GETTING THE DEAL THROUGH

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Arbitration

in 33 jurisdictions worldwide

Contributing editors: Gerhard Wegen and Stephan Wilske

2007

Published by
GLOBAL ARBITRATION REVIEW
in association with:
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GLOBAL ARBITRATION REVIEW
THE INTERNATIONAL JOURNAL OF PUBLIC AND PRIVATE ARBITRATION

Australia

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LAWS AND INSTITUTIONS

International multilateral conventions

1 Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when is the Convention in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to arbitration is your country a party to?

Australia has been a signatory to the New York Convention since 1975. Australia's accession to the New York Convention is without reservation and extends to all of its current territories. Australia is also a signatory to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID).

International bilateral agreements

2 Do bilateral agreements relating to arbitration exist with other countries?

Australia is a party to a number of bilateral investment treaties, for example, with China (1988), Vietnam (1991), Papua New Guinea (1991), Poland (1992), Hungary (1992), Indonesia (1993), Romania (1994), Czech Republic (1994), the Philippines (1995), Laos (1995), Argentina (1997), Peru (1997), Pakistan (1998), Chile (1999), India (2000), Egypt (2002), Lithuania (2002) and Uruguay (2003).

Bilateral investment treaties with Turkey, the United Mexican Governments and Sri Lanka have been signed but are not yet in force. Arbitration under the ICSID Convention is the designated dispute resolution procedure under most of these treaties.

Australia is also party to free-trade agreements with New Zealand (1989), Singapore (2003), Thailand (2005) and the United States (2005). Free-trade agreements are under negotiation with ASEAN (together with New Zealand), China, Malaysia and under consideration with the Gulf Cooperation Council and Japan. With the exception of the Australia–US Free-Trade Agreement, all other free-trade agreements offer investor–state arbitration for the resolution of disputes.

Domestic arbitration law

3 What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards in your jurisdiction?

Australia's legislative powers are divided between the Commonwealth of Australia, as the federal entity, and the six states. In addition there are two federal territories with their own governments. International arbitrations are governed by the International Arbitration Act 1974 (Cth) (IAA). Domestic arbitrations are governed by the relevant Commercial Arbitration Act (CAA) of each state or territory where the arbitration takes place. Following amendments made in 1984 and 1993, the CAAs of the states and territories are largely uniform. For international arbitrations the UNCITRAL Model Law has the force of law in Australia (section 16 of the IAA).

4 Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

No, only international arbitrations are governed by the UNCITRAL Model Law. For domestic arbitrations, the CAAs provide for an arbitration procedure that is quite distinct from that under the Model Law.

For example, whereas recourse against an award under the Model Law is only possible within the narrow grounds of its article 34, judicial review of an award under the CAA (section 38) is possible, subject to appeal by a party, in respect of a manifest error of law on the face of the award (section 38(5)(b)(i) CAA) or where strong evidence exists that the arbitrator made an error of law and where the determination of that question may add substantially to the certainty of commercial law (section 38(5)(b)(ii) CAA).

Mandatory provisions

5 What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

According to section 14 of the CAA, the arbitrator may conduct proceedings under the arbitration agreement as the arbitrator thinks fit. This broad power is, however, subject to certain limitations. As a general rule, the arbitrator must conduct proceedings in accordance with the principles of procedural fairness and natural justice. For example, the arbitrator must be impartial and independent and each party must be given an opportunity to present its position. Apart from that, the CAA gives parties a great degree of freedom to tailor the arbitration process according to their individual needs.

Substantive law

6 Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Section 22 of the CAA provides that unless the parties agree otherwise in writing, the arbitrator shall make any determina-

tion according to law. The arbitrators may act as *amiables compositeurs* only if the parties so choose and agree in writing. The Model Law provides similar provisions (article 28) with regard to international arbitrations.

Arbitration institutions

7 What is (or are) the most prominent arbitration institution(s) in your country?

The Australian Centre for International Commercial Arbitration (ACICA) is arguably the most prominent arbitral institution in Australia. ACICA administers domestic and international arbitrations conducted under the ACICA Arbitration Rules and also provides a range of other arbitration-related services. In July 2005, ACICA released its new arbitration rules. Based on the UNCITRAL Arbitration Rules, the ACICA Rules provide an advanced, efficient and flexible framework for the conduct of arbitrations. ACICA operates in close cooperation with the Australian Commercial Disputes Centre (ACDC), which offers administrative and other services in relation to domestic arbitration and ADR (see www.acica.org.au and www.acdcltd.com.au).

Another prominent institution is the Institute of Arbitrators and Mediators Australia (IAMA see www.iama.org.au).

The International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) are both represented in Australia. The LCIA has an Australian chapter as part of its Asia-Pacific Users' Council. ICC-Australia has offices in Sydney and Melbourne. The Australian chapter of the Chartered Institute of Arbitrators is also very active.

ARBITRATION AGREEMENT

Arbitrability

8 Are there any types of disputes which are not arbitrable?

There are few statutory provisions that render certain disputes not arbitrable. Section 11 of the Carriage of Goods by Sea Act 1991 (Cth) declares void an arbitration agreement in a bill of lading or similar document relating to the international carriage of goods to or from Australia, unless the arbitration agreement provides that the place of arbitration is in Australia. Further, section 43 of the Insurance Contracts Act 1984 (Cth) and section 19 of the Insurance Act 1902 (NSW) affect the arbitrability of insurance-related disputes in that an arbitration clause is not binding unless the parties agreed to arbitration after the dispute arose. In *HIH Casualty & General Insurance Limited (in liquidation) v Wallace* [2006] NSWSC 1150 this was held to also extend to reinsurance contracts.

Australian courts have generally taken a positive approach towards the arbitrability of disputes. The question of whether a dispute is arbitrable usually arises in the context of applications to stay court proceedings. Section 7(2)(b) of the IAA, provides that the court must stay its proceedings if there is a valid arbitration agreement and the dispute involves the termination of a matter that, in pursuance of the arbitration agreement, is capable of settlement by arbitration. Matters capable of settlement by arbitration have been interpreted as "any claim for relief of a kind proper for determination in a court" (*Elders CED Limited v Davo Corporation* (1984) 59 ALR 206).

The issue of which disputes are capable of settlement by arbitration has not yet been finally resolved. Especially in relation to competition, bankruptcy and insolvency matters, courts have occasionally refused to stay proceedings though without expressly holding that these matters are inherently not arbitrable. Instead, most court decisions have considered whether the scope of the arbitration agreement is broad enough to cover such disputes (see for example *ACD Tridon Inc v Tridon Australia* [2002] NSWSC 896).

Such considerations commonly arise in relation to the Trade Practices Act 1974 (Cth) – Australia's competition and consumer protection legislation. In *IBM Australia Ltd v National Distribution Services Ltd* [1991] 22 NSWLR 466, the New South Wales Court of Appeal held that some issues relating to consumer protection under the Trade Practices Act are capable of settlement by arbitration. More recently, the NSW Supreme Court in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* [1996] 39 NSWLR 160 and the Federal Court in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers* [1998] 159 ALR 142, confirmed that disputes based on section 52 of the Trade Practices Act (relating to misleading or deceptive conduct) are arbitrable.

However, in *Petersville Ltd v Peters (WA) Ltd* (1997) ATPR 41-566 and *Alstom Power Ltd v Eraring Energy* (2004) ATPR 42-009 the Federal Court took a slightly different position and held that disputes under part IV of the Trade Practices Act (anti-competitive behaviour) are more appropriately dealt with by the court – irrespective of the scope of the arbitration agreement. These decisions show that courts might be reluctant to allow the arbitrability of competition matters and seek to preserve the courts' jurisdiction to hear matters that have a public dimension.

Concerning the arbitrability of insolvency matters, please see *Tanning Research Laboratories Inc v O'Brien* [1990] 64 ALJR 211, reported in *Yearbook Commercial Arbitration XV* (1991), pp 521–529.

Requirements

9 What formal and other requirements exist for an arbitration agreement?

With regard to international arbitrations in Australia, both the Model Law and the New York Convention prescribe form requirements for arbitration agreements. For the purposes of enforcing foreign arbitral awards and where the IAA applies without the Model Law (ie, where the parties have opted out of the Model Law), article II(2) of the New York Convention sets out the form requirements. Although an agreement in writing is required by both the New York Convention and the Model Law, the Model Law definition is more expansive. Article 7(2) of the Model Law allows the arbitration agreement to be communicated in any form that provides a record of the agreement. In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 it was confirmed that an arbitration clause contained in an exchange of letters was sufficient to fulfil the writing requirement. Although there is no Australian authority on the potential of a waiver of formal requirements by the parties, it is arguable that at the enforcement stage a court will not accept an objection that the arbitration clause does not meet formal requirements where there was ample opportunity for the party to object during the arbitration proceedings (see *Overseas Cosmos Inc v Mr Vessel Corp* (1997) 12 *Mealey's International Arbitration Reports* I-1 at I-4).

For arbitrations conducted under one of the CAAs, section 4(1) merely requires the arbitration agreement to be in writing. There is no express requirement for the agreement to be signed and the requirement of writing is not further specified. In general no distinction is drawn between the submission of an existing dispute to arbitration and an arbitration clause providing for the reference of future disputes to arbitration.

Under Australian law there is no limitation on a government or government entity being a party to an arbitration in Australia. Section 5 of the CAA and section 2B of the IAA specifically provide that the Crown is bound by the Act.

Enforceability

10 Under what circumstances is an arbitration agreement no longer enforceable?

Some statutory provisions render arbitration agreements in certain types of contract invalid. For example, section 43 of the Insurance Contracts Act 1984 (Cth) renders an arbitration clause in a contract of insurance void unless the agreement to arbitrate was made after the dispute or the difference arose (see also comments on section 19 of the Insurance Act 1902 (NSW) in paragraph 8 above). A similar provision can be found in section 7C of the Home Building Act 1989 (New South Wales) and section 14 of the Domestic Building Contracts Act 1995 (Victoria) (see *Age Old Builders Pty Limited v Swintons Pty Limited* [2003] VSC 307).

Third parties

11 In which instances can third parties or non-signatories be bound by an arbitration agreement?

This issue is regularly discussed in connection with the piercing of the corporate veil. Although Australian courts are reluctant to challenge the traditional separate legal entity principle, there are a number of circumstances in which the courts have considered whether the independent autonomy of the parties to the contract might be pierced so that the binding character of the agreement is extended to the parent company or another entity closely related to it.

On occasion, Australian courts have adopted the alter ego principle in relation to questions of agency. For example, courts have held that where the shareholders have a level of control over the company that is a party to the arbitration agreement, the acts of the company are in certain circumstances considered to be acts of the shareholders (*Brewarrana Pty Ltd v Commissioner of Highways* (1973) 4 SASR 476). Courts have also held that a non-signatory is bound by the arbitration agreement where the company structure used when entering into the arbitration agreement was a sham or façade, or incorporated for the purposes of masking the real purpose of the parent company (*Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449).

Further, where the parent company had a clear and unambiguous intention to use the corporate structure in such a way, as to deny the plaintiff certain pre-existing legal rights, for example in case of fraud, the courts have also allowed for a piercing of the corporate veil.

Group of companies

12 Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the so-called 'group of companies' doctrine?

Australian courts have shown much reluctance to recognise the group of companies doctrine. In *Heytesbury Holdings Pty Ltd v City of Subiaco* (1998) 19 WAR 440 it was held that a parent company exercising control of its subsidiary does not itself justify treating acts of the subsidiary as those being of the parent company. But as *Qintex Australia Finance Limited v Schroders Australia Limited* (1990) 3 ACSR 267 suggests, the question as to whether or not the group of companies doctrine applies is far from settled.

Multiparty arbitration agreements

13 What are the requirements for a valid multiparty arbitration agreement?

A multiparty arbitration agreement must comply with the general form requirements for arbitration agreements. Most importantly all must be party to the arbitration agreement. Parties should be aware that neither the IAA, the Model Law or the CAA provide for a specific procedure for the appointment of arbitrators in multiparty disputes.

Most arbitration rules, however, have incorporated special rules for the appointment of arbitrators in multiparty situations, so parties should generally refer to such rules in their arbitration agreement. Article 11 of the Arbitration Rules of the Australian Centre for International Commercial Arbitration (ACICA), for example, expressly provides for a procedure for the appointment of arbitrators in a multiparty dispute.

CONSTITUTION OF ARBITRAL TRIBUNAL

Appointment of arbitrators

14 Are there any restrictions as to who may act as an arbitrator?

Australian laws do not impose any restrictions as to arbitrators' professional qualifications, nationality or residency. All arbitrators, however, must be independent and impartial.

15 Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

For international arbitrations, article 11(3) of the Model Law provides that, subject to the parties agreeing otherwise, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator. If a party fails to appoint the arbitrator within 30 days of receipt of the request to do so from the other party, or the two arbitrators fail to agree on a third arbitrator within 30 days of their appointment, the appointment shall be made, upon the request of the party, by the Supreme Court of the state or the territory in which the arbitration is conducted.

In addition, article 11(4) of the Model Law provides that where: (i) any of the parties fails to comply with the agreed appointing procedure; (ii) the parties, or the two arbitrators, are unable to reach an agreement expected of them under such procedure; or (iii) a third party, including an institution, fails to perform any function entrusted to it under any such procedure, any party may request the Supreme Court of the state or territory in which the arbitration takes place to take necessary measures for the appointment of the arbitrator or tribunal.

In relation to domestic arbitrations, sections 7 and 8 of the CAA provide a default procedure for the appointment of arbitrators. Section 7 of the CAA provides that in the absence of an agreed appointment process, the parties shall jointly agree on an arbitrator (note that section 6 of the CAA states that the arbitration shall be conducted by a single arbitrator unless agreed otherwise by the parties). Ultimately, in case of persisting default of one party, the court has the power to fill any vacancy in the arbitral tribunal pursuant to section 10 of the CAA upon the application of the other party.

Challenge and replacement of arbitrators

16 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, the procedure, including challenge in court.

Under article 12(2) of the Model Law arbitrators may be challenged if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess the agreed qualifications. The same standards of impartiality and independence apply for party-nominated and neutrally-appointed arbitrators.

Article 12(1) of the Model Law applies the justifiable doubts tests. At common law, Australian courts apply the reasonable suspicion or reasonable apprehension test. In *Gas and Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Limited* [1978] VR 385, the Supreme Court of Victoria decided that suspicion is established if a party or the public would reasonably consider the arbitrator did not or would not decide the dispute in a fair and unprejudiced manner. This test was reworded to the 'reasonable apprehension' test in *Livesey v New South Wales Bar Association* (1983) 151 CLR 294.

With regard to the procedure for challenges, article 13 of the Model Law states that the parties may agree on a procedure and, failing such an agreement, the challenge shall proceed in accordance with article 13(2) of the Model Law. Article 13(2) provides for the challenge to be submitted to the arbitral tribunal in the first instance. If the arbitral tribunal rejects such challenge, the challenging party may request the court to decide.

The test in article 12(2) of the Model Law has also been accepted as a standard for domestic arbitrations in this respect (*Gascor v Ellicott* [1997] 1 VR 332). For arbitral proceedings under the CAAs, section 44 allows the court, on application of a party to the arbitration agreement, to remove the arbitrator or umpire where it is satisfied that:

- there has been misconduct on the part of an arbitrator;
- undue influence has been exercised relating to an arbitrator; or
- an arbitrator is incompetent or unsuitable to deal with the particular dispute.

The CAAs expressly state that an arbitrator may be challenged, even by the party that appointed him or her (section 45(1) CAA).

Relationship between parties and arbitrators

17 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses and liability of arbitrators.

Although the type of relationship between the parties, the arbitrators and the arbitral institution – where applicable – depends on the type of arbitration and the chosen rules, it is generally accepted that there exists a tripartite agreement between each of the parties and the arbitrators.

In Australia, arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrator. They will, however, be liable for fraud in respect of acts or omissions in that respect (see section 28 of the IAA and section 51 of the CAA). Although there appears to be no case authority on this issue from Australian courts, it is likely that these provisions will not excuse an arbitrator for breaches of the contract between him or her and the parties. But the implication is that the arbitrator has a certain degree of immunity unless found guilty of gross misconduct that amounts to fraud.

JURISDICTION

Court proceedings despite arbitration agreement

18 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

With regard to international arbitrations, article 8(1) of the Model Law provides that where an action is brought before a court in a matter that is the subject of an arbitration agreement, the court shall, upon request of a party, refer the parties to arbitration unless it finds that the arbitration agreement is incapable or void, or the dispute is not one that is capable of settlement by arbitration. A party has to raise this objection by the time it makes its first submissions on the substance of the dispute.

Where the Model Law does not apply, section 7 of the IAA contains a similar provision, according to which a court shall stay the court proceedings and refer the matter to arbitration by order, upon such conditions (if any) as it thinks fit.

For domestic arbitrations, section 53 of the CAA gives the court a discretionary power to stay proceedings if it is satisfied that:

- there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
- the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration.

An application in this respect shall not, except with the leave of the court, be made after the applying party has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance.

Jurisdiction of arbitral tribunal

19 What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

For international arbitrations, article 16 of the Model Law enacts the *Kompetenz–Kompetenz* principle, pursuant to which arbitrators may rule on their own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement.

The CAAs do not contain an equivalent provision. The position at common law is that arbitrators may rule on their own jurisdiction, at least if the parties have prima facie concluded an agreement to arbitrate (see *Ferris v Plaister* (1994) 34 NSWLR 475). However, the position at common law is not so clear if there is a dispute concerning the initial existence or validity of a contract containing an arbitration clause or a dispute concerning the existence of the arbitration clause. In practice, arbitral proceedings will generally continue notwithstanding a court challenge to the arbitrator's jurisdiction. But if there is a dispute concerning the initial existence of a contract, arbitrators will usually adjourn arbitral proceedings while those issues are resolved by a court.

ARBITRAL PROCEEDINGS

Place and language of arbitration

20 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

For international arbitrations, article 20(1) of the Model Law provides that parties may agree on the place or seat of arbitration. Failing such agreement, the place or seat is decided by the arbitral tribunal. There is no requirement that hearings be held at that seat. The arbitral tribunal may decide to hold the hearings or meetings in a place (venue) other than the seat (article 20(2) of the Model Law).

For arbitrations conducted under the CAAs, common law suggests that arbitrators are authorised to determine the place of arbitration on the basis that this is a procedural matter entrusted to them (see *Whitwhan Trustees* [1894] 39 Sol JO 692).

For arbitrations under the ACICA Rules, where the parties have not chosen a seat, the seat of the arbitration will be Sydney (article 19.1 ACICA Rules).

Commencement of arbitration

21 How are arbitral proceedings initiated?

The mechanism for commencing arbitral proceedings largely depends on what the parties have agreed to, in particular which arbitration rules have been chosen.

For international arbitrations, proceedings are usually initiated by a notice of arbitration which is submitted to the respondent (or the institution). The statement of claim is to be submitted within the time agreed by the parties or as a determined by the arbitral tribunal (article 23 of the Model Law).

According to article 21 of the Model Law, the arbitration is deemed to have commenced on the date when the request for arbitration is received by the respondent.

For domestic arbitrations, section 3(5) of the CAA provides that an arbitration may be commenced by:

- serving a notice on the other party requesting the appointment of an arbitrator;
- serving a notice on the other party requiring the other party to refer, or to concur in the reference of, the dispute to arbitration; or
- taking any other step contemplated in the arbitration agreement in regards to referring the dispute to arbitration.

Under the ACICA rules arbitration proceedings are initiated by giving a notice of arbitration to ACICA (article 4.1 ACICA Rules).

Hearing

22 Is a hearing required and what rules apply?

Arbitrators must ensure that parties are treated equally and that each party is given a proper opportunity to present its case. This requires an arbitrator to give the parties proper notice of any hearing or meeting for the purposes of inspecting goods, properties or documents.

For arbitrations under the Model Law article 24 requires a tribunal to hold a hearing upon request by a party, unless both parties agree otherwise.

Section 14 of the CAA states that subject to this Act and to the arbitration agreement, the arbitrator may conduct proceedings under that agreement in such circumstances as the arbitrator thinks fit. The limitation of 'subject to the Act' means that mandatory provisions must be followed, but in practice there are few mandatory provisions concerning the arbitral procedure set out in the CAA.

Evidence

23 By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Arbitrators conducting proceedings under the Model Law are not bound by the local rules of evidence. They have considerable freedom to determine the facts. Article 19(2) of the Model Law provides that the tribunal may determine the admissibility, relevance, materiality and weight of evidence. The tribunal, or the parties with the tribunal's approval, may also request assistance in the taking of evidence from a competent court. In that case, the court would apply its own rules regarding the taking of evidence.

The CAA also provides a liberal approach as to the rules of evidence (section 19(3) of the CAA). Arbitrators may inform themselves as they think fit. Parties can, by agreement, however, require the arbitrator to apply certain rules of evidence. Further, section 19(1) of the CAA provides that, subject to a contrary intention in the arbitration agreement, evidence before the arbitrator may be given orally or in writing and shall, if the arbitrator so requires, be given on oath or affirmation or by affidavit. In practice, written evidence is common.

Arbitrators may order parties to produce documents (see articles 17 and 19(2) of the Model Law and section 14 of the CAA). But arbitrators may only make orders with respect to the parties to the proceedings. If a discovery order is required over a non-party, court assistance may be necessary. As with evidentiary procedures generally, the discovery process in Australian arbitrations is influenced by the common law system. Limited discovery has, however, become the common practice used in commercial courts as well as in domestic arbitration.

Subject to a contrary agreement by the parties, arbitral tribunals are authorised to appoint one or more expert witnesses to assist them (article 26 of the Model Law and section 19(3) of the CAA). In practice, an arbitrator will generally seek the consent of the parties before deciding to appoint an expert.

Upon request, a court can issue subpoenas ordering a witness to appear (see article 27 of the Model Law and section 17 of the CAA).

Court involvement

24 In what instances can the arbitral tribunal request assistance from a court and in what cases may courts intervene?

The courts' powers under the Model Law are very restricted. However, courts may:

- appoint arbitrators where the parties or the two party-appointed arbitrators fail to agree on an arbitrator (articles 11(3) and 11(4) of the Model Law);
- decide on a challenge of an arbitrator if so requested by the challenging party (article 13(3) of the Model Law);
- decide, upon request by a party, on the termination of a mandate of an arbitrator (article 14 of the Model Law);
- decide on the jurisdiction of the tribunal, where the tribunal has ruled on a plea as a preliminary question, and a party has requested the court to make a final determination its jurisdiction (article 16(3) of the Model Law);

- assist in the taking of evidence (article 27 of the Model Law);
- set aside an arbitral award (article 34(2) of the Model Law); and
- grant interim measures of protection (article 9 of the Model Law).

The powers of the courts under the CAAs are slightly broader. For example, in addition to the powers in regards to the appointment and challenge of arbitrators, a court may, on the application of a party, issue subpoenas under section 17 of the CAA.

Further, under section 40 of the CAA, the Supreme Court may determine any question of law arising in the course of the arbitration, given that the arbitrator has consented to such application by a party, or where all parties have agreed to this.

Confidentiality

25 Is confidentiality ensured?

The question of confidentiality was stressed by the High Court of Australia in *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10). The court confirmed that arbitral proceedings and hearings are private in the sense that they are not open to the general public.

The court, however, took a different position with respect to documents and information concerning the arbitration. It was held that documents voluntarily produced by a party to arbitral proceedings are not automatically confidential. Parties may agree in their arbitration agreement that documents be kept confidential, but such an agreement is not implied merely by the fact parties having agreed to arbitrate. A different rule was set down by the court with respect to documents produced under compulsion, such as documents subject to discovery order. Those documents are confidential and may only be produced with the consent of the party to whom they belong or when a person is compelled by law to produce them.

INTERIM MEASURES

Interim measures by the courts

26 What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Article 9 of the Model Law provides that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for the court to grant such a measure. In general, the CAAs allow for a higher level of intervention by the courts than the Model Law. Section 47 of the CAA confers on the court the same power to make interlocutory orders for the purposes of, and in relation to, arbitration proceedings as it does for proceedings in the courts. However, in *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical and Electrical Engineers Pty Limited* [1994] 2VR 386, it was emphasised that the purpose of section 47 is not to allow courts a greater influence in the arbitral proceedings, but rather to facilitate and support arbitral proceedings.

There is currently debate whether an Australian court is entitled to also grant interim measures of protection (eg, a *Mareva* injunction) in support of foreign arbitrations, as article 1(2) of the Model Law specifically allows the application of article 9 for arbitrations with a foreign seat. Although the position in Australia is yet to be tested it is possible that Australian courts will follow the decision of the High Court of Singapore in *Front Carriers Ltd v Atlantic Shipping Corp* [2006] SGHC 127 granting such interim measure of protection in support of arbitration proceedings in England, as Singapore's arbitration laws are very similar to those in Australia.

Interim measures by the arbitral tribunal

27 What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Subject to any contrary agreement of the parties, article 17 of the Model Law empowers the tribunal to 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 arbitral tribunal may require a party to provide appropriate security in connection with such a measure. Measures ordered under article 17 of the Model Law must be in respect of the subject matter of the dispute. Therefore, unless agreed otherwise by the parties, the arbitrators may not be entitled to order security for costs of the proceedings (see for example article 28.2(e) of the ACICA Arbitration Rules, which expressly allows for security for costs).

Parties may also adopt the optional provisions in section 23 of the IAA, which provide for the enforcement of interim measures under chapter VIII of the Model Law.

Although the CAAs do not explicitly refer to the arbitrator's power to order interim measures, a number of provisions are relevant. Section 14, for example, allows arbitrators to conduct the proceedings as they think fit. Section 37 of the CAA provides that the parties shall at all times do all things that the arbitrator requires to enable a just award to be made, and no party shall wilfully do or cause any act to delay or prevent any award being made. Finally, section 23 of the CAA confers on an arbitrator the power to make an interim award, unless a contrary intention is expressed in the arbitration agreement.

AWARDS

Decisions by the arbitral tribunal

28 Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences if an arbitrator refuses to take part in a vote or sign the award?

Article 29 of the Model Law requires that, unless agreed otherwise by the parties, any decision of the arbitral tribunal shall be made by a majority of its members. Questions of procedure, however, may be decided by the presiding arbitrator, if so authorised by the parties or all members of the tribunal. Article 31(1) of the Model Law states that the signature of the majority of the members of the tribunal is sufficient, provided that reasons for the omission of the signature are given.

Form and content requirements

29 What form and content requirements exist for an award? Does the award have to be rendered within a certain time limit?

Form requirements under the CAAs and the Model Law differ slightly. Article 31 of the Model Law for example requires the award to be in writing and signed by the arbitrators. The award must contain reasons, state the date and place of arbitration, and be delivered to each party in original form.

The form requirements under section 29 of the CAA are similar. If the parties agree that an award shall not be made in writing, however, section 29(2) of the CAA provides that the arbitrators shall, upon request by a party within seven days after making the award, give that party a statement in writing signed by the arbitrator containing the terms and reasons for making the award. The CAAs, in contrast to the Model Law, do not require the award to mention the date and place it was made.

Where the award is to be signed, it should be noted that where the arbitration is conducted by more than one arbitrator, the arbitrators should execute the award in the presence of each other, otherwise it may be invalid (see *Wade v Dowling* (1854) 4 E&B 44).

Neither the CAA nor the Model Law impose an obligation on the arbitrators to render the award within a certain time limit.

Date of award

30 For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Under article 34 (3) of the Model Law an application to set aside the award may only be made within three months of the date when the award has been received by the party making the application. A request for correction of the award under article 33 of the Model Law may only be made within 30 days after the party has received the award.

The CAAs do not stipulate particular time limits. However, the Supreme Court Rules of the states and territories stipulate time limits for appeals (insofar as provided for under the CAAs). Rule 5(1)(b), for example, allows an application to the court to be made only within 28 days of the date on which notice of the award is given by the arbitrator.

Types of awards

31 What types of awards are possible and what types of relief may the arbitral tribunal grant?

Subject to any contrary agreement between the parties there are presently no limits to the remedies that an arbitrator may award. The question, however, whether punitive or exemplary damages may be awarded by an arbitrator has not yet come before the courts.

Termination of proceedings

32 By what other means than an award can proceedings be terminated?

Under the Model Law, proceedings may be terminated (other than by an award) if:

- the claimant fails to communicate his statement of claim within the time provided and in the form required under article 23(1);
- the parties settle the dispute before the issuing of an award;
- the claimant withdraws its claim (although proceedings may not be terminated if the respondent objects and the tribunal recognises that the latter has a legitimate interest in obtaining final settlement of the dispute);
- the parties agree that the proceedings be terminated; or
- the tribunal determines that continuation of the proceedings has become unnecessary or impossible for any other reason. In this case the tribunal must first give the parties notice of its intention to terminate the proceedings, and may then do so unless a party raises justifiable grounds for objection.

Arbitrations under the CAAs may be terminated by the court (upon application by one of the parties or an arbitrator) where there has been undue delay by a party in taking necessary steps to have a dispute referred to or dealt with by arbitration (section 46(2)(a) of the CAA).

Cost allocation and recovery

33 How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The Model Law makes no provision for the allocation or recovery of costs.

Section 27(1) of the IAA (optional) provides that, except where otherwise agreed by the parties, the allocation of costs shall be at the arbitral tribunal's discretion.

The ACICA Arbitration Rules provide a more specific framework for the allocation and recovery of costs in awards. According to article 41.1 of the ACICA Rules, costs are usually borne by the unsuccessful party. Further, article 41.2 of the ACICA Rules gives the arbitral tribunal the discretion to apportion the legal and other costs of the successful party between the parties if it is deemed reasonable to do so, taking into account the circumstances of the case.

Costs may also be awarded against a party where that party has claimed and was granted interim measures of protection that were later found to have been unjustified (article 28.7).

The allocation of costs under the CAAs is very similar and is left to the discretion of the arbitrator. The arbitrator may:

- make directions as to who should bear the costs and the method of payment;
- settle the amount of costs to be paid or any part thereof, or arrange for an assessment of costs; or
- award costs to be assessed or settled as between party and party or as between legal practitioner and client.

In exercising discretion the arbitrators must take into account any refusal or failure by a party to do all that is required by the arbitrator to enable a just award to be made (as required by section 37 of the CAA).

Other than the fees and expenses of the tribunal, any costs directed to be paid that are not settled by the arbitrator must be assessed (see *Morgan Belle Pty Ltd v API Services (Vic) Pty Ltd* [2005] SASC 488).

Interest

34 May interest be awarded for principal claims and for costs and at what rate?

The Model Law contains no provisions relating to the awarding of interest.

Section 25 of the IAA (optional) enables the arbitrators to make an award on interest on the whole or any part of a principal claim at such reasonable rate as the arbitrator determines. Interest may be awarded for the whole or any part of the period between the date on which the cause of action arose and the award date. Compound interest is not authorised.

Under section 26 of the IAA (optional), where the arbitrator has made an award for the payment of money, he may direct a party to pay interest on any unpaid portion from the date of the award or a specified future date.

The CAAs are similar to the IAA, although the rate of interest awarded on a principal claim may not exceed the rate of interest payable on a judgment debt of the Supreme Court. In addition, the CAAs provide that the arbitrator may award interest on a

debt or on an amount of liquidated damages where arbitral proceedings have been brought for its recovery and it has been paid in full or in part during the course of the proceedings.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

35 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Article 33 of the Model Law provides for correction and interpretation of arbitral awards. Within 30 days of receipt of the award, a party may request the arbitral tribunal correct any computation, clerical or typographical errors in the award. The arbitral tribunal may also correct such errors on its own initiative. But interpretations of awards may only be given if there is an agreement by the parties for the tribunal to do so. The CAAs contain no provisions for an arbitrator to interpret an award. Section 30, however, empowers the arbitrator or the court, on application of a party, to make an order correcting the award if it contains a clerical mistake, an error arises from an accidental slip or omission, a material miscalculation of figures, a material mistake in the description of any person, thing or matter referred to in the award or a defect of form.

In *Form-Quip Ltd v Trafalgar Properties Ltd* (unreported, NSW Sup Ct, 19 July 1990) it was held that the compliance with and performance of an award does not exclude that party applying for a correction.

Challenge of awards

36 How and on what grounds can awards be challenged and set aside?

Under the Model Law the exclusive recourse against an award is an application for setting aside the award. The grounds upon which an award may be set aside (article 34(2) of the Model Law) mirror the grounds for refusing recognition and enforcement of a foreign award under article V of the New York Convention.

Under the CAAs, recourse against an award is dealt with very differently. Section 38(2) of the CAA allows for an appeal to the Supreme Court on any question of law arising out of an award. But an appeal may only be brought either with the consent of all parties to the arbitration agreement or with the leave of the Supreme Court (section 38(4) of the CAA).

The Supreme Court will not grant leave unless it considers that the determination of the question of law would substantially affect the rights of one or more parties to the arbitration agreement and there is either a manifest error of law on the face of the award or strong evidence exists that the arbitrator made an error of law and that determination of the question may add substantially to the certainty of commercial law (section 38(5) of the CAA).

On hearing an appeal a court may either confirm, vary or set aside the award, or remit the award together with the Supreme Court's opinion on the question of law to the arbitrator for reconsideration (section 38(3) of the CAA).

Section 40 of the CAA permits parties to conclude an exclusion agreement, excluding or limiting the rights of appeal under section 38(2) of the CAA. The exclusion agreement must be entered into after commencement of the arbitration. For certain types of contracts, such as insurance, transport and commodity contracts, restrictions on exclusion agreements apply (section 41 of the CAA).

Recognition and enforcement

37 What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Australia is a signatory to the New York Convention. Section 8 of the IAA is based on article V of the Convention and provides that foreign awards may be enforced in the courts of a state or territory as if the award had been made in that state or territory in accordance with its laws.

Section 8 of the IAA, however, only extends to awards made in a convention country outside Australia. Where the New York Convention does not apply, enforcement may be possible under article 25 of the Model Law.

Where enforcement of awards is neither covered by the New York Convention nor the Model Law, section 33 of the CAA will apply. Section 33 operates similarly to section 8 of the IAA.

Australian courts have an excellent record for enforcing foreign arbitral awards. They rarely refuse enforcement. But parties should be aware that interlocutory or procedural orders made by arbitrators may not be characterised as an award for the purposes of enforcement (see *Resort Condominiums International Inc v Bolwell* (1993) 118 ALR 655).

For those circumstances parties may opt to apply section 23 of the IAA, which allows courts to enforce interim measures of protection (article 17 of the Model Law) under chapter VIII of the Model Law as if these were awards.

Cost of enforcement

38 What costs are incurred in enforcing awards?

For the enforcement of a foreign arbitral award in Australia, the party seeking enforcement must commence proceeding in the Supreme Court (summons). By way of example, court fees for commencing proceedings in the Supreme Court of New South Wales are approximately A$1,318 for corporations and A$659 for individuals (as at 1 July 2006).

OTHER

Judicial system influence

39 What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Historically, the Australian legal system has developed from the English system. There are a number of features of Australian court practice that might exert an influence on an Australian arbitrator. For example:

- **Court procedure** The litigious process, whereby witnesses are sworn, examined and then cross examined, can be, and indeed often is, an influence on Australian arbitrators.
- **Rules of evidence** The Evidence Act sets out the procedure by which evidence may be led in Australian court proceedings. This includes stringent rules as to the admissibility of evidence. Although article 19 of the Model Law permits the arbitral tribunal to determine the admissibility, weight, materiality and relevance of any evidentiary material, it is likely that these rules will affect how this is done. Yet arbitrators are not bound to follow these rules.
- **Discovery** It is common in Australia for parties involved in large-scale commercial litigation to undergo very extensive discovery. Although courts in recent years have moved away

from 'general discovery' and towards a more limited scope, for example by making orders for 'classes' of documents, discovery in Australia can still result in the production of a very substantial number of documents.

- **Affidavits** It is becoming increasingly common in Australia for witnesses to give evidence in chief by means of sworn witness statements.
- **Expert witnesses** Recently there has been a dramatic shift towards judicial case management, which has extended to expert witnesses. A variety of techniques are now employed in Australian courts to enhance the independence of experts. For example, to increase impartiality, in Queensland expert evidence is to be given by a single person where possible and penalties may apply to parties who needlessly retain multiple experts. Another initiative is the streamlining of evidence by limiting the differences between experts before trial (by requiring them to exchange draft reports and confer with one another) and narrowing contentious issues during trial by means of 'hot tubbing' (whereby experts are sworn one after another in a panel format after all factual evidence has been heard).
- **Interim measures of protection** The ordering of interim measures of protection pending the outcome of court proceedings is very common in Australia, and indeed, is generally considered necessary in long or complex proceedings to avoid frustration of the process. Australian courts will also grant interim measures ex parte in certain circumstances. Interim measures of protection are not familiar to all jurisdictions. It is possible that familiarity may influence Australian arbitrators' willingness to order them in proceedings.

Regulation of activities

40 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign arbitrators will need to be aware that for hearings conducted in Australia, income tax and goods and services tax might apply in relation to fees earned. Australian authorities will apply a tax on income earned by non-residents from Australian sources.

Fees are likely to have an Australian source if the agreement between the parties and the arbitrators was made, payment is made and the services are to be performed in Australia. But Australia has entered into double taxation agreements with many of its trading partners and these agreements generally allocate primary taxing rights to the country of residence.

In Australia Goods and Services Tax is a value added tax (presently 10 per cent), which is charged on the supply of goods and services. Arbitrators' fees will only be subject to GST if their annual Australian turnover exceeds A$50,000. In those circumstances, an arbitrator will have to register for GST purposes. If the arbitral hearing does not physically take place in Australia, the arbitrators may not have to register and pay GST in respect of their fees notwithstanding that the seat of the arbitration is in Australia. Although payment of arbitrators' fees is made through an arbitral institution, this does not necessarily remove the arbitrator from any GST applications in Australia if all other requirements are fulfilled. Further, in some circumstances, the arbitration services may be GST-free, for example, where the parties to the dispute are not Australian residents and do not have a permanent presence in Australia during the arbitration.

Also division 3 of the IAA contains some optional provisions to which parties may opt in. Some of these provisions are dealt with in questions 27, 33, 34 and 37.

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