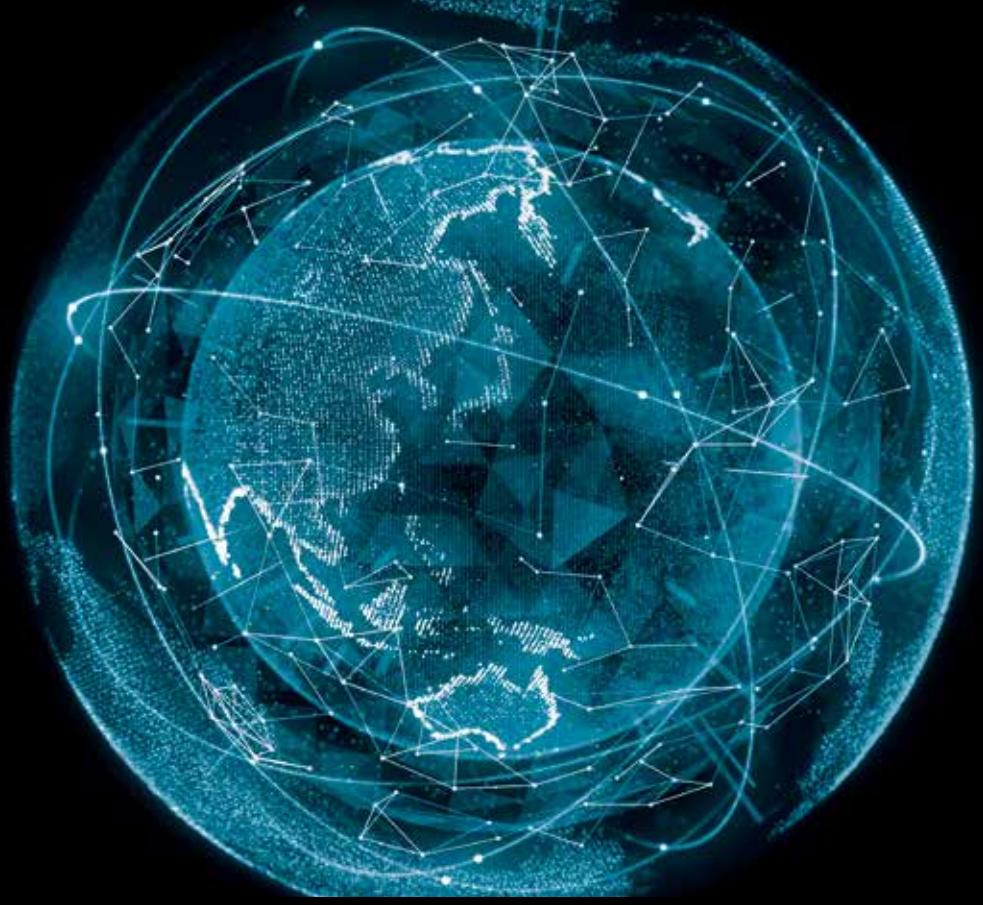

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The Asia-Pacific Arbitration Review 2022

A Global Arbitration Review Special Report

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Welcome to *The Asia-Pacific Arbitration Review 2022*, *a Global Arbitration Review* special report. For the uninitiated, *Global Arbitration Review* is the online home for international arbitration specialists the world over, telling them all they need to know about everything that matters.

Throughout the year, we deliver our readers pitch-perfect daily news, surveys and features; lively events (under our GAR Live and GAR Connect banners (GAR Connect for virtual)); and innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments in each region than the exigencies of journalism allow. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series.

It contains insight and thought leadership inspired by recent events, from 35 pre-eminent practitioners. Across 14 chapters and 92 pages, they provide us with an invaluable retrospective on the past year. All contributors are vetted for their standing and knowledge before being invited to take part.

The contributors' chapters capture and interpret the most substantial recent international arbitration events across the Asia-Pacific region, with footnotes and relevant statistics. Elsewhere they provide valuable background on arbitral infrastructure in different locales to help readers get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, Hong Kong, India, Malaysia, Singapore, Sri Lanka and Vietnam and has overviews on construction and infrastructure disputes in the region (including the effect of covid-19), the state of ISDS and what to expect there, and trends in commercial arbitration, as well as contributions by four of the more dynamic local arbitral providers.

Among the nuggets this reader learned is that:

- force majeure is not necessarily the only option for project participants affected by covid-19, especially if the FIDIC suite is in the picture;
- Korea's diaspora is known as its *Hansang* and more 'international' arbitrators are now accepting KCAB appointments (the number of KCAB 'first-timers' is up by 23 per cent);
- it has become far easier for foreign counsel and arbitrators to conduct cases in Thailand;
- there have been some strongly pro-arbitration decisions from the Philippines and Vietnam of late;
- Sri Lanka's courts also seem to have turned a corner on avoiding excessive interference; and
- improvements in the arbitral environment in Vietnam are part of a concerted effort that began in 2015.

I also found answers to some other questions that had been on my mind, such as whether an increase in case numbers in the SIAC in 2020 was matched by an increase in the total value at stake there (spoiler alert: no), and a number of components I plan to consult when the need arises – including a summary of key decisions in Singapore; a long explainer on the background to the Amazon-Future dispute in India; and a fabulous chart deconstructing the arbitral furniture in Uzbekistan.

I hope you enjoy the volume and get as much from it as I did. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
May 2021

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Australia's arbitration friendliness continues with recognition of ICSID awards

Frank Bannon, Dale Brackin, Steve O'Reilly and Clive Luck
Clayton Utz

In summary

This chapter provides an overview of the law and practice of international commercial and investor-state arbitration in Australia. It explores recent judgments of the Australian courts upholding arbitral awards in the face of challenges, giving broad effect to arbitral agreements and granting leave for the recognition of International Centre for Settlement of Investment Disputes (ICSID) arbitral awards. It also looks at the framework for institutional arbitration in Australia pursuant to the Australian Centre for International Commercial Arbitration (ACICA) Rules and a number of local facilities at which hearings may be held.

Discussion points

- Institutional arbitration in Australia with ACICA
- Arbitration and covid-19
- Emergency arbitration as an emerging development
- Enforcement of arbitration agreements
- Grounds for challenge to arbitral awards
- Interim measures and court orders to assist arbitration
- Recognition of ICSID awards against state parties

Referenced in this article

- ACICA
- Australian Disputes Centre
- *Trans Global Projects Pty Ltd (In liquidation) v Duro Felguera Australia Pty Ltd* (2018) WASC 136
- *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) FCAFC 83
- *Rinehart v Welker* [2012] NSWCA 95
- *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd* [2020] FCA 1033
- *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116
- *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2021] FCAFC 0003
- *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case 2012-12
- International Arbitration Act 1974 (Cth)
- Commercial Arbitration Acts
- The ICSID Convention

Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution (ADR). Initially rising to prominence as the dominant method of dispute resolution in the construction and infrastructure industries, commercial parties now choose arbitration to resolve domestic and international disputes in a broad range of sectors, spanning energy, commodities, trade, investment and general corporate and commercial transactions. Strong and steady growth of the Australian economy over the past two decades and the opening of Asian markets have accelerated a growing trend towards the use of arbitration, particularly to resolve international disputes.

Australia continues to develop as an attractive hub for international arbitration. Its robust legislative framework together with the strongly supportive approach of Australia courts to the enforcement of arbitral awards and agreements make it an ideal choice of seat for commercial parties, putting Australia at the forefront of international arbitration in the Asia-Pacific region.

Arbitration law reforms in Australia

Australia's international arbitration framework underwent significant changes in 2010. The primary legislation for international arbitration in Australia is the International Arbitration Act 1974 (Cth) (IAA). Importantly, amendments to the IAA adopted the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), replacing the 1985 version.

There were a number of other noteworthy amendments to the IAA. In particular, section 21 was repealed, which had the effect that parties could no longer contract out of the Model Law. The IAA now includes detailed provisions dealing with the consolidation of proceedings, which apply if the parties expressly agree to them.

At the domestic arbitration level, uniform arbitration legislation based on the 2006 Model Law is now in operation in all states and territories of Australia. This uniform legislation is known as the Commercial Arbitration Acts (CAAs). The CAAs represent a significant step forward in modernising Australia's domestic arbitration legislation, having brought it into alignment with the IAA at the federal level.

The CAAs include confidentiality provisions that apply unless the parties specifically opt out, and allow for an appeal from the arbitration award if certain preconditions are met. Further, under the CAAs, the courts are obliged to stay proceedings in the presence of an arbitration agreement, thus removing the discretion to stay proceedings that was previously available.

Australia has further entrenched the use of ADR processes through the enactment of the Civil Dispute Resolution Act 2011 (Cth). This Act explicitly recognises that litigation should be a last resort in resolving disputes and requires parties to take 'genuine steps', such as mediation or direct negotiations, to resolve a civil dispute before court proceedings can be commenced.

Institutional arbitration in Australia: Australian Centre for International Commercial Arbitration

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's premier international arbitration institution.

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It has published its own set of arbitration rules, known in their current version as the ACICA Arbitration Rules 2021 (the ACICA Rules). The first edition of the ACICA Rules was published in 2005, but ACICA has issued multiple revisions since then.

The ACICA Rules came into effect on 1 April 2021 and provide a detailed framework for institutional arbitrations that reflects international best practice on a comprehensive range of issues, including: appointment of arbitrators (articles 11 to 15); confidentiality and data protection (article 26); proactive tribunal case management (eg, article 25); availability of interim measures (article 37); consolidation and joinder mechanisms at the outset and during the course of arbitral proceedings (articles 16 and 17); emergency measures prior to the constitution of the tribunal (Schedule 1); costs (articles 48 to 51); and interpretation and correction of awards (articles 45 and 46). Distinguishing features of the ACICA Rules, as compared with some other leading sets of institutional arbitral rules, include: the tribunals' 'overriding objective' to conduct proceedings with fairness and efficiency in proportion to the value and complexity of a given dispute (article 3); the tribunals' powers to make an award granting early dismissal or termination of any claim, defence or counterclaim (article 25.7); the express recoverability of parties' in-house legal costs (article 48(d)); and provisions addressing the disclosure of third-party funding arrangements (article 54). The Rules also contain unique provisions that permit the suspension of an arbitration to allow for mediation and other dispute resolution procedures (article 55).

The ACICA Rules also contain procedures that permit the appointment of an emergency arbitrator who may grant any interim measures of protection on an emergency basis that he or she deems necessary and on such terms as he or she deems appropriate, in matters commenced under the ACICA Rules where no tribunal has yet been appointed. By accepting the ACICA Rules, parties also accept to be bound by the emergency rules and any decision of an emergency arbitrator, unless the parties expressly opt out of the regime in writing. Such emergency interim measures may take the form of an award or of an order that must be made in writing and must contain the date when it was made and the reasons for the decision. These emergency procedures generally follow the same approach as the ACICA Rules on interim measures and will not prejudice a party's right to apply to any competent court for interim measures.

ACICA has also published a set of Expedited Arbitration Rules (the ACICA Expedited Rules), of which the latest version was published as part of the 2021 update to the ACICA Rules. The ACICA Expedited Rules aim to provide arbitration that is quick, cost-effective and fair, considering in particular the amounts in dispute and complexity of issues. These rules operate on an opt-in basis.

Arbitration and covid-19

With the onset of covid-19, procedural adaptation has been required of parties, arbitral institutions and tribunals across the world. Despite an initial period of disruption and uncertainty, both arbitration and arbitration-related litigation proceedings have transitioned to online formats and have continued mostly unabated, other than in cases where there are exceptional reasons shown as to why proceeding in such a format would not be practicable. To assist this transition to virtual formats, ACICA issued an Online Arbitration Guidance Note with practical guidance on the conduct of arbitrations online, including with respect to hearings, witness examination, translation and transcription. The ACICA Rules also recently adopted provisions specifically embracing virtual arbitration, and electronic filing, signing and communication, and expressly empowering tribunals to decide whether an arbitration will be held in-person or virtually (article 25.4). Similarly, arbitration-related litigation conducted in most courts across Australia has taken place through virtual means, consistent with amended procedural rules and practice notes issued in each Australian state and territory.

Hearing facilities

The Australian Disputes Centre (ADC), based in Sydney and out of which ACICA operates, is an independent non-profit organisation and serves as 'one-stop' ADR shop, offering a full range of dispute resolution services, including mediation and international arbitration.

The ADC houses leading ADR providers, which, in addition to ACICA, include CIArb Australia and the Australian Maritime and Transport Arbitration Commission.

The ADC is available for any arbitrations, regardless of whether the arbitration is domestic or international, Australian or foreign-seated, or proceeding under the ACICA or other institutional rules. The ADC also accommodates mediations and other dispute resolution processes. In addition to high-quality hearing facilities, the ADC also provides all the necessary business support services, including case management and trust account administration provided by skilled and professional staff.

Founded in 2014, and integrated with ACICA in 2020, the Perth Centre for Energy and Resources Arbitration (PCERA) was established as a not-for-profit centre for arbitration and expert determination specialised in administering dispute resolution in the energy and resources sector. The PCERA is located in Perth, Western Australia, which is a regional hub for Australian and Asian energy and resources projects. The PCERA offers an institutional framework, the PCERA Arbitration Principles, which is designed to facilitate the efficient resolution of energy and resource industry disputes. This framework is coupled with a specialised knowledge base drawn from an array of specialised arbitration practitioners. These qualities make the PCERA an attractive option for disputing parties in the energy and resources sector.

A further institutional addition to the Australian arbitration scene in 2014 was the Melbourne Commercial Arbitration and Mediation Hub (MCAMH). Arbitrations at the MCAMH benefit from the same neutrality, judicial support and leading regulatory framework as offered by other Australian arbitral institutions.

Primary sources of arbitration law

Legislative powers in Australia are divided between the Commonwealth of Australia, as the federal entity, and the six states and two territories.

As mentioned above, matters of international arbitration are governed by the IAA, which incorporates the Model Law. The Model Law provides for a flexible and arbitration-friendly legislative environment, granting parties ample freedom to tailor the procedure to their individual needs.

The IAA supplements the Model Law in several respects. Division 3, for example, empowers Australian courts to make orders in aid of evidence gathering in international arbitrations, such as by way of a subpoena requiring a person to produce certain documents or to attend examination before the arbitral tribunal. While these provisions apply unless the parties expressly opt out, there are other provisions (those dealing with the consolidation of proceedings) that only apply if the parties expressly opt in. The IAA also provides clarity on the meaning of the term 'public policy' for the purpose of articles 34 and 36 of the Model Law.

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Part II of the IAA implements Australia's obligations as a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Australia acceded to the New York Convention without reservation. Australia is also a signatory to the ICSID Convention, the implementation of which is contained in Part IV of the IAA.

Domestic arbitration is governed by the relevant CAAs of each state or territory where the arbitration takes place. All states and territories, except the Australian Capital Territory, have passed uniform domestic arbitration legislation adopting the Model Law, ensuring that Australia has a largely consistent domestic and international arbitration legislative framework in line with the international benchmark.

Arbitration agreements

For international arbitrations in Australia, the Model Law and the New York Convention require the arbitration agreement to be in writing. While article II(2) of the New York Convention requires an 'agreement in writing' to include an arbitral clause in a contract or an arbitration agreement signed by both parties or contained in an exchange of letters, the Model Law is more expansive, covering content recorded in any form. Under the IAA, the term 'agreement in writing' has the same meaning as under the New York Convention. Domestic arbitrations under the CAAs adopt the more expansive definition contained in the Model Law.

In the landmark decision of *Comandate Marine Corp v Pan Australia Shipping* (2006) FCAFC 192, the Federal Court of Australia held that an arbitration clause contained in an exchange of signed letters was sufficient to fulfil the written requirement. An arbitration clause can also be incorporated by express reference to standard terms and conditions, as was held in *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd* (2018) NSWCA 81.

However, as the Federal Court pointed out in its decision in *Seeley International Pty Ltd v Electra Air Conditioning BV* (2008) FCA 29, ambiguous drafting may still lead to unwanted results. In that case, the arbitration clause included a paragraph providing that nothing in the arbitration clause would prevent a party from 'seeking injunctive or declaratory relief in the case of a material breach or threatened breach' of the agreement. The Federal Court interpreted that paragraph to mean that the parties intended to preserve their right to seek injunctive or declaratory relief before a court. The court was assisted in its interpretation by the fact that the agreement also included a jurisdiction clause. Another case where a poorly drafted clause was held to be ineffective was *Hurdsman & Ors v Ekactrm Solutions Pty Ltd* (2018) SASC 112, in which the clause provided for referral of disputes to a 'mediator for determination in accordance with the (Singapore International Arbitration Centre Rules)'. Mediation under the Singapore International Arbitration Centre Rules is, of course, non-existent, but the court was not willing to imply that the reference to mediator was intended to mean 'arbitrator'. In such cases, an application for rectification of an ambiguously worded contract may be an appropriate means by which to obtain enforcement.

Under Australian law, arbitration agreements are not required to be mutual. They may confer a right to commence arbitration to one party only (see *PMT Partners v Australian National Parks & Wildlife Service* (1995) HCA 36). Some standard form contracts, particularly in the construction industry and the banking and finance sector, still make use of this approach.

Arbitrability

Australian courts have taken a broad view on the scope of commercial disputes that are capable of settlement by arbitration (ie, arbitrable). In the landmark case of *Rinehart v Welker* (2012) NSWCA 95, Bathurst CJ clarified that 'it is only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will be held to be non-arbitrable' (at (167)). After a detailed analysis of the Australian authorities, his Honour held that disputes that are arbitrable may include claims involving fiduciary breach, fraud, serious misconduct, claims for the removal of a trustee and certain statutory claims for breach of the Competition and Consumer Act 2010 (Cth) (such as claims under section 18 in respect of misleading and deceptive conduct) and contraventions of the Corporations Act 2010 (Cth), notwithstanding that such claims may entail the grant of statutory remedies by the arbitral tribunal.

However, the arbitrability of commercial disputes is not without its limits. For example, there is a recognised principle that arbitrators cannot award relief that affects the public at large. Competition, bankruptcy and insolvency disputes are generally (although not invariably) non-arbitrable. Intellectual property disputes affecting rights in rem, such as the status of patents and trademark, are similarly non-arbitrable (*Larkden Pty Limited v Lloyd Energy Systems Pty Limited* (2011) NSWSC 268).

Where multiple claims are brought by one party, but only some of which are capable of settlement by arbitration, the courts have approached this issue by staying court proceedings only for those claims it considers capable of settlement by arbitration (see *Hi-Fert v Kiukiang Maritime Carriers* (1998) 159 ALR 142).

Third parties

There are very limited circumstances in which a third party that is not privy to the arbitration agreement may be a party to the arbitral proceedings. One situation in which this can occur is in relation to a parent company where a subsidiary is bound by an arbitration agreement, though this exception is yet to be finally settled by Australian courts. There is, however, authority suggesting that a third party can be bound by an arbitration agreement in the case of fraud or where a company structure is used to mask the real purpose of a parent company (see *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449).

Under the revised IAA, courts now have the power to issue subpoenas for the purpose of arbitral proceedings, requiring a third party to produce to the arbitral tribunal particular documents or to attend for examination before the arbitral tribunal (section 23(3) of the IAA). In *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd* (2018) VSC 316, the Supreme Court of Victoria approved the issuance of subpoenas compelling two witnesses to give evidence before an Australian-seated arbitral tribunal pursuant to these provisions. Similarly, under the CAAs, a party may obtain a court order compelling a person to produce documents under section 27A.

The case of *Samsung C&T Corporation, in the matter of Samsung C&T Corporation* (2017) FCA 1169 suggests that parties will face greater difficulty in obtaining subpoenas from Australian courts in aid of foreign-seated arbitration proceedings, the court in that case declining to grant subpoenas in aid of Singapore-seated arbitration proceedings.

The arbitral tribunal

Appointment and qualification of arbitrators

Australian laws impose no special requirements with regard to the arbitrator's professional qualifications, nationality or residence.

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However, arbitrators must be impartial and independent, and must disclose circumstances likely to give rise to justifiable doubts as to their impartiality or independence. The IAA clarifies that a justifiable doubt exists only where there is a real danger of bias of the arbitrator in conducting the arbitration.

Where the parties fail to agree on the number of arbitrators to be appointed, section 10 of the CAAs provides for a single arbitrator to be appointed, while article 10 of the Model Law provides for the appointment of a three-member tribunal. The appointment process for arbitrators will generally be provided in the institutional arbitration rules, or within the arbitration agreement itself. For all other circumstances, article 11 of the Model Law and section 11 of the CAAs prescribe a procedure for the appointment of arbitrators.

Where the parties have not agreed upon an appointment procedure or where their appointment procedure fails, parties are able to seek the appointment of arbitrators for international arbitrations from ACICA. The availability of statutory appointment procedures was confirmed in *Broken Hill City Council v Unique Urban Built Pty Ltd* (2018) NSWSC 825, a case in which the court, noting article 11 of the CAAs, rejected the submission that an arbitration clause was inoperable by reason that it specified a non-existent entity (the Australasian Dispute Centre) as the appointing authority. Furthermore, pursuant to article 11(5) of the Model Law, any appointment made by ACICA is unreviewable by a court.

The emergency arbitrator provisions in the ACICA Rules enable the appointment of an emergency arbitrator in arbitrations commenced under the ACICA Rules but before the case is referred to an arbitral tribunal. The emergency procedure calls for ACICA to use its best endeavours to appoint the emergency arbitrator within one business day of its receipt of an application for emergency relief.

Arbitration law in Australia does not prescribe a special procedure for the appointment of arbitrators in multiparty disputes. If multiparty disputes are likely to arise under a contract, it is advisable to agree on a set of arbitration rules containing particular provisions for the appointment of arbitrators under those circumstances, such as those found under article 13 of the ACICA Rules.

Challenge of arbitrators

For arbitrations under the IAA and the CAAs, a party can challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. The parties are free to agree on a procedure for challenging arbitrators. Failing such agreement, the Model Law and CAAs prescribe that the party must initially submit a challenge to the tribunal, and then may apply to a competent court if the challenge is rejected.

To remove arbitrators because of a perceived lack of independence and impartiality under the IAA and the CAAs, any challenge must demonstrate that there is a 'real danger' that the arbitrator is biased.

Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary

The CAAs contain provisions under section 27D to facilitate med-arb, a process whereby an arbitrator may act as a mediator or conciliator or other 'non-arbitral intermediary' to resolve the dispute. Med-arb may occur if the arbitration agreement provides for it or the parties have consented to it. Under the CAAs, an arbitrator who has acted as a mediator in mediation proceedings that have been terminated may not conduct subsequent arbitration proceedings in relation to the dispute unless all parties to the arbitration consent in writing.

Liability of arbitrators

The IAA and CAAs both provide that arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrators (with the exception of fraud). This exclusion is also reflected in article 49 of the ACICA Rules. There are no known cases where an arbitrator has been sued in Australia.

The arbitral procedure

The principle of party autonomy is held in high regard by Australian tribunals. As a result, arbitral procedure tends to vary significantly according to the particulars of the dispute and the needs of the parties involved.

Parties are generally free to tailor the arbitration procedure to their particular needs, provided they comply with fundamental principles of due process and natural justice. In doing so, the most significant requirement under the Model Law is that the parties are treated with equality and are afforded a reasonable opportunity to present their case. This requirement cannot be derogated from, even by the parties' agreement.

Court involvement

Australian courts have a strong history of supporting the autonomy of arbitral proceedings. Courts will generally interfere only if specifically requested to do so by a party or the tribunal, and only where the applicable law allows them to do so.

The courts' powers under the Model Law, and therefore under the IAA, are very restricted. Under the Model Law, courts may:

- grant interim measures of protection (article 17J);
- 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); and
- set aside an arbitral award (article 34(2)).

In addition to those functions prescribed in the Model Law, courts have additional powers granted by the IAA, including the power to issues subpoenas, as discussed above.

Domestically, courts also have limited power to intervene under the CAAs. These circumstances include:

- applications by a party to set aside or appeal against an award (sections 34 and 34A);
- where there is a failure to agree on the appointment of an arbitrator, the court may appoint an arbitrator at the request of a party (section 11);
- a challenge to an arbitrator (section 13);
- terminating the mandate of an arbitrator who is unable to perform the arbitrator's functions (section 14);
- reviewing an arbitral tribunal's decision regarding jurisdiction (section 16); and
- making orders in relation to the costs of an aborted arbitration (section 33D).

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Interim measures

Under the Model Law, the arbitral tribunal is generally free to make any interim orders or grant interim relief as it deems necessary. Further, under the Model Law, courts may order interim measures irrespective of whether the arbitration is seated in that country. Courts may also enforce interim measures issued by a foreign arbitral tribunal (article 17H of the Model Law).

The CAAs contain detailed provisions dealing with interim measures in part 4A, including allowing courts to make interim awards unless the parties expressly intend otherwise and an obligation on courts to enforce interim measures granted in any state or territory, except in limited circumstances.

The willingness of Australian courts to grant interim measures in aid of arbitration can be seen from the case of *Trans Global Projects Pty Ltd (In liquidation) v Duro Felguera Australia Pty Ltd* (2018) WASC 136, where the court granted freezing orders against the respondent's assets after finding that there was a risk that the respondent would dissipate its assets and a danger that a prospective arbitral award in favour of the applicant would be left unsatisfied. The decision was upheld on appeal.

Payment of security for costs is not required by an award debtor who, taking a purely defensive position, resists proceedings for the enforcement of an arbitral award. See *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd* [2020] FCA 1033.

Stay of proceedings

Provided the arbitration agreement is drafted widely enough, Australian courts will stay proceedings in face of a valid arbitration agreement. Section 8 of the CAAs gives greater primacy to the arbitration agreement. So long as there is an arbitration agreement that is not null or void, inoperative or incapable of being performed, the court must refer the parties to arbitration. There is no scope for the court to exercise discretion so as not to enforce an arbitration agreement.

For international arbitrations, Australian courts support the autonomy of international arbitration and will stay court proceedings in the presence of a valid arbitration agreement broad enough to cover the dispute, assuming the subject matter of the dispute is arbitrable. Courts will refuse a stay only if they find the arbitration agreement is null, void, inoperative or incapable of being performed and may impose such conditions as they think fit in ordering a stay.

Similarly, article 8 of the Model Law mandates a stay of proceedings where there is a valid arbitration agreement. A party must request the stay before making its first substantive submissions. Although the issue of the relationship between article 8 of the Model Law and section 7 of the IAA has not been settled by the courts, the prevailing opinion among arbitration practitioners is that a party can make a stay application under either of the two provisions (this also seems to reflect the position of the Federal Court in *Shanghai Foreign Trade Corporation v Sigma Metallurgical Company* (1996) 133 FLR 417).

The IAA is expressly subject to section 11 of the Carriage of Goods By Sea Act 1991 (Cth), which renders void an arbitration agreement contained in a bill of lading or similar document relating to the international carriage of goods to and from Australia, unless the designated seat of the arbitration is in Australia. There are also statutory provisions in Australia's insurance legislation that render void an arbitration agreement unless it has been concluded after the dispute has arisen.

Party representation

There is great flexibility regarding legal representation in international arbitrations under the IAA and domestic arbitrations under the CAAs. In either situation, parties may elect to either represent themselves or choose to be represented by a legal practitioner or any other person. There is no equivalent provision in the Model Law.

Confidentiality of proceedings

Arbitrations seated in Australia enjoy confidentiality by default (section 23C), subject to a limited number of narrow exceptions, such as where the parties expressly agree otherwise (sections 23D to 23G).

The current position reflects the amendments to the IAA effected by the Civil Law and Justice Legislation Amendment Act 2015. Prior to this enactment, confidentiality under the IAA only applied on an opt-in basis, with the onus on the parties to agree expressly (in their arbitration agreement or otherwise) to hold arbitration proceedings confidentially. Failure to do so could lead to the unsavoury outcome where an arbitration was not confidential, despite a party having at all times intended to resolve the commercial dispute on a confidential basis.

The 2015 amendments to the IAA effectively displaced the well-known decision in *Esso Australia Resources v Plowman* (1995) 183 CLR 10, in which the High Court of Australia held that while arbitral proceedings and hearings are private in the sense that they are not open to the general public, this does not mean that all documents voluntarily produced by a party during the proceedings are confidential.

Evidence

Evidentiary procedure in Australian arbitrations is largely influenced by the common law system. Arbitrators in international and domestic arbitration proceedings are not bound by the rules of evidence, and may determine the admissibility, relevance, materiality and weight of the evidence with considerable freedom (article 19(2) of the Model Law and section 19(3) of the CAAs).

Although arbitrators enjoy great freedom in the taking of evidence, in practice, arbitrators in international proceedings will often refer to the IBA Rules on the Taking of Evidence (the IBA Rules). The ACICA Rules also recommend the adoption of the IBA Rules in the absence of any express agreement between the parties and the arbitrator (article 31.2).

The situation is slightly different in domestic arbitrations. Despite the liberties conferred by section 19(3) of the CAAs, many arbitrators still conduct arbitrations similarly to court proceedings: namely, witnesses are sworn in, examined and cross-examined. Nevertheless, arbitrators are more and more frequently adopting procedures that suit the particular circumstances of the case and that allow for more efficient proceedings.

For arbitrations governed by the IAA, article 27 of the Model Law allows an arbitrator to seek the court's assistance in the taking of evidence. In such case, a court will usually apply its own rules for the taking of evidence.

Form of the award

The proceedings are formally ended with the issuing of a final award. The Model Law and the CAAs contain similar form requirements that awards must meet (see article 31 of the Model Law and section 31 of the CAAs).

The Model Law and the CAAs do not prescribe time limits for delivery of the award and delays in rendering an award do not result in the termination of the arbitral proceedings. Despite this, a party may apply to a court to terminate an arbitrator's mandate on the basis that the arbitrator is unable to perform his or her function or fails to act without undue delay (article 14(1) of the Model Law).

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Under article 29 of the Model Law, any decision of the arbitral tribunal must be made by a majority of its members, but the presiding arbitrator may decide procedural questions if authorised by the parties or the arbitral tribunal.

Recourse against an award

The only available avenue for recourse against international awards is to set aside the award (article 34(2) of the Model Law). The grounds for setting aside an award mirror those for refusal of enforcement under the New York Convention, and essentially require a violation of due process or a breach of public policy. The term 'public policy' in article 34 of the Model Law is qualified in section 19 of the IAA and requires some kind of fraud, corruption or breach of natural justice in the making of the award. The Model Law does not contemplate any right to appeal for errors of law.

In 2014, the Full Court of the Federal Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) FCAFC 83 held that an international arbitral award will not be set aside or denied enforcement under the Model Law for a breach of the rules of natural justice unless real unfairness or real practical injustice in the conduct of the dispute resolution process is demonstrated by reference to established principles of natural justice and procedural fairness. The Full Court also rejected the notion that minor or technical breaches of the rules of natural justice would suffice for the setting aside or non-enforcement of an international arbitral award in Australia. Consistent with that decision, the courts have in subsequent cases declined to interfere with the enforcement of arbitral awards where procedural irregularities are shown to have occurred, absent proof of resulting prejudice. See *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116 at [30].

Further, the Federal Court's decision in *Uganda Telecom Pty Ltd v Hi Tech Telecom Pty Ltd* (2011) FCA 131 reinforced the finality of arbitral awards and Australia's pro-enforcement policy by holding that there is no general discretion to refuse enforcement; and the public policy ground for refusing enforcement under the IAA should be interpreted narrowly and should not give rise to any sort of residual discretion.

In *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* (2014) NSWSC 1403, the Supreme Court of New South Wales held that where parts of an award are affected by a breach of the rules of natural justice in respect of one aspect of an arbitration, the infected parts of the award can be severed and the balance of the award enforced in accordance with section 8 of the IAA. The decision was subsequently affirmed by the Court of Appeal (see (2015) NSWCA 229). This case reflects the strongly pro-enforcement attitude of Australian courts to enforcing arbitral awards.

The same grounds for setting aside an award apply domestically. However, the CAAs also permit an appeal of an award on a question of law in limited circumstances (section 34A). Such an appeal is only possible with the leave of the court or if the parties agree to the appeal before the end of the appeal period. Further, the court must be satisfied that the following requirements are satisfied:

- the determination of the question will substantially affect the rights of one or more of the parties;
- the question is one that the arbitral tribunal was asked to determine;
- the decision of the tribunal on the question is obviously wrong (or is one of general public importance); and
- despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

The confinement of challenges under the IAA and CAAs strictly to those grounds set out in the acts was confirmed by the Federal Court in *Beijing Be Green Import & Export Co Ltd v Elders International Australia Pty Ltd* (2014) FCA 1375. In that case the applicant was unsuccessful in seeking a stay of the execution of a money judgment of a China International Economic and Trade Arbitration Commission (CIETAC) award, pending determination of separate CIETAC arbitral proceedings. The applicant sought a stay on the ground that the award in the latter proceedings would constitute a substantial set-off of the monetary judgment. The Court held that this ground did not warrant a stay and the respondent was entitled to the fruits of the arbitral process into which the parties had freely entered.

Australian courts will give effect to the three-month time limit for challenges to international arbitral awards contained in article 34(3) of the Model Law, and will dismiss challenges to awards that are brought out of time, as seen in *Sharma v Military Ceramics Corporation* [2020] FCA 216.

The increasing incidence of emergency arbitration has led to more attention being paid to the issue of enforceability in the context of awards rendered by emergency arbitrators. *Sauber Motorsport AG v Giedo Van Der Garde BV and Others* (2015) VSCA 37 concerned award enforcement proceedings in a dispute where an emergency arbitrator had earlier granted emergency injunctive relief. This remains a developing area of law in Australia.

Enforcement

Often, in practice, the most important moment for a party that has obtained an award is the enforcement stage. Australia has acceded to the New York Convention without reservation. It should be noted, however, that the IAA creates a quasi-reservation in that it requires a party seeking enforcement of an award made in a non-Convention country to be domiciled in, or to be an ordinary resident of, a Convention country. So far, no cases have been reported where this requirement was tested against the somewhat broader obligations under the New York Convention and, given the ever-increasing number of Convention countries, the likelihood that this requirement will be of practical relevance is decreasing.

Section 8 of the IAA implements Australia's obligations under article V of the New York Convention and provides for foreign awards to be enforced in the courts of a state or territory as if the award had been made in that state or territory and in accordance with the laws of that state or territory. For awards made within Australia, either article 35 of the Model Law for international arbitration awards, or section 35 of the CAAs for domestic awards, applies.

In 2013, the High Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia & Anor* (2013) HCA 5 confirmed that the Federal Court has jurisdiction to enforce international arbitral awards and that the powers exercised by an arbitral tribunal are not in contravention of the Australian Constitution.

Investor-state arbitration

Investment protection is a critical part of the business and regulatory landscape for Australia, given its highly active trade channels, particularly with Asia. A framework setting the terms of trade, including a mechanism for the resolution of disputes, is necessary both to encourage and promote continued foreign direct investment in Australia, as well as to protect Australian investors' activities abroad. To this end, Australia is a signatory to the ICSID Convention and a range of bilateral investment

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treaties and free trade agreements (FTAs), many of which contain investor-state dispute settlement provisions that provide for the resolution of disputes by international arbitration under the ICSID Convention. Notable treaties to which Australia is a party include: the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which entered into force on 30 December 2018; the Pacific Agreement on Closer Economic Relations Plus, which entered into force 13 December 2020; and earlier FTAs with China, Japan and Korea, representing Australia's three largest export markets. In November 2020, Australia signed the Regional Comprehensive Economic Partnership (RCEP), along with 15 other countries, being member states of the Association of Southeast Asian Nations and China, Japan, New Zealand and South Korea. RCEP will enter into force 60 days after six ASEAN member states and three non-ASEAN member states have ratified it. Australia is on track to ratify the agreement in 2021.

The past three years have seen a significant increase in activity in investor-state arbitration cases involving Australia. Australian courts have granted 'recognition' of investor-state arbitral awards made against the Democratic Republic of Congo and Spain in two separate sets of proceedings, and there are several other enforcement proceedings that remain before the courts. In the recent judgment of *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2021] FCAFC 0003, the court granted recognition of an award made against Spain, but found that the various 'foreign state immunity' arguments sought to be raised by Spain would potentially arise for determination at any future enforcement and execution stage (ie, asset recovery proceedings). The availability of foreign state immunity protections under Australian law to sovereign states in defence of enforcement proceedings is yet to be considered by the courts.

The sole case in which Australia has been named as respondent to an ISDS claim filed by an investor is *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL, PCA Case 2012-12). The case was dismissed on jurisdictional grounds in 2015. The tribunal held that the claimant had changed its corporate structure deliberately to gain protection of the underlying investment treaty at a time the relevant dispute was foreseeable and that this constituted an impermissible abuse of rights and process.

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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 168 partners and over 1,700 employees based in six offices around the country (Sydney, Melbourne, Brisbane, Canberra, Darwin and Perth).

Our clients include Australia's and the world'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.

Clayton Utz is a full-service firm with 14 national practice groups (NPG): banking and financial services; competition; commercial litigation; corporate, M&A and capital markets; employment and workplace relations; environment and planning; insurance advisory and claims; intellectual property and technology; major projects and construction; public sector; real estate; restructuring and insolvency; taxation; and forensic and technology services. Our NPG structure allows us to focus on the needs of individual sectors of commerce and industry by supporting them with precise and specialised areas of legal practice. We have been a key player in many of Australia's largest and most complex projects, with clients including federal and state government departments and many of Australia's top 100 companies.

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, having 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's international arbitration group is ranked in Global Arbitration Review's *GAR 100* list of top international arbitration practices in the world.

Clayton Utz is committed to the development and study of international arbitration and international dispute resolution in Australia and the Asia-Pacific region. Clayton Utz, supported by the University of Sydney, holds an annual International Arbitration Lecture, with previous presenters including Sally Harpole, Toby Landau QC, Lord Mustill, Fali Nariman, Rusty Park, Arthur Marriott QC, Karl-Heinz Böckstiegel, Gabrielle Kaufmann-Kohler, Jean-Claude Najar, Essam Al Tamimi, David Rivkin, Chief Justice James Allsop AO and most recently Professor Zachary Douglas QC.

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