

The International Comparative Legal Guide to:

International Arbitration 2009

A practical insight to cross-border International Arbitration work



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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Australia?

There are form requirements under each of the International Arbitration Act 1974 (Cth) (“IAA”), the UNCITRAL Model Law (“Model Law”), the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and the Commercial Arbitration Acts in each of the states and territories (“CAA”).

While all of those laws require arbitration agreements to be in writing, article 7(2) of the Model Law has a slightly more expansive definition in that it specifically provides that arbitration agreements may be communicated in any form that provides a record of the agreement. Article II of the New York Convention (as well as the IAA) requires an arbitration agreement to be either signed by the parties or to be contained in an exchange of letters, telex or telegrams.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

Provided the transaction is commercial in nature, there are no special requirements or restrictions for an individual person to enter into an arbitration agreement.

1.3 What other elements ought to be incorporated in an arbitration agreement?

There are no particular requirements under the domestic or international legislation. However, in the context of international arbitration, it is in the interests of both parties to provide the following details in the arbitration agreement:

- a clear indication as to the scope of the arbitration agreement determining which (if not all) disputes are referred to arbitration;
- the seat of the arbitration;
- the number of arbitrators (unless the parties wish this to be determined after the dispute is referred to arbitration);
- the language of the arbitration; and
- the arbitration rules governing the proceedings (recommended).

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

Section 7(2) of the IAA requires court proceedings to be stayed in face of a valid arbitration agreement. Australian courts will enforce a valid arbitration agreement broad enough to cover the particular matter, subject to the matter being arbitrable. In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 the Federal Court confirmed that arbitration agreements shall be interpreted widely, an approach that was subsequently confirmed by the House of Lords in the *Premium Nafta* decision.

For domestic arbitrations, the court has discretionary power to stay proceedings. In exercising that discretion, a court will commonly have regard to whether all aspects of the claim may be referred to arbitration so as to avoid multiple proceedings, a common issue which frequently arises in cases in which Australia’s Proportionate Liability legislation applies.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

The approach with regard to mediation agreements has not been uniformly settled. While the Supreme Court of Queensland in *Alco Steel (Qld) Pty Ltd v Torres Strait Gold Pty Ltd* refused to stay proceedings on the basis of a mediation agreement between the parties, the Supreme Court of New South Wales took a different approach in a similar situation in *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd* where the Court required the parties to enter into a mediation.

With regard to expert determination, courts will generally interpret an expert determination agreement as not ousting the jurisdiction of the court. However, this approach is not settled and parties cannot confidently predict that their expert determination agreement will be enforced in the face of court proceedings that have been commenced.

However, with ADR receiving increasing recognition and support by the courts, it is expected that courts will tend to refer, in the first instance, parties to the ADR process which they agreed between them.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Australia?

The enforcement of international arbitration agreements is governed by section 7 of the IAA, which implements Australia’s obligations under the New York Convention, and article 8 of the Model Law.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

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 IAA which incorporates the Model Law, the New York Convention and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States ("Washington Convention").

Domestic arbitrations are governed by the relevant 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 now largely uniform. The CAA provides for an arbitration procedure that is quite distinct from that under the Model Law. The key differences will be dealt with separately under each of the relevant topics below.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

Section 16 of the IAA provides that the Model Law has the force of law in Australia and governs all 'international arbitrations' as defined in article 1(1). The parties may, however, choose to opt out of the Model Law under section 21 of the IAA, in which case the proceedings will be governed by the relevant state or territory arbitration legislation (CAA).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Australia?

Under both the Model Law as well as the CAA, arbitrators are generally free to conduct the proceedings as they think fit, subject to where the parties agree otherwise. However, there are certain mandatory provisions (or requirements) from which the parties cannot derogate. For example, arbitrators must ensure that the parties are treated with equality and that each party is given a full opportunity to present its case (article 18 Model Law). Further, under article 24(2) of the Model Law, parties must be given sufficient notice in advance of any hearing and of any meeting of the arbitral tribunal. This can be regarded as a mandatory provision as it impacts directly on the requirements of due process and natural justice.

In respect of domestic arbitrations under the CAA, arbitrators may conduct proceedings in such a manner as they think fit, subject to provisions of the CAA (section 14 of the CAA). Although this may be interpreted to mean that mandatory provisions must be followed, in practice there are only a few mandatory provisions concerning the arbitral procedure set out in the CAA. At common law there is a requirement that judicial proceedings conform with principles of due process and natural justice. This also applies to arbitral proceedings.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Australia? What is the general approach used in determining whether or not a dispute is "arbitrable"?

There are few statutory provisions that render certain disputes not

arbitrable. One example is section 11 of the Carriage of Goods by Sea Act 1991 (Cth) which 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.

In some States arbitration clauses in insurance (and in NSW also re-insurance) contracts are not enforceable.

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. There have occasionally been refusals by courts to stay proceedings which involve competition, bankruptcy or insolvency matters. However, courts have not found those matters to be not arbitrable *per se*, but rather that in those particular circumstances the scope of the arbitration agreement did not extend to such matters. For example, in the realm of the Trade Practices Act 1974 (Cth), the Australian consumer protection and competition legislation, courts are not yet united in their approach to arbitrability of disputes arising under these states (see *Alstom Power Ltd v Eraring Energy and Hi-Fert Pty Ltd v Kiukiang Maritime Carriers*).

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Yes. Article 16 of the Model Law incorporates the principle of *competence-competence* which allows arbitrators to rule on their own jurisdiction.

3.3 What is the approach of the national courts in Australia towards a party who commences court proceedings in apparent breach of an arbitration agreement?

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 must raise this objection by the time it makes its first submissions on the substance of the dispute.

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

With regard to domestic arbitrations, section 53 of the CAA gives the court a discretionary power to stay proceedings (see also question 1.4).

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

The intervention by courts in the arbitral process is limited by virtue of article 5 of the Model Law which provides for greater autonomy of the arbitration. As mentioned above, article 16 of the Model Law stipulates that the arbitral tribunal has competence to rule on its own jurisdiction.

If, however, the arbitral tribunal has decided the issue of jurisdiction as a preliminary question, either party may, within 30 days, request

the court to finally decide on the issue (article 16(3) of the Model Law).

3.5 Under what, if any, circumstances does the national law of Australia allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The jurisdiction of an arbitral tribunal is derived from the arbitration agreement and extends only to the parties to that agreement.

One exception to this rule is sometimes found in relation to groups of companies where a parent company (or another controlling entity) may be bound by the arbitration agreement entered into by its subsidiary (or controlled entity).

Australian courts have been very reluctant to recognise this doctrine, but the issue has yet to be finally decided by the courts (see *Qintex Australia Finance Limited v Schroders Australia Limited*).

However, there has been Australian authority suggesting that a non-signatory third party can be bound in case of fraud or where the company structure used when entering into the arbitration agreement was a sham or façade, or where the company was incorporated for the purposes of masking the real purpose of the parent company (see *Sharrment Pty Ltd v Official Trustee in Bankruptcy and Brewarrana Pty Ltd v Commissioner of Highways*).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Australia and what is the typical length of such periods? Do the national courts of Australia consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Each State and Territory has its own act governing limitation periods. These are:

- Limitation Act 1985 (ACT).
- Limitation Act 1969 (NSW).
- Limitation Act (NT).
- Limitation of Actions Act 1974 (Qld).
- Limitation of Actions Act 1936 (SA).
- Limitation Act 1974 (Tas).
- Limitation of Actions Act 1958 (Vic).
- Limitation Act 1935 (WA).

Although the wording differs between the Acts, in substance they all stipulate that the limitation period with regard to the commencement of arbitration proceedings depends on nature of the underlying cause of action which is the subject of those proceedings (sections 47 (ACT), 70 (NSW), 46 (NT), 41 (Qld), 33 (Tas) and 28 (Vic)).

In Australia, limitation periods are regarded as a matter of substantive law. This is stipulated by section 5 of the uniform *Choice of Law (Limitation Periods) Acts* in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia. The Act also provides that if the substantive law in an arbitration is the law of an Australian State or Territory, or the law of New Zealand, the limitation periods in those respective places will apply in respect of the arbitration proceedings.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

For international arbitrations under the Model Law, article 28(1) provides that the tribunal should decide disputes in accordance with the 'rules of law' which were chosen by the parties as applicable to the substance of the dispute, whereby any designation of the law or legal system of a particular State shall be regarded as directly referring to the substantive law of that State and not its conflict of law rules (unless otherwise expressed). Failing any designation by the parties, the arbitrator shall apply the law determined by the conflict of law rules which it considers applicable. An arbitral tribunal may only decide *ex aequo et bono* or as *amiable compositeur* in circumstances where the parties have expressly authorised it to do so.

With regard to arbitration proceedings conducted under the CAA, an arbitrator is required to make any determination in accordance with the law (section 22(1) of the CAA). Only in circumstances where the parties have agreed in writing, the arbitrator may determine any question that arises for determination in the course of the proceedings by reference to considerations of a general justice and a fairness (section 22(2) of the CAA).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

There is no universal answer to this question. However, statutes such as the *Trade Practices Act 1974* (Cth) include mandatory provisions from which Australian parties and Australian proceedings may not opt out by choosing a foreign law to apply in circumstances where the *Trade Practices Act* would otherwise be applicable.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Where the parties have chosen the specific laws to apply to their arbitration agreement, that set of law prevails. In the absence of a particular choice made by the parties the arbitrator will usually (although not bound to) apply the closest connection test with regard to the law applicable to the formation and validity of the arbitration agreement. Although this will often point to the law of the seat of the arbitration there have been circumstances in which arbitrators have found that a different law has a much closer connection to the arbitration agreement and applied the law other than the law of the seat of jurisdiction in respect of the arbitration agreement.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

No. The parties are free to appoint the arbitrator of their choice, to determine the number of arbitrators and to set out the procedure to be followed for their appointment. Furthermore, the parties are free to stipulate particular qualifications which the arbitrators shall possess.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. There are default procedures under both the Model Law and the CAA.

With regard to 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.

In relation to domestic arbitrations, sections 6, 7 and 8 of the CAA together provide a default procedure for the appointment. 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 provides for a single arbitrator unless agreed otherwise.)

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Under article 11(3) of the Model Law, a court may only intervene in the selection and appointment of arbitrators if a party fails to appoint the arbitrator within 30 days of receipt of the request to do so from the other party, or if the two party-appointed arbitrators fail to agree on a third arbitrator within 30 days of their appointment. Unless the parties have agreed to extend this time period, 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 held.

In addition, article 11(4) of the Model Law provides that where: (i) a party 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, each 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.

For domestic arbitrations, 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.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

Under article 12(2) of the Model Law, an arbitrator may be challenged if circumstances exist which give rise to justifiable doubts as to their impartiality or independence, or if the arbitrator does not possess the agreed qualifications.

At common law, Australian courts apply the reasonable suspicion or reasonable apprehension test whereby suspicion is established if a party or the public would reasonably consider the arbitrator not to decide the dispute in a fair and unprejudiced manner (*Livesey v New South Wales Bar Association*).

The test in article 12(2) of the Model Law has now been accepted as a standard for domestic arbitrations in this respect (*Gascor v Ellicott*).

5.5 Are there rules or guidelines for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Australia?

Article 12 of the Model Law provides that a person who may be appointed as an arbitrator shall immediately disclose potential conflicts of interest likely to give rise to doubts as to his impartiality or independence. This is a continuing obligation throughout the arbitration.

Although no statutory rules exist which describe the arbitrators' disclosure requirements and guidelines in respect of conflicts of interest, the IBA Guidelines on Conflict of Interest are generally accepted and applied by arbitrators (and arbitral institutions) throughout Australia.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Australia? If so, do those laws or rules apply to all arbitral proceedings sited in Australia?

The parties are free to tailor the rules of procedure to their particular needs subject to basic requirements that provide for equality and fairness. Most parties agree to a set of institutional or *ad hoc* rules which they may modify. There is no restriction on which procedural rules may be chosen by the parties for an arbitration conducted in Australia. In the absence of a choice of a particular set of rules, the Model Law provides the framework for the proceedings. In the event that the parties opted-out of the Model Law, the CAA sets out the procedure.

6.2 In arbitration proceedings conducted in Australia, are there any particular procedural steps that are required by law?

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

International arbitration 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 determined by the arbitral tribunal (article 23 of the Model Law). Failure to do so will result in the termination of the proceedings (article 25 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.

6.3 Are there any rules that govern the conduct of an arbitration hearing?

For arbitrations conducted under the Model Law, article 24 requires a tribunal to hold a hearing upon request by a party. Other than what is required to give effect to the principles of procedural fairness and natural justice, there are no rules as to how the hearing shall be conducted.

For domestic arbitrations, section 14 of the CAA provides that, subject to the arbitration agreement and any mandatory provisions in the CAA (of which there are few), the arbitrator may conduct proceedings in such manner as they think fit.

6.4 What powers and duties does the national law of Australia impose upon arbitrators?

Arbitrators have an obligation to ensure that the parties are treated equally and that each party is given a proper opportunity to present its case (article 18 of the Model Law). Article 24(2) of the Model Law mandates that arbitrators give proper notice in advance of any hearing or meeting. Furthermore, arbitrators are under a continuing obligation throughout the arbitration to immediately disclose any circumstances to the parties which could give rise to justifiable doubts as to their impartiality and independence (see also question 5.5).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Australia and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Australia?

Australian laws do not impose restrictions on the nationality or residency of arbitrators provided that all arbitrators are independent and impartial.

6.6 To what extent are there laws or rules in Australia providing for arbitrator immunity?

Under section 28 of the IAA, arbitrators cannot be held liable in negligence for anything done or omitted to be done in the course of their duty. However, an arbitrator may be held liable for fraud.

In respect of domestic arbitrations, section 51 of the CAA contains a similar provision.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The courts' power under the Model Law is very restricted.

However under the Model Law 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));
- decide on a challenge of an arbitrator if so requested by the challenging party (article 13(3));
- decide, upon request by a party, on the termination of a mandate of an arbitrator (article 14);
- 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 on its jurisdiction (article 16(3));
- assist in the taking of evidence (article 27);
- set aside an arbitral award (article 34(2)); and
- grant interim measures of protection (article 9).

The powers of the courts under the CAA are slightly broader. For example, in addition to the powers in relation 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 has the power to 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.

6.8 Are there any special considerations for conducting multiparty arbitrations in Australia (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

An arbitration agreement comprising multiple parties must comply with the general form requirements for arbitration agreements and, most importantly, all parties must be party to the arbitration agreement. Parties should be aware that neither the IAA, the Model Law nor the CAA provide for a specific procedure for the appointment of arbitrators in multiparty disputes. In circumstances where multiparty disputes arise, parties should therefore agree on a set of procedural rules that contain special appointment provisions for those circumstances - for example, the arbitration rules of the

Australian Centre for International Commercial Arbitration (ACICA).

A consolidation of proceedings is envisaged both in the CAA (section 26) and in an optional provision of the IAA (section 24). The requirements for consolidation are set out in great detail in these provisions and generally require the proceedings to be related.

6.9 What is the approach of the national courts in Australia towards *ex parte* procedures in the context of international arbitration?

The only context in which a court would directly need to consider *ex parte* proceedings is at the stage of the enforcement of international arbitration agreements and/or foreign awards. Such proceedings are then subject to the domestic court rules on *ex parte* proceedings.

In relation to *ex parte* considerations in international arbitration proceedings, article 25 of the Model Law allows the tribunal to continue proceedings in the absence of a party if due notice was given to that party (see paragraph 33 of the explanatory notes on the Model Law). An Australian court will therefore uphold an award rendered in those circumstances if it finds that the tribunal gave due notice.

7 Preliminary Relief and Interim Measures

7.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Unless parties have agreed otherwise, article 17 of the Model Law allows the tribunal to order any party to take such interim measure of protection as the arbitral tribunal considers 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.

While the tribunal is not required to seek assistance from a national court when granting interim relief, the court's involvement is indispensable:

- when an order is sought against a third party that is not a signatory to the arbitration agreement; or
- where a party seeks to enforce an interim order (only if the parties have adopted the optional provision in section 23 of the IAA which provides for the enforcement of interim measures under chapter VIII of the Model Law).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

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, an interim measure of protection from a court and for the court to grant such a measure.

In general, the CAA allows for a higher level of intervention by the courts than does 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 than it does for proceedings in the courts. However, as pointed out in *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical and*

Electrical Engineers Pty Limited, 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.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Where appropriate, Australian courts have been open to assisting arbitral proceedings whilst preserving and respecting the exclusive jurisdiction of the arbitral tribunal. Accordingly, Australian courts are very reluctant to interfere with arbitral proceedings (see also question 7.2).

7.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Article 17 of the Model Law is worded restrictively in that it allows interim measures only with regard to the 'subject matter' of the dispute. Therefore, it is unlikely that an arbitrator will be entitled to order security for costs of the proceedings unless the parties have expressly agreed so (see, for example, article 28.8(e) of the ACICA Arbitration Rules which expressly allows for security for costs to be ordered).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Australia?

Arbitrators conducting proceedings under the Model Law are not bound by the local rules of evidence. Instead, they may freely determine the admissibility, relevance, materiality and weight of the evidence (article 19(2) of the Model Law).

The CAA also provides a liberal approach with regard to applying the rules of evidence (section 19(3) of the CAA), in that arbitrators may inform themselves in such a manner as they think fit. Parties can, however, by agreement require the arbitrator to apply certain rules of evidence.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

Arbitrators may order parties to produce documents. However, arbitrators may only make such orders with respect to the parties to the proceedings. Further, article 27 of the Model Law allows the tribunal, or a party with the tribunal's approval, to request a court to assist in the taking of evidence.

Under the CAA, a party may obtain a court order compelling a person to produce documents.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

A court may assist in the process of taking evidence upon request of the tribunal or of a party with the tribunal's approval (article 27 of the Model Law). Such court assistance is necessary when the tribunal lacks the coercive power to enforce the order or if a non-party is concerned.

8.4 What is the general practice for disclosure / discovery in international arbitration proceedings?

Although there is no single approach with regard to international arbitrations, it has become very common in litigation and domestic arbitration in Australia to limit the discovery process by way of classes of documents that fall within defined categories.

8.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

Unless the parties have agreed otherwise, article 24 of the Model Law allows the arbitrator to decide whether evidence is produced in written or oral form. The rules regarding evidence procedure in domestic arbitrations are very similar to those in court proceedings. Witnesses are sworn and then examined or cross-examined. 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.

8.6 Under what circumstances does the law of Australia treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

Questions of privilege of documents are subject to common law as well as the Evidence Acts. Where Australian law applies to the question of privilege of documents in arbitration proceedings, there are two main categories of privilege that potentially apply:

- documents covered by the legal professional privilege/client legal privilege (comprising the so-called advice privilege and the litigation privilege); and
- documents that have been produced for the purpose of settlement negotiations (without prejudice privilege).

Generally, where the content of a document (or part thereof) has been disclosed to another party, this will constitute a waiver of privilege. However, questions in relation to waiver of privilege are far more complex and have constantly been the subject of court decisions.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral 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. Signature of the majority of the members of the tribunal is sufficient, provided that reasons for the omission of signatures are given (article 31(1) of the Model Law).

Form requirements under the CAA and the Model Law differ slightly. Article 31 of the Model Law 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.

For domestic awards, section 29 of the CAA provides that if the parties agree that an award shall not be made in writing, 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. In contrast, the CAA does not

require the award to mention the date and place it was made.

The Supreme Court of Victoria held recently in *Oil Basins Limited v BHP Billiton Limited* that insufficient reasons provided in the award may lead to misconduct by the arbitrator(s) and to the award being set aside. The Supreme Court took a rather narrow view as to what it regards as sufficient reasons.

If the award is to be signed and the arbitration is conducted by more than one arbitrator, it should be noted that the arbitrators should execute the award in the presence of each other. Otherwise it may be invalid (see *Wade v Dowling*).

10 Appeal of an Award

10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

Under the Model Law, an application for setting aside the award is the exclusive recourse against an award. The grounds upon which an award may be set aside, found in 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.

In relation to domestic arbitrations, 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 grounds for granting such leave are rather narrow.

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).

10.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

While there is no Australian authority suggesting that article 34 of the Model Law cannot be excluded in any way by the parties, given that the grounds stipulated therein touch upon questions of natural justice and fairness, it appears unlikely that an Australian court would allow parties to derogate from that provision.

Section 40 of the CAA specifically permits parties to exclude or limit 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).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No. The grounds for appeal in the CAA are plenary.

10.4 What is the procedure for appealing an arbitral award in Australia?

Unless the parties consent to the appeal, the party seeking to appeal the award will have to make an application for leave to appeal to the competent Supreme Court of the relevant state or territory (section 38(4) of the CAA).

The Supreme Court will not grant leave unless it considers that the

determination of the question of law concerned would substantially affect the rights of a party to the arbitration agreement and that there is either a manifest error of law on the face of the award or strong evidence that the arbitrator made an error of law and that the determination of the question may add substantially to the certainty of commercial law (section 38(5) of the CAA).

11 Enforcement of an Award

11.1 Has Australia signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Australia has been a signatory to the New York Convention since 1975. Australia's accession to the New York Convention is without reservations and extends to all of its territories other than Papua New Guinea. The New York Convention is annexed to and given the force of law by the IAA.

11.2 Has Australia signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No. Australia is not a signatory to any regional Conventions of such a nature.

11.3 What is the approach of the national courts in Australia towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Australian courts have an excellent track record for enforcing foreign arbitral awards.

Section 8 of the IAA is based on article V of the New York 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 those laws.

However, section 8 of the IAA only extends to awards made in a convention country outside Australia. Where the enforcement provisions under the IAA do not apply, enforcement may be possible under article 25 of the Model Law.

Where enforcement of awards is neither covered by the Model Law nor the New York Convention, section 33 of the CAA may apply, which operates in a similar manner to section 8 of the IAA.

11.4 What is the effect of an arbitration award in terms of *res judicata* in Australia? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

An arbitral award has the same *res judicata* effect as a judgment and disposes of the dispute (procedurally and substantively). Parties are precluded from resubmitting the dispute in any forum.

12 Confidentiality

12.1 Are arbitral proceedings sited in Australia confidential? What, if any, law governs confidentiality?

In *Esso Australia Resources Limited v Plowman*, the High Court

held that confidentiality, in contrast to privacy, is not implied in the mere fact that parties agreed to arbitrate. An express agreement of confidentiality - whether separate or as part of the arbitration agreement - is necessary for the arbitration proceedings to be confidential.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

As a general rule, documents produced under compulsion (for example, by way of discovery) may not be used in any collateral or subsequent proceedings. However, documents disclosed and/or provided voluntarily during the arbitration are deemed to be public unless the parties have agreed for the arbitration to be confidential (see question 11.1).

12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

In addition to the issues referred to in question 11.1, confidentiality of arbitral proceedings may be overridden by public policy considerations, which require that the interest of the public in the disclosure of certain documents or information prevails over the parties' interest in confidentiality of proceedings (see *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*).

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Subject to any contrary agreement between the parties, there are no limits to the remedies that an arbitrator can award. However, the question whether an arbitrator can award punitive or exemplary damages has not yet been considered by Australian courts.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The Model Law does not contain any provision relating to an award for interest.

Section 25 of the IAA (optional) enables the arbitrators to make an award of interest on the whole or any part of a principal claim at such reasonable rate as the arbitrator determines. Compound interest is not authorised.

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

For domestic arbitrations, section 31 of the CAA allows the arbitrator to award interest at a rate which does not exceed the judgment debt rate of the Supreme Court. Compound interest is not authorised.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

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

The allocation of costs under the CAA is very similar and is left to the discretion of the arbitrator, who may:

- make directions as to who should bear the costs and the method of payment;
- determine the amount of costs to be paid or arrange for an assessment of costs; or
- award costs to be assessed or settled as between the parties or as between legal practitioner and client.

In exercising discretion, the arbitrator 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 (section 37 of the CAA).

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Whether or not an arbitral award attracts Goods and Services Tax (GST) consequences in Australia will depend on a number of circumstances including:

- whether the payment made under an award constitutes consideration for supply, rather than damages;
- if so, whether such supply is taxable, input-taxed or GST free;
- the place of residence of the parties; and
- the connection of the underlying dispute with Australia.

14 Investor State Arbitrations

14.1 Has Australia signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Yes. The Washington Convention is annexed to the IAA (schedule 3).

14.2 Is Australia party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

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), Philippines (1995), Laos (1995), Argentine (1997), Peru (1997), Pakistan (1998), India (2000), Egypt (2002), Lithuania (2002) and Uruguay (2003).

Bilateral Investment Treaties (BITs) with Turkey, the United Mexican Governments and the Democratic Socialist Republic of Sri Lanka have been signed but are not yet in force.

Australia is also party to free trade agreements with New Zealand (1989), Singapore (2003), Thailand (2005), the United States (2005), Chile (1999) and ASEAN (together with New Zealand (2009)). Free Trade Agreements are under negotiation with China and Malaysia and are 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.

Australia has signed the Energy Charter Treaty with a declaration under article 45(2) not accepting provisional application of the treaty and declarations concerning trade-related investment measures. The treaty has not yet been ratified.

14.3 Does Australia have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

To the extent possible, language used in BITs is largely uniform. In particular, dispute resolution clauses in all of the BITs are structured similarly in that they propose negotiation or amicable settlement procedures before referring disputes to arbitration.

14.4 In practice, have disputes involving Australia been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in Australia been to the enforcement of ICSID awards and how has the government of Australia responded to any adverse awards?

Australia facilitates and supports dispute resolution under ICSID. While to date the practical importance of ICSID in Australia has been marginal, the use of ICSID dispute settlement procedures is likely to rise in the near future due to the increasing number of investment treaties to which Australia is signatory.

14.5 What is the approach of the national courts in Australia towards the defence of state immunity regarding jurisdiction and execution?

Australia is committed to its obligations under international treaties. National courts are prepared to readily enforce proceedings against Australian federal or state entities making any defence of immunity subject to exceptional circumstances only.

Both the IAA (section 2B) and the CAA (section 5) specifically state that the Crown is bound by the Act.

15 General

15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Australia? Are certain disputes commonly being referred to arbitration?

Due to growing international business networks and Australia's strong economic ties with booming Asian countries, Australian (and foreign) companies are becoming increasingly aware of the importance and advantages of international arbitration.

ACICA is arguably the most prominent arbitration 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.

Disputes in the construction industry are still most commonly referred to arbitration and an increasing number of these arbitrations have the seat within Australia.

15.2 Are there any other noteworthy current issues affecting the use of arbitration in Australia, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

In late 2008 the government announced a review of Australia's international arbitration legislation. A revised IAA is expected in late 2009.

Further, ACICA recently launched the Australian Maritime and Transport Arbitration Commission, which will provide specialist services to the business community in this area.



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Doug has extensive experience as arbitrator and counsel in international and domestic arbitrations under the ICC, LCIA, AAA, KLRCA, SIAC, and ACICA Rules. He has also been regularly involved in the use of ADR including mediation in construction industry disputes.

He is vice president of the Chartered Institute of Arbitrators (London), president of the Australian Centre for International Commercial Arbitration, a Foundation Fellow and graded arbitrator of the Institute of Arbitrators & Mediators Australia, an arbitrator member of the Society of Construction Arbitrators (London) and a member of the Australian Executive Committee of the Dispute Review Board Foundation. He is co-editor-in-chief of the International Construction Law Review, editorial board member of the International Trade and Business Law Review, editorial board member of Global Arbitration Review, and a member of the Melbourne Juris Doctor Advisory Board of the University of Melbourne.

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Björn Gehle is a Special Counsel in Clayton Utz' International Arbitration Group. Prior to joining the firm in 2002, Björn worked for major international law firms in Frankfurt, Munich and London. Björn has advised and represented clients in disputes throughout Asia, Europe, Africa, the Middle East and Australia, and has considerable experience in conducting arbitrations under various arbitration rules including ICC, LCIA, ACICA, DIS, SIAC and UNCITRAL. He regularly advises government and private sector clients in relation to disputes involving major infrastructure projects. Other areas of specialisation include international trade and protection of foreign investment.

He is a member of the CI Arb, a member of the global advisory board of the ICDR Y&I, a member of the German Institution of Arbitration (DIS), the Swiss Arbitration Association, an honorary member of the Centre for Transnational Law (CENTRAL) and a founding member and co-chair of the Australasian Forum for International Arbitration (AFIA).

Björn has published widely on international arbitration topics and is regularly invited as speaker at conferences and university lectures.

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Clayton Utz was founded in 1833 and today is one of the largest and most successful commercial law firms in Australia. We have 213 partners, 904 legal staff and 880 shared services staff based in six offices around the country, in Sydney, Melbourne, Brisbane, Canberra, Darwin and Perth. Our clients include Australia's largest corporations and financial institutions as well as Federal and State government agencies. We also maintain strong links with legal firms across the globe through membership of the Lex Mundi and Pacific Rim Advisory Council (PRAC) networks.

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The International Arbitration Group at Clayton Utz is one of the leading practices in the Asia-Pacific region. The team is known for its world-class practitioners. Doug Jones and Michael Pryles are well known throughout the International Arbitration community. We have advised and represented clients in major international transactions, projects and disputes throughout the world under all of the major arbitration rules and regimes.

Clayton Utz is committed to the development and study of International Arbitration and international dispute resolution in Australia and the Asia-Pacific region. In association with the University of Sydney, Clayton Utz holds an annual International Arbitration Lecture, with previous presenters including Lord Mustill, Fali Nariman, Rusty Park, Arthur Marriott QC, Karl-Heinz Böckstiegel, Gabrielle Kaufmann-Kohler and, most recently, Jean-Claude Najjar.

For further information on Clayton Utz' International Arbitration practice, please visit www.claytonutz.com.

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