AUSTRALIA

Law & Practice

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1. General

1.1 Prevalence of Arbitration

Arbitration is well-established in Australia. It is frequently used as a means of determining international commercial disputes, as well as for determining "domestic" disputes between Australian residents. Legislation provides for the enforcement of foreign arbitral awards as well as for enforcement of arbitral awards made in Australia.

The focus of this Chapter is on international commercial arbitration. In this introductory section we make a number of general remarks about the conduct of arbitration, the legal profession and arbitral institutions. In **Section 2,** we discuss the legislative framework that facilitates international arbitration in Australia. In **Section 3**, we focus on the requirements to make arbitration agreements enforceable and the approach of the Australian courts with respect to the enforcement of arbitration agreements. **Section 4** considers requirements relevant to the composition of the arbitral tribunal and **Section 5** discusses questions of jurisdiction, including the recent decision of the Western Australian Supreme Court in *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* (2014) WASC 10 which demonstrates the approach taken to parties who commence court proceedings in breach of an arbitration agreement. In the following sections we cover matters relevant to the conduct of arbitral proceedings such as obtaining preliminary and interim relief, procedural and evidentiary considerations, confidentiality and the making of awards. Review and enforcement of arbitral awards are dealt with in **Sections 11 and 12**.

The Australian legal profession includes many practitioners with substantial experience in the conduct and management of international arbitrations. Arbitrations are typically managed, on behalf of clients, by solicitors or law firms of which solicitors are members or employees. Solicitors generally retain barristers (i.e. independent trial counsel), to provide strategic advice as to the preparation of the claim or defence, to draft or settle critical documents to be relied on in the hearing, and to act as advocates for the client at the hearing of an arbitral dispute.

In Australia, there is a coherent legislative framework that governs the conduct of international arbitrations and Australian commercial courts are familiar with arbitral procedures. This enables clients to have confidence in the overall process: not only should they expect experienced Australian practitioners, both solicitors and barristers, to conduct their arbitral proceedings professionally and efficiently, they should also expect to be able to rely on the judicial process, where necessary, to enforce arbitral awards (whether given in Australia or elsewhere) and to as-

sist the arbitral processes including, where necessary, by granting interim relief.

1.2 Trends

The last twelve months have not seen any significant legislative action affecting international arbitration, but a number of notable court decisions have been handed down. Two issues in particular that have been considered by the courts are worth mentioning.

The first, which arose most recently in the context of a domestic arbitration but has equal importance for international arbitration, is the extent to which courts will recognise the ability of arbitral tribunals to enforce statutory rights. This issue was considered by the Court of Appeal in the State of Victoria in its decision in *Brazis v Rozati* (2014) 102 ACSR 626. That decision was interlocutory only, concerning as it did an application for leave to appeal, so more may soon be said by the Court of Appeal about the ability of arbitral tribunals to enforce statutory rights. We refer to this issue in more detail in **Section 5** below.

The second issue is the content of the obligation to afford procedural fairness, or natural justice, to the parties involved in an arbitral proceeding, and the circumstances in which a court in Australia may be prepared to set aside or decline to enforce an arbitral award where there has been a breach of the requirement to afford procedural fairness. This was the subject of the decision of the Full Court of the Federal Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387. We refer to this issue in more detail in **Section 12** below.

1.3 Key Industries

Arbitration, including international arbitration, has been common for many years as a dispute resolution mechanism contained in construction and engineering contracts. In recent years international arbitration in Australia has also been common in matters concerning international trade, especially in commodities, and in the energy and resources sector.

1.4 Arbitral Institutions

In the experience of the authors, the arbitral institutions most commonly used for international arbitration in Australia are the International Chamber of Commerce (**ICC**), the Australian Centre for International Commercial Arbitration (**ACICA**) and the Institute of Arbitrators and Mediators Australia (**IAMA**). A wide range of institutional procedural rules for the conduct of international commercial arbitration are used and rules are sometimes selected on an ad hoc basis, for example by selecting the Supreme Court rules of the place where the arbitration is to be held. There are numerous centres with facilities to conduct hearings in large scale arbitrations.

2. Governing Law

2.1 International Legislation

Australia has a federal system of government, with a Commonwealth or national government as well as governments within the individual States and Territories that make up the Commonwealth of Australia. International arbitration in Australia is governed by the *International Arbitration Act* 1974 (Cth) (**IAA**), an Act of the Commonwealth Parliament.

With respect to international arbitration, the IAA applies to the exclusion of the laws of the various States and Territories (which deal with domestic arbitration). However, when seeking to enforce an arbitral award or to obtain the assistance of a court in connection with the conduct of an arbitration such as, for example, by challenging the appointment of an arbitrator, parties may choose to approach the Federal Court of Australia (which has registries in all capital cities and is administered by judges appointed by the Commonwealth) or the Supreme Court of the State or Territory where the arbitration is to be held. The Supreme Courts are administered by judges appointed by the relevant State or Territory.

Part I of the IAA includes a provision to the effect that the IAA binds the Crown: that is to say, the Act makes clear that it binds the Crown, or the government, as well as private individuals and corporations. The objects of the IAA are stated as being, among other things, to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes.

In relation to the enforcement of foreign arbitral awards, Part II of the IAA adopts the 1958 International Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**the New York Convention**) which provides a framework for the recognition by States of arbitral awards made in other States. Section 8(1) of the IAA provides that a

foreign award is binding for all purposes on the parties to the arbitration agreement. Other provisions of the IAA permit foreign awards to be enforced as if they were judgments or orders of Australian domestic courts.

As to the conduct of international commercial arbitration in Australia, and the enforcement of awards made in Australia, Part III of the IAA adopts the UNCITRAL Model Law, as adopted by the UN Commission on International Trade Law in 1985 and amended in 2006. Section 16(1) of the IAA provides that the Model Law has the force of law in Australia and s 21 provides that, if the Model Law applies to an arbitration, the law of an Australian State or Territory relating to arbitration does not apply. As explained above, this does not prevent recourse to the Supreme Court of the State or Territory where an arbitration is being held, to enforce an award or to seek interim relief. It does however mean that the Model Law and the IAA provide an exclusive code setting out the parties' rights and obligations for international arbitration conducted in Australia.

Part III of the IAA contains a number of important interpretative provisions that affect how Australian courts apply the Model Law. In particular, s 19 of the IAA provides that, without limiting the generality of articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law (which are concerned with circumstances in which interim measures and arbitral awards may not be recognised or enforced or may be set aside), an interim measure or an award is in conflict with, or is contrary to, the public policy of Australia if:

(a) the making of the interim measure or award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award. As discussed below, Australian courts have considered this "natural justice" requirement in the last 12 months.

In addition to containing interpretative provisions, Part III of the IAA contains a series of provisions designed to assist international arbitral proceedings. By virtue of s 22 of the IAA, some of these provisions are "opt in" provisions and some are "opt out" provisions which can be engaged (or not) by an arbitration clause or by other agreement between the parties. For example, Part III contains provisions directed to enabling parties to arbitral proceedings to issue subpoenas through the involvement of the Australian domestic courts; it enables the domestic courts to make orders where, for example, parties refuse or fail to attend before an arbitral tribunal or refuse to produce documents or answer questions; it contains restrictions on the disclosure of confidential information; and it contains provisions dealing with matters such as security for costs, the payment of interest on amounts ordered to be paid by arbitral tribunals and the ability of arbitrators to direct to whom, by whom and in what manner, the costs of the arbitration are to be paid. The provisions are detailed and the preceding description is necessarily only a general summary: what is significant for present purposes is that the IAA contains a coherent legislative framework intended to facilitate the conduct of international arbitrations. It enables the courts to operate in a manner that is complementary to and assists arbitral proceedings but discourages interference with the conduct of arbitral proceedings. Because some of the provisions are "opt in" and some are "opt out", careful attention should be given to the needs of any particular arbitration agreement at the time of contracting.

Part IV of the IAA gives legal force to Chapters II to VII of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**the CSID**). As indicated above, the focus of this Chapter is on international commercial arbitration and we do not address the topic of investor-state arbitration. It is worth noting that a number of agreements between Australia and other countries contemplate investor-state arbitration. The IAA enables the procedures set out in the CSID to be engaged to assist with the investor-state arbitration.

2.2 Changes to National Law

There have been no changes to the IAA in recent years. The last substantial changes were in 2010 when amendments were introduced to adopt the 2006 amendments to the Model Law.

With the exception of the Australian Capital Territory (**ACT**), the States and Territories within Australia have themselves adopted uniform commercial arbitration legislation, based in each jurisdiction on the Model Law. This State and Territory legislation,

which applies in relation to domestic arbitrations, has been introduced through a process of reforms that have taken place since 2010. The last jurisdiction where the new uniform legislation came into effect was Western Australia where the legislation became effective in August 2013. In these circumstances, where international arbitration is concerned, s 21 of the IAA has less significance than previously was the case because there are fewer differences between the legislation for domestic arbitration and international arbitration than was previously the case. Section 21 makes it clear that, where the Model Law applies by virtue of the IAA, the Model Law and the IAA are the source of the relevant governing obligations and rights rather than any State or Territory legislation. This may be important in some cases because there are still some differences between the various Commercial Arbitration Acts of the States and Territories which deal with domestic arbitrations, and the Model Law as adopted in the IAA. Practitioners reading Australian court decisions on arbitration need to bear in mind that many of the reported decisions concern domestic arbitrations, and that before the recent reforms, the domestic arbitration legislation was quite different from the Model Law. The reasoning in some of the decisions may be applicable to arbitrations conducted in accordance with the Model Law but that will not necessarily be the case, so caution is required.

3. The Arbitration Agreement

3.1 Enforceability

As relevant to the enforcement of foreign arbitration agreements, and foreign arbitral awards, the IAA provides that the term "arbitration agreement" means an agreement in writing of the kind referred to in the New York Convention. The New York Convention (and the Model Law) expressly contemplates that arbitration agreements will be written. Under article II, the New York Convention requirement for an "agreement in writing" can include an arbitral clause signed by the parties or be contained in an exchange of letters or correspondence. In *Comandate Marine Corp v Pan Australia Shipping* (2006) 157 FCR 45 (**Comandate Marine**) the Full Court of the Federal Court of Australia held that there was a valid arbitration agreement for the purposes of the New York Convention where the agreement was embodied in a series of documentary exchanges. Allsop J (with whom Finn and Finkelstein JJ agreed on this issue) said at 85 [152] that "[w]here there is clear mutual documentary exchange as to the terms of, and assent to, the arbitration agreement, the purpose of Art. II is fulfilled". His Honour went on to say that even if an agreement reached by mutual documentary exchange is conditional, in the sense of being operative only upon an event occurring, the arbitration agreement is nevertheless contained in the exchange of documents.

In relation to the conduct of international arbitral proceedings in Australia and the enforcement of awards made in Australia, s 16 of the IAA adopts the meaning of "arbitration agreement" that is contained in Option 1 of article 7 of the Model Law. Option 1 includes a requirement for writing, but specifies that the requirement for writing is met if the content of the agreement is recorded in any form. In particular, the requirement for writing can be met by electronic communication, if the information contained therein "is accessible so as to be useable for subsequent reference".

It follows that for the purposes of enforcing foreign arbitration agreements and awards in Australia and for the purposes of conducting international commercial arbitrations in Australia, a written arbitration agreement in the form of a contract signed by both parties will be a valid arbitration agreement. However, an arbitration agreement need not take this form to be valid and enforceable, provided that the requirements for writing as explained above are satisfied.

3.2 Approach of National Courts

Both s 7 of the IAA and article 8 of the Model Law contemplate court proceedings being stayed where (broadly speaking) the proceedings involve a matter that is capable of being determined by arbitration. There appears to be overlap between the two provisions although they are not identical. If an action is brought in a matter which is the subject of an arbitration agreement and if a party so requests before submitting his first statement on the substance of the dispute, article 8 of the Model Law requires courts to enforce arbitration agreements by referring the dispute to arbitration. In practice, enforcement of an arbitration agreement, whether pursuant to s 7 of the IAA or article 8 of the Model Law, is done by staying a court proceeding brought in breach of an arbitration agreement. There is no discretion to per-

mit a court to refuse a stay if the action is in a "matter which is the subject of an arbitration agreement" under article 8 of the Model Law or under s 7, the proceedings "involve the determination of a matter … capable of settlement by arbitration". However, an important qualification is that a court is not required to refer the parties to arbitration if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. We refer to this in **section 3.3** below.

In some cases, there is room for debate about whether a particular court proceeding is an action brought in a "matter which is the subject of an arbitration agreement" or a "matter capable of settlement by arbitration". The approach of the courts overall is to adopt an expansive approach to the construction of arbitration agreements. This approach favours staying court proceedings, although there have been some differences in approach between different Australian courts.

As to the Federal Court, in *Comandate Marine* Allsop J said (at [164]) that contracts to arbitrate should be construed by "giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration". His Honour noted that this liberal approach is underpinned by "the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places" and noted that such an approach could be discerned from a range of earlier Australian decisions as well as decisions in other jurisdictions. The reference to such a presumption is similar to what was subsequently said by Lord Hoffman in the United Kingdom House of Lords decision in *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951; [2007] UKHL 40 (**Fiona Trust**). Lord Hoffman referred to an assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. He said that arbitration clauses should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. In making those remarks, he rejected distinctions identified in earlier cases considering the scope of arbitration agreements, whereby phrases referring to disputes "under" the contract were thought to be narrower in operation than phrases such as "in relation to" or "in connection with" the contract, suggesting that a "fresh start" was needed when considering such phrases in arbitration agreements. The Western Australian Court of Appeal endorsed this approach in *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110.

However, in the New South Wales Court of Appeal decision in *Rinehart v Welker* [2012] NSWCA 95 at [120]-[122] Bathurst CJ (with whom McColl JA agreed at [204] and Young JA agreed in part at [219]) said that while a liberal approach to construction is appropriate, arbitration clauses should not be construed, irrespectively of the language used by the parties, in accordance with a presumption that the parties are likely to have intended any dispute arising out of the relationship into which they entered to be decided by the same tribunal. This decision concerned a domestic arbitration but the approach of focussing on the language chosen by the parties is consistent with the approach taken by the High Court of Australia in relation to the construction of commercial contracts generally. The New South Wales Court of Appeal expressly declined to adopt the "fresh start" approach referred to by Lord Hoffman. The approach of the New South Wales Court of Appeal leaves room for a narrower meaning to be attributed to phrases such as "under the contract" than to phrases such as "in connection with the contract" or "relating to the contract or the transactions regulated by the contract". It appears, therefore, that there is a difference of opinion between the New South Wales Court of Appeal and the Full Court of the Federal Court, at least as to the role to be played by a presumption that parties should be taken to have intended to have all disputes arising from their transaction determined in one forum, namely in an arbitral proceeding, unless the language of the contract makes clear that certain issues are to be excluded from the ambit of the arbitration.

The Western Australian Court of Appeal recently revisited the authorities in *Cape Lambert Resources Ltd v Mcc Australia Sanjin Mining Pty Ltd* [2013] WASCA 66. Martin CJ (with whom Buss JA agreed and McClure P relevantly agreed) referred to the reasons of Bathurst CJ and neither approved nor disapproved them, but noted that to the extent that Lord Hoffman's observations in *Fiona Trust* endorse an ex-

pansive approach to the construction of the ordinary meaning of the words of dispute resolution clauses, they are consistent with authority in Australia and in other jurisdictions.

In light of the above decisions it is safe to say that, in general, arbitration agreements will be construed expansively and liberally. However, it is unclear whether all courts in Australia will act on the basis of a presumption that all disputes arising from a transaction are intended to be dealt with by arbitration, in the absence of clear wording to the contrary. In light of this, there is certainly scope for argument about the width of particular phrases in particular contracts and those drafting arbitration agreements should be aware of this because some expressions used in clauses referring disputes to arbitration may be construed more narrowly than others. This is also something to bear in mind if one wishes to invoke the jurisdiction of a court and has a choice of different courts.

There are also two areas of dispute where international arbitration may be called for, but where the effect of Australia's domestic legislation is that arbitration agreements will not be enforced.

The first is in relation to some contracts for the carriage of goods by sea. The effect of s 11 of the *Carriage of Goods by Sea Act* 1991 (Cth), the operation of which is expressly preserved by s 2C of the IAA, is that arbitration agreements contained in a bill of lading or in a non-negotiable document providing for the Hague Rules to govern the contract as if it were a bill of lading, are not effective unless they require the place of arbitration to be in Australia. These provisions could be invoked, for example, by a plaintiff in an Australian court required to respond to an application by a defendant seeking to stay the court proceeding in favour of arbitration to be conducted outside of Australia, where the contract concerns carriage of goods by sea and the arbitration agreement is in the bill of lading.

The second concerns insurance contracts. Section 43 of the *Insurance Contracts Act* 1984 (Cth) provides that, if a provision included in a contract of insurance has the effect of requiring disputes to be referred to arbitration, the provision is void. It should be noted, however, that parties to such contracts may agree to arbitrate after the dispute has arisen.

3.3 Validity of Arbitral Clause

In *Comandate Marine* Allsop J accepted (without conclusively determining the point) that if a "credible case" is made out that the arbitration agreement is null and void, that issue should be heard and determined by a court before referring a dispute to arbitration. However, Australian courts are prepared to accept the validity of an arbitration agreement or arbitration clause within a broader contract, even when the broader contract is said to be null and void. Thus to avoid a referral to arbitration where an arbitration agreement applies, it is necessary to demonstrate the invalidity of the arbitration agreement or arbitration clause itself, rather than the invalidity of the principal contract containing the arbitration agreement.

This follows from the doctrine of severability which is applied by Australian courts and which is also embodied in the Model Law. This approach regards an arbitration agreement as separate and severable from a principal contract containing an arbitration agreement: *Ferris v Plaister* (1994) 34 NSWLR 474; *Comandate Marine* at [229]-[231]. On this approach, then provided the arbitration agreement (as opposed to the principal contract) is not regarded as invalid, a dispute covered by an arbitration agreement that is sought to be issued in a court will be referred to arbitration and the court proceeding stayed. Similarly the fact that an arbitrator might consider the principal contract to be invalid does not result in the arbitrator having no jurisdiction where the arbitration agreement contained within the principal agreement is not itself invalid.

Article 16 of the Model Law enacts the doctrine of severability: it treats arbitration clauses in agreements separately from the agreements in which they are found. It contemplates that a decision by an arbitral tribunal that the overall agreement is invalid, does not render the arbitration clause itself invalid as a matter of law.

4. The Arbitral Tribunal

4.1 Selecting an Arbitrator

Under the Model Law, the parties to an international arbitration are free to determine the number of arbitrators that they wish to have determine their dispute. If they do not do so, the number of arbitrators is three. There are no particular qualifications that

an arbitrator must possess in Australia in order to serve on an arbitral tribunal. Lawyers experienced in dispute resolution are commonly used: these include retired judges, barristers, solicitors and academic lawyers. Non-lawyers are often used, sometimes in conjunction with lawyers on a three person panel, if the dispute relates to a particularly technical subject: valuers and engineers, for example, often sit as arbitrators.

Article 11 of the Model Law deals with the process for appointment of arbitrators. The effect is that the parties are free to agree on a procedure of appointment, but that failing such agreement where there are three arbitrators, each party shall appoint one and the two arbitrators thus appointed shall appoint the third. Parties are entitled to apply to a court for assistance in some circumstances, such as if a party fails to act as required under an agreed appointment procedure.

In practice, parties generally agree an appointment procedure between themselves in their arbitration agreement. They may do so expressly or by incorporating the rules of an arbitral institution into their arbitration agreement. The ICC Arbitration Rules, for example, provide that where the parties have not agreed upon the number of arbitrators, the ICC's international court of arbitration will make an appointment of a sole arbitrator, save where it appears that the dispute is such as to warrant the appointment of three arbitrators.

The Model Law provides, by article 11(5), that where a court or other authority (such as an arbitral institution) appoints an arbitrator, that decision is not to be subject to appeal.

4.2 Challenging or Removing an Arbitrator

The Model Law provides (by article 13) that the parties are free to agree a procedure for challenging arbitrators, subject to article 13(3). Article 13(3) confers a right upon parties who have challenged an arbitrator unsuccessfully, to have a court decide the challenge.

Many, if not all, of the commonly used institutional rules for the conduct of international arbitrations contain their own regimes for the challenge of arbitrators. In the event of the parties not reaching agreement as to the procedure for challenges, the Model Law requires a party who intends to challenge an arbitrator, to send a written statement of the reasons for the challenge to the arbitral tribunal within 15 days of becoming aware of the constitution of the tribunal or of any justifiable doubts as to the arbitrator's impartiality or independence. Unless the challenged arbitrator then withdraws, the arbitral tribunal decides on the challenge. An unsuccessful challenger wishing to have a court decide the challenge must make an application to the court within 30 days of receiving notice of the decision rejecting the challenge. There is no right of appeal from a decision of a court on a challenge.

4.3 Independence, Impartiality and Conflicts of Interest

Article 12(1) of the Model Law requires that where a person is approached in connection with his possible appointment as an arbitrator, he is obliged to disclose circumstances likely to give rise to "justifiable doubts as to his impartiality or independence". The content of this concept is explained further by s 18A of the IAA, which is an interpretative provision. It specifies that there are justifiable doubts as to impartiality or independence, only if there is a "real danger of bias" on the part of the person.

The "real danger of bias" test mandated by s 18A of the IAA differs from the test applied in Australia for determining whether a judge ought to recuse himself or herself on the ground of bias. A judge is obliged to recuse himself or herself where a fair minded lay observer might reasonably apprehend bias. The test in s 18A adopts that referred to by the House of Lords in the United Kingdom, in *R v Gough* [1993] AC 646, where it was said that the correct inquiry is whether there is a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration.

The "real danger of bias" is a higher threshold to be met by a party seeking to challenge an arbitrator than the standard of whether there is a reasonable apprehension of bias.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

As discussed above, there are restrictions on referring to arbitration some disputes relating to the carriage of goods by sea and contracts of insurance. These restrictions arise because of the operation of particular statutory provisions.

Difficulties can arise in some cases where a party seeks to refer claims that rely on statutory causes of action to arbitration, as well as contractual claims. There are numerous cases where it has been accepted that claims under the *Australian Trade Practices Act* 1974 (Cth) (**the TPA**) that depend on establishing misleading or deceptive conduct, are capable of being determined in arbitral proceedings. The TPA and its successor, the *Competition and Consumer Act* 2010 (Cth), is Australia's principal legislation relating to competition and consumer protection. In *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, the New South Wales Court of Appeal considered a dispute arising under s 52 of the TPA, which prohibited corporations from engaging in conduct that is misleading or deceptive. The plaintiff in that case alleged that an agency agreement had wrongfully been terminated, by reason among other things of misleading representations having been made, in contravention of s 52. The agency agreement that had been terminated required disputes or differences "arising out of" the agency agreement to be referred to arbitration in London. The Court of Appeal dismissed an appeal from a first instance decision, which had ordered that a proceeding issued in the New South Wales Supreme Court be stayed, on the basis that arbitration in London was the appropriate means to determine the dispute. In reaching that view, the court indicated that the term "arising out of" should not be construed narrowly and considered that there was nothing that prevented claims arising under s 52 of the TPA being dealt with in arbitration.

There are other cases where it has been held that, by reason of the construction of the particular arbitration clause, disputes under the TPA were not required to be dealt with in arbitration. This underscores the importance of considering the width of particular phrases in arbitration agreements: as discussed above, arbitration clauses referring disputes arising "under the contract" may be construed more narrowly than clauses referring disputes to arbitration that arise "under or in connection with the contract".

There is one decision of the Federal Court, of which we are aware, that suggests that claims relating to anti-competitive conduct are more appropriately dealt with by a court than in an arbitration: *Petersville Ltd v Peters* (WA) Ltd (1997) ATPR 41-566. This decision concerned a domestic arbitration and the former State arbitration legislation. It is doubtful whether the approach taken in the *Petersville* case would be held to apply if the arbitration were an international arbitration to which the IAA applies. Under Article 8 of the Model Law, there is no discretion to refuse a stay of a court proceeding about a matter which is the subject of an arbitration agreement, unless the arbitration agreement is found to be null and void, inoperative or incapable of being performed. In the authors' view it is unlikely that a court applying the Model Law would conclude that an arbitration agreement is null and void, inoperative or incapable of being performed merely because a claim related to anti-competitive conduct where the claim is between two private entities and falls within the scope of the arbitration agreement.

There may be room for argument about whether an arbitration agreement that requires some kinds of claims under the *Corporations Act* to be determined by an arbitration is capable of being performed. In *ACD Tridon v Tridon Australia* [2002] NSWSC 896 Austin J concluded (once again, in a domestic arbitration under the former State legislation) that a shareholder oppression claim sought to be brought under the *Corporations Act* did not fall within the scope of the arbitration agreement in that case. However, the court indicated that, in principle, such claims could be determined in arbitral proceedings if the arbitration agreement were drafted in appropriately wide language.

The Victorian Supreme Court recently relied on that decision, and ordered that oppression claims brought under the *Corporations Act* should be stayed pending arbitration: *Re 700 Form Holdings Pty Ltd* [2014] VSC 385. An application for leave to appeal that decision was brought before the Victorian Court of Appeal, which ruled recently that there was sufficient doubt about whether oppression claims are capable of being dealt with in an arbitration to justify

a grant of leave to appeal: *Brazis v Rosati* (2014) 102 ACSR 526 [2014] VSCA 264. Leave to appeal having been granted, it is likely that if the proceeding is not settled, that the Victorian Court of Appeal will say something soon about whether such claims are able to be determined in arbitration proceedings.

There is at least one case that suggests that the application of some provisions in the *Corporations Act* is not capable of being determined by arbitration. In *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 Warren J refused to refer to arbitration a dispute in which one party sought a winding up order against the other. The case concerned was a domestic arbitration. The court held that the arbitration clause was null and void, because it had the effect of bypassing the statutory regime for winding up companies. One can perhaps understand why such a dispute should not be referred to arbitration: a winding up order affects the rights of third parties, beyond the parties to the arbitration agreement. If this analysis is correct, it would be applicable to international arbitrations even though the case concerned a domestic arbitration.

The state of the law appears to be that while some statutory claims are capable of being determined in arbitration proceedings, and courts will stay court proceedings where that is the case, much will depend on the construction of the arbitration agreement. The outcome of the dispute currently before the Victorian Court of Appeal might provide some clarity in this area. There is uncertainty about whether some kinds of statutory claims are capable of being determined by arbitration.

5.2 Challenges to Jurisidiction

The Model Law contemplates, by article 16, that an arbitral tribunal may rule on its own jurisdiction and, as mentioned above, the doctrine of severability which is embodied in article 16 contemplates that an arbitration clause can be treated as valid even if the overall contract in which it is contained is considered null and void.

5.3 Timing of Challenge

Challenges to jurisdiction are required to be made not later than when the statement of defence is submitted, in which case the arbitral tribunal may rule on the issue as a preliminary question or reserve its decision until rendering an award on the merits. If the tribunal rules as a preliminary question that it has jurisdiction, then within 30 days after having received notice of that ruling, any party may request a court to decide the matter. In this case, the decision of the court cannot be appealed.

5.4 Breach of Arbitration Agreement

Australian courts generally take an unfavourable view of a party commencing legal proceedings in court, despite the subject matter of the proceeding falling within the scope of an arbitration agreement. Where an arbitration agreement covers the claim sought to be brought in court, there is no discretion under the Model Law or the IAA to refuse a stay of court proceedings, if a stay is sought. As explained above, a stay will only be granted, where the matter is held to be the subject of an arbitration agreement, if the arbitration agreement is found to be null and void, inoperative or incapable of being performed.

In *Pipeline Services WA v Atco Gas Australia Pty Ltd* [2014] WASC 10 Martin CJ considered the costs consequences applicable for a party who had issued proceedings in breach of an arbitration agreement. The court had already stayed the proceedings, and the issue was whether the party who had issued the proceedings should be ordered to pay costs by reference to the relevant court scale or on an indemnity basis. Costs on an indemnity basis allow a more generous recovery, as entitling the successful party to recover its actual costs, provided that they are not unreasonably incurred or unreasonable in amount. In ordering costs to be paid on an indemnity basis, Martin CJ emphasised that while the court's discretion with respect to costs could not and should not be fettered by arbitrary or inflexible rules, indemnity costs should be ordered. His Honour was influenced by the decision of Colman J in the English case of *A v B* [2007] EWHC 54, which favoured an award of indemnity costs as a matter of principle, where proceedings were commenced in breach of an arbitration agreement.

5.5 Right of Tribunal to Assume Jurisdiction

Arbitral proceedings are only binding as between parties to the arbitration agreement: neither the Model Law nor the IAA permits an arbitral tribunal to assume jurisdiction over individuals or entities that are neither parties to the arbitration agreement, nor signatories to the contract containing the arbitration agreement.

6. Preliminary and Interim Relief

6.1 Types of Relief

Articles 17 to 17I of the Model Law contain comprehensive provisions entitling arbitral tribunals to grant preliminary orders and interim relief generally, unless otherwise agreed by the parties. Article 17H provides that interim measures granted by an arbitral tribunal, whether in Australia or elsewhere, are enforceable by courts. In addition, article 17J permits courts to issue interim measures in relation to arbitration proceedings, irrespective of whether the place of the arbitration proceedings is in Australia or elsewhere.

Section 23K of the IAA permits an arbitral tribunal to make an order for security for costs. However, such an order must not be made solely on the basis that the party against whom the order is made is not ordinarily resident in Australia, or is a corporation incorporated under the law of a foreign country, or is a corporation that is controlled from a foreign country. Section 23K is an "opt out" provision: thus, the power to order security for costs can be exercised unless the parties have agreed that it is inapplicable.

7. Procedure

7.1 Governing Rules

Under article 19(1) of the Model Law, the parties are free, subject to the other provisions of the Model Law, to agree on the procedure to be followed by the arbitral tribunal. In the event that the parties cannot agree, the arbitral tribunal is permitted, subject to the provisions of the Model Law, to conduct the arbitration in such manner as it considers appropriate. While this gives considerable flexibility to the parties and the tribunal to determine the procedure to be followed, there are a number of mandatory requirements:

(a) article 18 of the Model Law requires the parties to be treated with equality, and requires each party to be given a full opportunity of presenting his or her case;

(b) under articles 34 and 36 an award is amenable to being set aside or not enforced, if it established that the award is in conflict with the public policy of the State (in this case, Australia) or that recognition or enforcement of the award would be contrary to Australian public policy. Under s 19 of the IAA, an award (including an interim measure) is taken to be contrary to public policy if a breach of the rules of natural justice occurred in connection with the making of it.

7.2 Procedural Steps

In practice, procedural matters are generally determined by agreement and where disputes arise, the tribunal rules on the process that it considers appropriate. Questions of procedure are able to be determined by the presiding arbitrator if the parties agree to this course.

7.3 Legal Representatives

As to representation, s 29(2) of the IAA permits a party to appear in person, and to be self represented, or to be represented by a legal practitioner from any jurisdiction, or indeed by any other person of that party's choice. Therefore there is no requirement in international arbitrations conducted in Australia for parties to be represented by Australian legal practitioners. Most parties in significant arbitration matters however elect to have at least some Australian representation.

8. Evidence

8.1 Rules of Evidence

Many parties agree on rules for the taking and admissibility of evidence. The International Bar Association Rules on the Taking of Evidence in International Arbitration (**the IBA Rules**) are often adopted by agreement. The ACICA Rules state that the arbitral tribunal shall have regard to, but is not bound to apply, the IBA Rules and that any agreement by the parties as to rules of evidence and the ACICA Rules prevail over any inconsistent provision in the IBA Rules. On some occasions, parties agree to apply the laws of evidence applicable in court proceedings in the place where the arbitration is to be held. In Australia, this results in a stricter approach to evidentiary matters than would ordinarily be the case if the parties were to agree, for example, to adopt the IBA Rules or for the Tribunal not to be bound by the rules of evidence.

8.2 Powers of Compulsion

Under article 19(2) of the Model Law, if the parties have not agreed on the procedure to be followed in conducting the proceedings (including as to evidence), the Tribunal can conduct the arbitration in

the manner it considers appropriate, and may determine the admissibility, relevance, materiality and weight of any evidence. This provides greater freedom and flexibility both to arbitrators and the parties in relation to evidentiary matters than would be the case if Australian law of evidence were applied strictly.

9. Confidentiality

The IAA contains a regime providing for the confidentiality of arbitral proceedings and confidential information in relation to the arbitral proceeding. However, caution is required: first, the confidentiality provisions are "opt in" provisions that will only apply if the parties agree for them to apply. Secondly, the IAA identifies in s 23D some circumstances in which confidential information in relation to arbitral proceedings may be disclosed. These include circumstances where the disclosure is necessary for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party and the disclosure is no more than reasonable for that purpose, and where the disclosure is in accordance with an order made or a subpoena issued by a court. Thirdly, the arbitral tribunal itself is also permitted to make orders allowing a party to disclose confidential information, on request and after giving each of the parties the opportunity to be heard. Fourthly, if the parties do not opt in to the confidentiality provisions, and if the parties do not expressly agree a separate confidentiality regime (such as by adopting institutional rules that contain a confidentiality regime) there is no implied requirement as to confidentiality. In *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10 the High Court of Australia rejected the view that confidentiality is an essential attribute of private arbitral proceedings and also rejected the view that there was an implied term in an arbitration agreement to the effect that each party would not disclose information provided in and for the purposes of the arbitration. In doing so, however, the court acknowledged that parties are entitled to agree between themselves for the arbitration to be confidential. Thus, if confidentiality is to be maintained, it is advisable either to agree to the application of the "opt in" provisions in the IAA, or to agree some other confidentiality regime because there is no enforceable entitlement to confidentiality in the absence of such an agreement.

10. The Award

10.1 Legal Requirements

Final decisions of the arbitral tribunal are required to be made by majority. Procedural matters on the other hand may be able to be determined by the presiding arbitrator only, as explained above. As to the form and contents of an award, the Model Law, in article 31, requires that an award be made in writing and signed by the arbitrator or arbitrators. Signature by the majority of members is sufficient, provided that the reason for any omitted signature is stated. An award is required to state reasons, unless the parties have agreed that no reasons are to be given or the award is to record an agreed settlement.

The Model Law does not contain any time limit within which an award must be delivered. It is prudent for parties, either in their arbitration agreement or elsewhere, to agree a time within which the tribunal is required to deliver an award and to ensure that the arbitrators are able to adhere to that timetable. Article 14(1) of the Model Law provides that a party may request a court to terminate the mandate of an arbitrator if, among other things, the arbitrator fails to act without undue delay.

10.2 Types of Remedies

There are no restrictions on the ability of an arbitral tribunal, subject to the terms of the parties' agreement, to award injunctive relief or other remedies other than damages. In general, however, punitive damages are not available under Australian law. It is unclear whether a court would enforce an arbitral award made in Australia, providing for punitive damages. If such an award were permitted under the governing law of the contract in respect of which the dispute arose, it would seem to be strongly arguable that such an award would be enforceable. However, given that punitive damages are not generally available in Australia, there would be room for argument about whether such an award should be enforced or not. It would be arguable that such an award should not be enforced as being contrary to Australian public policy, given that Australian law does not generally permit punitive damages. The merits or otherwise of such an argument would need to be considered in light of the particular facts of the case.

10.3 Recovering Interest and Legal Costs

The general practice in relation to interest and costs is that where an arbitral award orders payment of money, interest is awarded on that sum from the date on which the cause of action arose to the date the award is made. The legal costs of a successful party are also generally ordered to be paid by the unsuccessful party. These matters are the subject of s 25, s 26 and s 27 of the IAA, which are "opt out" provisions.

11. Review of an Award

11.1 Grounds for Appeal

It is generally very difficult to set aside an arbitral award: under article 34 of the Model Law, setting aside an award is the exclusive avenue for recourse. Only limited grounds are available, and these require proof of serious irregularities such as, for example, the party making the application not having been given proper notice of the appointment of the arbitrator, or having been unable to present his case. An award may also be set aside if it is determined that the dispute is not capable of settlement by arbitration under Australian law, or the award is contrary to public policy.

As to disputes not capable of settlement by arbitration, we have identified above that in some circumstances certain insurance contracts and disputes relating to the carriage of goods by sea are not capable of arbitration due to the effect of Australian domestic legislation. In addition, disputes where winding up orders are sought against corporations and possibly other claims under the *Corporations Act* may be considered to be incapable of being determined by arbitration. As to public policy, s 19 of the IAA provides that an award will be contrary to public policy if affected by fraud or corruption or if a breach of the rules of natural justice occurred in connection with the making of the award.

The "natural justice" ground is frequently invoked, but difficult to establish. As discussed below in the context of enforcement of awards, Australian courts have recently considered the content of the natural justice obligation. It has also recently been confirmed that the fact that an arbitral tribunal has made errors of fact, or errors of law, is not of itself sufficient to justify setting aside or refusing to enforce an arbitral award.

Thus there is no scope for merits review of an arbitral award – the sole basis of recourse is to apply under article 34 of the Model Law, for the award to be set aside on the basis of the grounds set out in the Model Law.

12. Enforcement of an Award

12.1 New York Convention

Article 35 of the Model Law provides that awards are to be enforced, subject to article 36. Article 36 contemplates that enforcement may be declined, on the same grounds as those for which an award may be set aside under article 34. These provisions are applicable to enforcement of awards made in Australia. For enforcement of awards made in other countries the New York Convention applies.

12.2 Enforcement Procedure

A number of recent decisions have confirmed that Australian courts generally favour enforcement of arbitral awards. In *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, the High Court of Australia rejected a constitutional challenge to the Federal Court's entitlement to enforce arbitral awards: it had been argued, in summary, that enforcement of awards is invalid unless the court is permitted to inquire whether the tribunal erred in law in making its award, because otherwise the enforcement process would impermissibly vest judicial power in an arbitral tribunal. This was rejected and the High Court concluded that giving effect to the parties' agreement to arbitrate and to an award made by an arbitrator does not involve any impermissible delegation of judicial power, notwithstanding the absence of any specific power to review an award for error of law.

After the High Court challenge the matter was returned to the Full Court of the Federal Court. In that decision, *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, the Full Court of the Federal Court referred to the Model Law and the IAA as embodying a framework of law for the regulation of arbitration. The Court said at 414 [109] that:

"The avowed intent of both is to facilitate the use and efficacy of international commercial arbitration … [t]he system enshrined in the Model Law was designed to place independence, autonomy and authority into

the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties."

The Court went on to observe that interference by national courts, beyond the matters identified in the Model Law as grounds for setting aside or non-enforcement, would undermine the system.

As to the requirement for natural justice, the court went on to say that articles 34 and 36 of the Model Law should be seen as requiring the demonstration of "real practical injustice or real unfairness" in the conduct of the reference or in the making of the award, before a court should act to set aside or decline to enforce an award.

12.3 Approach of the Courts

As to the enforcement of foreign arbitral awards, the IAA provides for this by adopting the New York Convention. Although article 35 of the Model Law refers to the enforcement of arbitral awards irrespective of the country in which they were made, it does not apply in Australia in relation to the enforcement of foreign awards. That is because where Chapter VIII of the Model Law (which contains the provisions concerned with recognition and enforcement of awards) and Part II of the IAA (which adopts the New York Convention) both apply, the effect of s 20 of the IAA is that Chapter VIII of the Model Law does not apply.

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The Victorian Court of Appeal has very recently explained the approach that is applicable where foreign awards are to be enforced. The decision shows that the approach to enforcement of foreign arbitral awards is the same as the approach taken to enforcement of international arbitration awards made in Australia. *Sauber Motorsport AG v Giedo Van Der Garde BV* [2015] VSCA 37 was a case concerning a dispute between the Sauber Formula One team and a driver, in which the driver sought to enforce a foreign arbitral award very shortly before the Australian Grand Prix in which the Sauber team was to participate. The award, which had been made in Switzerland, required the team to refrain from taking action that would deprive the driver of his entitlement to participate in the 2015 Formula One season. In dismissing an appeal from a decision ordering that the award be enforced, the Court of Appeal said:

"In order to establish that the enforcement of an award would be contrary to public policy by reason of a breach of natural justice what must be shown is real unfairness and real practical injustice. Courts should not entertain a disguised attack on the factual findings or legal conclusions of an arbitrator 'dressed up as a complaint about natural justice'. Errors of fact or law are not legitimate bases for curial intervention. Unfairness in any particular case will depend upon context, and all the circumstances of that case."

There is accordingly no basis for courts in Australia to engage in merits review at large of arbitral awards, or to set aside or decline to enforce arbitral awards merely because the court considers the arbitral tribunal has erred, whether the error be one of fact or law. Australian courts are very reluctant to review or interfere with arbitral decisions. This favours certainty, efficiency and finality and parties can generally expect that, once delivered, an arbitral award will be enforceable in Australia.