders with respect to the constitution of the arbitral tribunal);
 - (b) determination of discrete questions of law which arbitrators or parties are able to refer to the Court (depending on the statutory or other basis of the arbitration process);
 - (c) expeditious hearing and determination of appeals from the arbitration process (to the extent permitted under the statutory or other basis of the arbitration process);
 - (d) enforcement of arbitration awards and orders of arbitral tribunals (to the extent permitted under the statutory or other basis of the arbitration process); and

- (e) referring a proceeding or a question to arbitration under Chapter I Rule 50.08.
2. Court assistance is provided for all arbitration proceedings, international or domestic, and whether conducted under the *International Arbitration Act 1974* (Cth) or the *Commercial Arbitration Act 1984* (Vic). Enforcement or other proceedings with respect to arbitration conducted under these statutory provisions or under legislation in other jurisdictions (international and other Australian jurisdictions) are also available in the Court, subject to the provisions of the *International Arbitration Act 1974* or the *Commercial Arbitration Act 1984*, to the extent applicable.

International Arbitration

3. The *International Arbitration Act 1974* (s 18) confers jurisdiction on the Court to provide assistance with respect to the matters specified in Article 6 of the United Nations Commission on International Trade Law (“UNCITRAL”) *Model Law on International Commercial Arbitration 1985* (“the *Model Law*”) –
- (a) appointment of a sole or presiding arbitrator failing agreement by the parties or co-arbitrators (Article 11(3));
 - (b) appointment of an arbitrator or arbitrators where the appointment procedure agreed by the parties fails (Article 11(4));
 - (c) deciding on challenges to an arbitrator or arbitrators (Article 13(3));
 - (d) termination of the mandate of an arbitrator as a result of a failure or impossibility to act (Article 14);
 - (e) determining whether the arbitral tribunal has jurisdiction (Article 16);
- and

- (f) setting aside arbitral awards on the limited grounds specified in Article 34.
4. In addition to providing assistance under Article 6 of the *Model Law*, the *International Arbitration Act 1974* confers jurisdiction on the Court to –
- (a) enforce foreign arbitral agreements by staying a proceeding or part of a proceeding that is before the Court which invites the determination of a matter capable of settlement by arbitration which is subject to such an agreement (section 7(2));
 - (b) make interim or supplementary orders for the preservation of the rights of the parties or in relation to any property for the purpose of providing effective enforcement of arbitration agreements (section 7(3)); and
 - (c) enforce foreign arbitral awards to which the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (“the New York Convention”) applies (section 8).
5. It is noted that the jurisdiction of the Court to provide interim measures of protection (e.g. interlocutory injunctive relief for the preservation of assets or evidence, *Mareva* injunctions, search orders and the like) in partnership with the arbitration process is recognised in Article 9 of the *Model Law*.

Domestic (Australian) Arbitration

6. Domestic (Australian) arbitration is currently subject to the operation of the uniform commercial arbitration acts. The Victorian legislation is contained in the *Commercial Arbitration Act 1984*.

7. The *Commercial Arbitration Act 1984* confers jurisdiction on the Court to provide assistance to the arbitration process in a variety of matters and circumstances, including –
- (a) appointment or removal of arbitrators (sections 8, 10, 11, 13 and 44);
 - (b) ordering the attendance of witnesses or the production of documents (sections 17 and 18);
 - (c) consolidation of arbitration proceedings in some circumstances (section 26);
 - (d) correction of arbitration awards (section 30);
 - (e) enforcement of arbitration awards (section 33);
 - (f) taxation of any costs of an arbitration that are directed to be paid by an award and which are not taxed or settled by the arbitrator (section 34);
 - (g) assessment of the arbitrator's fees and expenses (section 35);
 - (h) orders in relation to the costs of an abortive arbitration (section 36);
 - (i) review of awards where there is a manifest error of law on the face of the award or there is strong evidence of an error of law where determination of the question dealt with by the award may add or be likely to add substantially to the certainty of commercial law (section 38);
 - (j) determination of a preliminary point of law with the consent of the arbitrator or of all the parties (section 39);
 - (k) setting aside an award where there has been misconduct by the arbitrator or setting aside the award in whole or in part where the arbitrator has misconducted the arbitration proceedings (section 42);
 - (l) remitting any matter for reconsideration by the arbitrator (section 43);

- (m) termination of arbitration proceedings and, possibly, removing the dispute to the Court in the event of undue delay (section 46);
- (n) the making of interlocutory orders for the purposes of and in relation to arbitration proceedings; to the same extent as may be done for the purposes of and in relation to proceedings in the Court (section 47);
- (o) extension of time periods under the *Commercial Arbitration Act 1984* or the arbitration agreement (section 48); and
- (p) staying Court proceedings to allow the arbitration to proceed (section 53).

Procedural Matters

8. Applications under the *International Arbitration Act 1974* (Cth) must be commenced by originating motion. In determining whether an arbitration is international, reference should be made to the provisions of the *International Arbitration Act 1974* and also to the UNCITRAL *Model Law* (which the provisions of this Act apply) – particularly, Article 1 of the *Model Law*. Applications under the *Commercial Arbitration Act 1984* (Vic) must also be commenced by originating motion and must comply with Chapter II, Order 9.
9. Parties seeking to bring an application must first consult with the Associate to the Judge managing Commercial Court, List G – Arbitration proceedings, to establish a hearing date and to appoint a Judge or Associate Judge to hear the application. The Prothonotary will only accept a summons with a return date authorised by this Associate.
10. An application to enforce a foreign award pursuant to the *International Arbitration Act 1974* (section 8), should, as far as possible, comply with the requirements of Chapter II, Rules 9.04 and 9.05. An application to enforce a

domestic (Australian) award pursuant to the *Commercial Arbitration Act 1984* must comply with the requirements of Chapter II, Rules 9.04 and 9.05.

11. An application to set aside a foreign award pursuant to Article VI of the New York Convention or Article 34 of the *Model Law* (see Part II and sections 16 and 20 of the *International Arbitration Act 1984*) should, as far as possible, comply with the requirements of Chapter II, Rules 9.04 and 9.05.
12. An application for leave to appeal against an arbitrator's award under the *Commercial Arbitration Act 1984* must comply with the requirements of Chapter II, Rule 9.06 and Chapter I, Rules 4.06 and 4.07.
13. Subject to any direction of the Judge or Associate Judge hearing the application, practitioners must deliver to the Judge or Associate Judge, not less than two clear days before the time appointed for the hearing of the application, a copy of all affidavits including exhibits together with a brief outline of argument in support of the application.
14. From time to time urgent interlocutory applications arise in the course of arbitrations. The Court will be available on very short notice to hear and promptly determine these applications. The following provisions shall apply to applications which are accepted by the Judge managing Commercial Court, List G, as urgent.
 - (a) The applicant should deliver to the Associate to this Judge at the time of seeking to bring the application a copy of the application and of all affidavits including exhibits and a brief outline of argument in support of the application.
 - (b) The practitioner for the respondent should as soon as practicable and in any event on the day prior to the hearing of the application (if possible in all the circumstances) deliver to the Associate to the Judge or

Associate Judge appointed to hear the application, a copy of all affidavits including exhibits filed in opposition together with a brief outline of argument.

- (c) If all parties to the application so request, the judicial officer appointed to hear the application may agree to determine the application within 24 hours of the completion of argument provided that in such a case no reasons for the decision will be provided at the time of determination. Any party requiring reasons must so advise the judicial officer at the time of the determination and the judicial officer will provide reasons, but they will be in short form. Reasons in short form will be simply statements, without elaboration, of the findings of fact and principles of law which lead to the determination.
- (d) If the application is one that is properly made ex parte, this should be clearly stated in all communications with the Associate to the Judge. Such communications need not be copied to the respondent until the interim determination of the application.
- (e) Where an application for an interlocutory order offers, or the court accepts, or an order or other Court document records the giving of “the usual undertaking as to damages”, this shall be taken to mean the following undertaking given to the Court:

To abide by any order which this Court might make as to damages, in case this Court shall be of the opinion that any person shall have sustained any loss, by reason of this order, which the party giving the undertaking ought to pay.

15. These procedural arrangements will apply notwithstanding the Commercial Court Practice Note No. 1 of 2010. Otherwise, the Commercial Court Practice Note is applicable.

Commercial Court – Arbitration Proceedings

16. The Chief Justice has appointed the Hon. Justice Croft to manage Commercial Court, List G – Arbitration proceedings. All arbitration proceedings, any applications in arbitration proceedings, and any urgent applications with respect to arbitration matters, should be directed to His Honour's Associate (telephone: 03.9603 7731).
17. Arbitration matters arising in proceedings already allocated to the Technology, Engineering and Construction List (TEC List) will continue to be managed within that List by the Hon. Justice Vickery, though they may be transferred to List G in accordance with the usual practice applied in the Commercial Court with respect to the transfer of matters between lists in that Court. The same position applies with respect to the possibility of transfer of arbitration matters from List G to the TEC List.
18. Any changes in these arrangements will be notified from time to time on the Commercial Court website – www.commercialcourt.com.au
19. This Practice Note takes effect on and from 1 January 2010.
20. This Practice Note is in substitution for Practice Note No. 7 of 2006 which is hereby revoked.

Vivienne Macgillivray

Executive Associate to the Chief Justice

17 December 2009