



# THE ROLE OF COURT ASSISTANCE IN COMMERCIAL ARBITRATION

The Hon Justice Michael Buss

President, Court of Appeal, Supreme Court of  
Western Australia

# AN INTEGRATED STATUTORY FRAMEWORK

- The statutes of the Commonwealth and the States comprise an integrated statutory framework for international and domestic arbitration. See ***Rinehart v Hancock Prospecting Pty Ltd (2019) 267 CLR 514***

UNCITRAL MODEL  
LAW (as amended in  
2006)

UNCITRAL Model Law on  
International Commercial  
Arbitration

1985

With amendments  
as adopted in 2006

INTERNATIONAL  
ARBITRATION ACT  
1974 (Cth)



**International Arbitration Act 1974**

STATE COMMERCIAL  
ARBITRATION ACTS

Western Australia

**Commercial Arbitration Act 2012**

NEW YORK  
CONVENTION

**CONVENTION**

ON THE RECOGNITION AND ENFORCEMENT  
OF FOREIGN ARBITRAL AWARDS



# STRUCTURE

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OVERVIEW OF MODEL LAW

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MODEL LAW PROVISIONS

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# OVERVIEW OF THE MODEL LAW

TCL AIR  
CONDITIONER  
(ZHONGSHAN) CO  
LTD V JUDGES OF THE  
FEDERAL COURT OF  
AUSTRALIA (2013) 251  
CLR 533

- In the interpretation of the Model Law regard must be had *'to its international origin and to the need to promote uniformity in its application and the observance of good faith'*.<sup>1</sup>

1. *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of The Federal Court of Australia* (2013) 251 CLR 533 [7] (French CJ & Gageler J).

EXPLANATORY NOTE  
BY THE UNCITRAL  
SECRETARIAT ON THE  
MODEL LAW

- Amendments to arbitration law reveal *'a trend in favour of limiting and clearly defining court involvement in international commercial arbitration'*.
- The justification is the conscious decision of the parties to an arbitration agreement to exclude court jurisdiction.

# COURT INVOLVEMENT IN THE ARBITRAL PROCESS

## FIRST GROUP OF CIRCUMSTANCES

- **Appointment, challenge** and **termination** of the mandate of an arbitrator (Articles 11, 13 and 14)
- **Jurisdiction** of the arbitral tribunal (Article 16)
- **Setting aside** of the arbitral award (Article 34)

## SECOND GROUP OF CIRCUMSTANCES

- Court assistance in **taking evidence** (Article 27)
- **Recognition** of the arbitration agreement, including its compatibility with court-ordered interim measures (Articles 8 and 9)
- Court-ordered **interim measures** (Article 17J)
- **Recognition** and **enforcement** of interim measures (Articles 17H and 17I) and of arbitral awards (Articles 35 and 36)

# OBJECTS OF THE ARBITRATION ACTS

## **2D Objects of this Act**

The objects of this Act are:

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

# ARTICLE 5

## *Article 5. Extent of court intervention*

In matters governed by this Law, no court shall intervene except where so provided in this Law.

### **Matters not governed by the Model Law include the:**

- capacity of parties to enter into the arbitration agreement;
- operation of State immunity; and
- contractual relations between parties and the arbitral tribunal.

### **Article 5 intends to:<sup>2</sup>**

1. require those who draft domestic laws to specify the circumstances in which court involvement is envisaged for the purpose of increasing certainty; and
2. exclude any general or residual powers of the domestic courts which are not specified in the domestic law.

2. *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 794 [41] (Randerson J).

# ARTICLE 5

## *Article 5. Extent of court intervention*

In matters governed by this Law, no court shall intervene except where so provided in this Law.

### **'No court must intervene'<sup>3</sup>**

- 'Intervene' is not defined in the Model Law.
- 'Matter' is not defined in the Model Law.
- Where a particular matter, involving the courts, is dealt with in the Model Law, the court's powers are to be determined by, and only by, provisions of the Model Law.

3. *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* [2020] WASCA 77 [297] - [332] (Quinlan CJ).

# ARTICLE 8

- The correct application of Article 8(1) is complicated where there are disputes as to whether the arbitration agreement is enforceable and as to the scope of the agreement.<sup>4</sup>

## *Article 8. Arbitration agreement and substantive claim before court*

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

# RELATIONSHIP BETWEEN ARTICLES 5 AND 8

- Where Article 8 is engaged, a court must grant a stay of proceedings<sup>5</sup> before the court except in the limited circumstances specified in Article 8(1).
- Article 5 prohibits the intervention of the court, except where so provided in the Model Law.<sup>6</sup>
- Where Article 8 is not engaged, Article 5 does not apply. Where Article 8 is not engaged, there is no prohibition on the court ordering a stay of the arbitral proceedings.<sup>7</sup>
- Article 5 (as incorporated into the domestic acts) if read literally, might suggest that the court lacks power to grant a stay.<sup>8</sup> A literal reading would be inconsistent with the paramount object of the legislation.

5. *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 794 [49] (Randerson J).

6. *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 794 [54] (Randerson J).

7. *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 794 [59] (Randerson J).

8. *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 [94] (Martin CJ).

# ARTICLE 9 AND ARTICLE 17J

## *Article 9. Arbitration agreement and interim measures by court*

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

- The relationship between Article 9 and Article 17J 'is not entirely clear'.<sup>9</sup>
- Bathurst CJ approved the conclusion of the Court of Appeal of Singapore that Article 9 does not confer any jurisdiction on a court.<sup>10</sup>

## *Article 17 J. Court-ordered interim measures*

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

## *Article 17. Power of arbitral tribunal to order interim measures*

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
- (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
  - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

9. *Ku-ring-gai Council v Ichor Constructions Pty Ltd* (2019) 99 NSWLR 260 [61] Bathurst CJ (Beazley P & Ward CJ in Eq agreeing).

10. *Ku-ring-gai Council v Ichor Constructions Pty Ltd* (2019) 99 NSWLR 260 [62] Bathurst CJ (Beazley P & Ward CJ in Eq agreeing).

# ARTICLE 17J

## ***Sino Dragon Trading Ltd v Nobel Resources International Pte Ltd (2015) 246 FCR 479***

- The power of the Federal Court to require a party to produce documents is contained in s 23 and s 23A(3) of the *International Arbitration Act 1974* (Cth).
- The submission by counsel for the applicant that the court could require the production of documents under Article 17J was rejected for four reasons:
  - (1) Contrary to the intention manifested by s 23 and s 23A;
  - (2) The concept of an 'interim measure' does not include making a procedural order;
  - (3) The applicant's approach to Article 17J was inconsistent with its narrow purpose; and
  - (4) The power under Article 17J '*should be exercised very sparingly*'.

## ***Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq) [2018] WASCA 174***

- Article 17J requires the court to exercise the power conferred by that article '*in accordance with its own procedures*'.

# SECTION 7 INTERNATIONAL ARBITRATION ACT 1974 (CTH) AND ARTICLE 17J

## ***Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd (2013) 398 ALR 666***

- The *'approach to the ambit of the powers conferred upon the court by s 7...is consistent with the limited role which national courts play when parties have agreed to resolve their disputes by international commercial arbitration'*: [93].
- McLure P observed *'it appears that Articles 9 and 17J...are in tension with the evident policy and purpose of s 7...that tension can be reconciled by the court exercising its Article 17J power sparingly'*: [128].

## **7 Enforcement of foreign arbitration agreements**

- (3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

## ***Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq) [2018] WASCA 174***

- There is a difference between the exercise of the court's power under s 7(3) and Article 17J.
- The power in Article 17J is expressly conferred on a court for the purpose of protecting the integrity of the arbitration process.

# ARTICLE 17J – FREEZING ORDERS

- Article 9 is inconsistent with the proposition that the court should only make a freezing order which operates until an arbitral tribunal has been established.<sup>11</sup>
- There are few reported cases in other jurisdictions which address the question of the appropriate period of operation for court-ordered interim measures.
- The court may be reluctant to make a freezing order if there is a serious contest as to whether the applicant has established an arguable case for final relief.

11. *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)* [2018] WASCA 174 [150] (Buss P, Murphy and Mitchell JJA).

# ARTICLE 13

## ***Sino Dragon Trading Ltd v Nobel Resources International Pte Ltd*** **(2015) 246 FCR 479**

- Article 13(2) is a default rule: [75].
- The power of the court under Article 13(3) is enlivened only *'if a challenge under any procedure agreed upon by the parties...is not successful'*: [76].
- Can the court decide a challenge on grounds already advanced or new grounds?: [78].
- No common law power exists for the court to decide a challenge to an arbitrator: [86].

### *Article 13. Challenge procedure*

- (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.
- (2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
- (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

# SECTION 14 *COMMERCIAL ARBITRATION ACT 2010* (NSW) AND ARTICLE 14

## ***Ku-ring-gai Council v Ichor Constructions Pty Ltd* (2019) 99 NSWLR 260**

- Held: A decision on whether the mandate of an arbitrator had been terminated was not an interim measure, but rather was a decision on whether an arbitrator was 'unable to perform' the arbitration within s 14(1): [65] - [66].

### *Article 14. Failure or impossibility to act*

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

### **14 Failure or impossibility to act** (cf Model Law Art 14)

- (1) If an arbitrator becomes in law or in fact unable to perform the arbitrator's functions or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if the arbitrator withdraws from office or if the parties agree on the termination.
- (2) Otherwise, if a controversy remains concerning any of these grounds, any party may request the Court to decide on the termination of the mandate.
- (3) A decision of the Court under subsection (2) that is within the limits of the authority of the Court is final.
- (4) If, under this section or section 13 (3), an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or section 12 (3).

# ARTICLE 16

- The making of a request within the stipulated period is an essential condition of the plaintiff's right to have the court decide the matter.<sup>12</sup>
- Article 16 is the statutory embodiment of the separability principle. It confirms an arbitral tribunal's jurisdiction to<sup>13</sup> determine its own jurisdiction.
- The principles underlying Hammerschlag J's reasoning apply with stronger force to a request for a court to decide the matter *without* a preliminary ruling from the arbitral tribunal.<sup>14</sup>

## *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

12. *teleMates Pty Ltd v Standard SoftTel Solutions Pvt Ltd* (2011) 257 FLR 75 [53] (Hammerschlag J)

13. *teleMates Pty Ltd v Standard SoftTel Solutions Pvt Ltd* (2011) 257 FLR 75 [57] (Hammerschlag J)

14. *Sino Dragon Trading Ltd v Nobel Resources International Pte Ltd* (2015) 246 FCR 479 [115] (Edelman J)

# ARTICLE 27

- A party may apply to a court for an order under s 23A(3) if at least one of the conditions in s 23A(a)-(f) are satisfied.
- Nothing in s 23A limits Article 27.<sup>15</sup>
- In ***Sino Dragon Trading Ltd v Nobel Resources International Pte Ltd (2015) 246 FCR 479***, Edelman J proceeded on the assumed basis that Article 27 includes a power to grant subpoenas.

## *Article 27. Court assistance in taking evidence*

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.

The court may execute the request within its competence and according to its rules on taking evidence.

(3) The court may, for the purposes of the arbitral proceedings, order:

- (a) the person to attend before the court for examination or to produce to the court the relevant document or to do the relevant thing; and
- (b) the person, or any other person, to transmit to the arbitral tribunal one or more of the following:
  - (i) a record of any evidence given in compliance with the order;
  - (ii) any document produced in compliance with the order, or a copy of the document;
  - (iii) particulars of any other thing done in compliance with the order.

15. *International Arbitration Act 1974 (Cth) s 23A(6)*.

# SECTION 23

## *INTERNATIONAL ARBITRATION ACT 1974 (CTH)*

### ***Mountain View Productions LLC v Keri Lee Charters Pty Ltd [2022] FCA 161***

An arbitrator granted the applicant permission to apply to the Federal Court for the issue of a subpoena for the production of documents.

Principles as summarised by Stewart J at [12]:

1. It is inappropriate for the court to '*second guess*' a tribunal which has granted an application to issue a subpoena.
2. The court should not '*rubber stamp*' the tribunal's permission for a party to apply for the issue of a subpoena.
3. The court should only issue a subpoena if satisfied of a '*legitimate forensic purpose*'.
4. Apparent relevance is a low threshold.
5. The difficulty of assessing relevance *prior* to a hearing must be taken into account.
6. The assistance that the party may derive from the production of the documents must be taken into account.

# ARTICLE 31

## *Article 31. Form and contents of award*

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

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

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

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

## **Feldman v Tayar (2021) 64 VR 429**

- Applicants sought to appeal enforcement of an arbitral award on the basis of inadequate reasons.
- The court referred to **Westport Insurance Corporation v Gordian Runoff (2011) 244 CLR 239**, where the High Court made it clear that the reasons of arbitral awards are not required to be of a judicial standard.
- Adequacy of reasons will depend on the evidence, complexity and nature of the issue, and the relevant finding: [77].

*All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. That is all that is meant by a 'reasoned award'.*

**Bremer Handelsgesellschaft mbH v Westzucker GmbH [No 2]** [1981] 2 Lloyd's Rep 130 [25].

# ARTICLES 34, 35 AND 36

## ARTICLE 34

- Application for setting aside as exclusive recourse against arbitral award.

## ARTICLE 35

- Recognition and enforcement.

## ARTICLE 36

- Grounds for refusing recognition and enforcement.

# ARTICLES 34, 35 AND 36

<p>TCL AIR CONDITIONER (ZHONGSHAN) CO LTD V JUDGES OF THE FEDERAL COURT OF AUSTRALIA (2013) 251 CLR 533</p>	<ul style="list-style-type: none"><li>▪ Parties confer upon the arbitrator an authority to determine their disputes.</li><li>▪ The arbitral award precludes recourse to the parties' original rights.</li><li>▪ The '<i>foundation of arbitration</i>' is the determination of the parties' rights by the agreed arbitrators.</li><li>▪ An award made by an arbitrator is final and conclusive.</li><li>▪ Arbitral awards are recognised as binding per res judicata and issue estoppel.</li></ul>
<p>TCL AIR CONDITIONER (ZHONGSHAN) CO LTD V CASTEL ELECTRONICS PTY LTD (2014) 232 FCR 361</p>	<ul style="list-style-type: none"><li>▪ Applicant applied for enforcement of the arbitral award to be refused under Article 36 and set aside under Article 34. The court dismissed the appeal.</li><li>▪ While rules of procedural fairness fall within 'public policy' in Article 34 and Article 36, courts should give a '<i>narrow meaning</i>' in that context.</li><li>▪ There must be '<i>demonstrated real unfairness or real practical injustice</i>'.</li></ul>
<p>EMERALD GRAIN AUSTRALIA PTY LTD V AGROCORP INTERNATIONAL PTE LTD (2014) 314 ALR 299</p>	<ul style="list-style-type: none"><li>▪ Parties to an arbitration governed by the Cth Act and the Model Law can expect that the relevant provisions of the Model Law and of the domestic legislation will be construed and applied with some uniformity in convention countries.</li><li>▪ Courts have been reluctant to find an award to be in conflict with public policy unless the complaint offends fundamental notions of justice and fairness.</li></ul>

# ARTICLES 34, 35 AND 36

HUI V ESPOSITO  
HOLDINGS PTY LTD  
(2017) 345 ALR 287

- Article 34 significantly limits the circumstances in which an arbitral award may be set aside.
- Significant judicial restraint must be exercised in considering a challenge.
- Article 34 is not intended to apply to unfairness caused by a party's own conduct, including forensic or strategic decisions.

GUOAO HOLDING  
GROUP CO LTD V  
XUE (NO 2) [2022]  
FCA 1584

- Applicant applied for enforcement of a foreign arbitral award under s 8(3) of the Cth Act. Stewart J held that the award must be enforced.
- The respondent's claims did not rise to *'the level of the award being contrary to fundamental norms of justice and fairness in Australia'*.
- It will generally be inappropriate for the court of a New York Convention country to reach a different conclusion to that reached by the court at the seat of the arbitration.

OBSERVATIONS

- Australian courts have recognised that *'significant judicial restraint'* must be exercised in relation to a challenge under Article 34.
- The court will set aside an arbitral award only in very limited circumstances.



# CONCLUDING REMARKS

- Australian courts understand and respect the freedom of parties to submit their disputes to arbitration.
- There are fundamental differences between resolving disputes by arbitration and by judicial proceedings.
- Parties who have elected to resolve their disputes by arbitration must be held to their election.