

Chapter 2

Australia's International and Domestic Arbitration Framework

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Abstract The legal regime for arbitration in Australia has undergone dramatic changes in the past five years. International arbitration matters are now governed exclusively by the *International Arbitration Act* 1974 (Cth) (at least for arbitration agreements entered into on or after 6 July 2010) and domestic arbitration is regulated by new uniform State and Territory legislation (except in the ACT). This paper examines key aspects of the Commonwealth legislation including the enforcement of arbitral agreements and awards under the New York Convention, the scope and application of the UNCITRAL Model Law in Australia (including the status of pre-6 July 2010 agreements) and the amendments introduced in 2010. The paper concludes with a discussion of the new principles applying to domestic arbitration.

2.1 Introduction

The object of this paper is to examine the legal framework in Australia with respect to commercial arbitration, both international and domestic. International arbitration in Australia is now regulated exclusively by the Commonwealth *International Arbitration Act* 1974 ('the IAA') at least for arbitration agreements entered into on or after 6 July 2010. The new state arbitration legislation, for example in Western Australia the *Commercial Arbitration Act* 2012 ('the CAA'), now only applies to domestic arbitration agreements and is in force in all States and Territories except the ACT. This legislation applies retrospectively to agreements entered into before the CAA's coming into operation. The last three years have therefore been a time of great change and reform to the arbitration landscape in Australia.

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2.2 The New York Convention

In considering the Commonwealth legislation, some legislative history is important. The IAA was first enacted in 1974 to give effect to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the Convention'). The Convention had 149 state parties as of 10 January 2014 and has effectively become a universal global law. The Convention is attached to Schedule 1 of the IAA and enacted in two important provisions: section 7 which provides for the mandatory staying of judicial proceedings brought in breach of an arbitration clause or agreement (implementing article II of the Convention) and section 8, which provides for the enforcement of foreign arbitral awards in Australia (implementing article V).

2.2.1 Arbitration Agreements

Broadly speaking, section 7 imposes an obligation on an Australian court to stay local court proceedings brought in breach of an arbitration agreement¹ where the place of arbitration is a member state of the New York Convention or a party to the arbitration agreement is incorporated or has its principal place of business in such a country.² The term 'arbitration agreement' is broadly defined under the Convention to include both an arbitral clause in a written contract and an arbitration agreement signed by both parties or contained in an exchange of letters or telegrams.³ This last phrase has been amended or interpreted in most countries to embrace more contemporary forms of electronic communication such as email and text message.⁴

Section 7 creates a mandatory stay procedure: generally speaking, a party cannot rely on mere arguments of convenience to avoid its obligation to arbitrate, which is in contrast to a foreign jurisdiction or choice of court clause where a court has a discretionary power not to enforce the clause.⁵ Hence, the aim of this provision is to reinforce the arbitral process by limiting the scope for parties to escape their contractual obligations to arbitrate.

In practice, a party has only three real arguments to prevent enforcement of an arbitration clause which falls within the scope of the New York Convention. First, it may argue that the subject matter of the dispute is not 'capable of settlement by arbitration'⁶ because the public interest requires it to be heard in a court. Originally

¹IAA s 7(2).

²IAA s 7(1).

³IAA s 3(1), Convention art II(1).

⁴IAA s 3(4).

⁵See, e.g. *Global Partners Fund Limited v Babcock & Brown Limited (in liq) and Ors* [2010] NSWCA 196.

⁶IAA s 7(2).

this category of exclusion was quite broad but recently consumer protection,⁷ competition⁸ and most intellectual property disputes⁹ have all been considered 'arbitrable' subject matter. The result is that there are now few disputes between private commercial entities which cannot be arbitrated on public policy grounds, at least where the interests of third parties, not bound by the arbitration clause, are not affected.¹⁰

The second argument a party may make to resist referral to arbitration is that the arbitration clause does not encompass the parties' claims as a matter of contractual construction. For example, assume a party brings actions in court for breach of section 18 of the *Australian Consumer Law* 2010 (Cth) ('ACL') [formerly section 52 of the *Trade Practices Act* 1974 (Cth)] and breach of contract. If the wording of the arbitration clause is narrowly construed, then perhaps only the breach of contract claim will be referred to arbitration with the result that the parties may have to contest claims arising from the one dispute in two different forums, a national court and the arbitration tribunal, which is expensive and inconvenient. This issue burdened the Australian courts on a number of occasions over the years¹¹ with divergent attitudes taken as to the proper scope of an arbitration clause.

Fortunately, in 2006 the Full Court of the Federal Court of Australia, in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,¹² decided that courts must strive to give a broad and flexible interpretation to arbitration agreements with the aim of referring as many of the parties' claims to arbitration as possible. This approach is justified by both party autonomy and the needs of international commerce which require certainty and efficiency in dispute resolution. So, where parties use generous wording in their arbitration clause (for example, submitting 'any dispute arising out of' or 'in connection with' this agreement to arbitration), then

⁷*Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; *Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177; *Casaceli v Natuzzi SpA* (2012) 292 ALR 143 (also franchising claims).

⁸*Mitsubishi Motors Corp v Soler-Chrysler-Plymouth Inc*, 473 US 614 (1985); *Casaceli v Natuzzi SpA* (2012) 292 ALR 143 (exclusive dealing), but compare *Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177 [56].

⁹An exception would be where an issue as to the validity or grant of a registered right such as a patent or trademark is involved: N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* (OUP 5th ed 2009) 125. In *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772 a dispute concerning the rights and obligations of parties to a contractual licence of a patent was held to be arbitrable.

¹⁰*ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 [192] (an application to wind up a company is likely not to be arbitrable because of its impact on third party creditors); *Parharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110. In *AED Oil Ltd v Puffin FPSO Ltd* (No. 2) [2009] VSC 534 the status of taxation claims was left open.

¹¹For an earlier study of this problem, see R. Garnett, 'The Current Status of International Arbitration Agreements in Australia' (1999) 15 *Journal of Contract Law* 29.

¹²(2006) 157 FCR 45.

the parties' entire dispute will be much more likely to be referred to the parties' stipulated method of dispute resolution.¹³

Yet, Australian courts have not gone so far as to adopt the English approach whereby an arbitration clause is to be construed, irrespective of the language used, in accordance with a presumption that all disputes will be decided by the arbitral tribunal.¹⁴ So, where the parties use restrictive words of reference in their arbitration clause, a stay of the parties' entire dispute will not be granted.¹⁵ A possible exception to this result would be where the parties included foreign choice of law and arbitration clauses in their contract and a party, on an application to stay Australian court proceedings, relied on such foreign law principles to determine the scope of the arbitration clause. Such principles would apply as the law governing the arbitration agreement and may yield a different outcome to the above position under Australian law.¹⁶

In the *Comandate* case, the court also made the very important finding that where parties agree on foreign choice of law and arbitration clauses they should be held to the consequences of their bargain even if this means that they may be denied rights under Australian statutory law such as the *Australian Consumer Law* because, for example, the foreign arbitrator may refuse to apply the statute.¹⁷ If a party wants access to the ACL they should include a provision in their contract expressly preserving such rights. This reasoning is to be welcomed: it plainly does nothing for the reputation of Australia as a centre of international arbitration if parties are allowed to circumvent arbitration agreements by post-contract appeals to novel Australian statutory rights.

The third argument that may be made to avoid arbitration is that the arbitration clause is invalid because it infringes an overriding mandatory statute of the forum prohibiting arbitration of certain disputes, such as section 11(2) of the *Carriage of Goods by Sea Act* 1991 (Cth) (COGSA) or section 43 of the *Insurance Contracts Act* 1984 (Cth). Clearly in such a case no stay can be granted because there is no arbitration agreement left to enforce. Note in this regard that section 7(5) of the IAA provides that a court is not required to stay its proceedings where the arbitration clause is 'null and void, inoperative or incapable of being performed'. Yet, even in the context of section 11(2) of the COGSA, which invalidates a foreign arbitration clause contained in a 'sea carriage document', courts in recent decisions have held that the prohibition does not apply to an arbitration provision in a voyage charter

¹³Note the following recent cases where a stay of court proceedings in favour of arbitration was ordered: *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894; *Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177; *Casaceli v Natuzzi SpA* (2012) 292 ALR 143; *Cape Lambert Resources Pty Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WSACA 66.

¹⁴*Fiona Trust Holding Corp v Privalov* [2007] 4 All ER 951 (UKHL).

¹⁵*Rinehart v Welker* [2012] NSWCA 95.

¹⁶Two examples of cases where foreign law was relied upon were *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 and *Casaceli v Natuzzi SpA* (2012) 292 ALR 143.

¹⁷*Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [241].

party,¹⁸ as opposed to a clause in a bill of lading. The pro-arbitration trend is unmistakable.

Also on the issue of validity, it should be noted that Australian courts have accepted that the arbitration clause is 'separable' from the principal contract in which such clause is contained.¹⁹ The consequence of this view is that the arbitral tribunal has the capacity to adjudicate a question as to the validity of such contract and so a party cannot avoid a stay of court proceedings simply on the basis that the principal contract was null and void. The arbitration clause *itself* must be shown to be invalid.

In relation to the 'inoperative' defence in section 7(5) of the IAA, parties have sought on occasion to argue that an arbitration clause cannot be enforced because it has been waived by one of the parties. Australian courts have, however, very sensibly required strong and unequivocal evidence of an intention by a party to abandon arbitration (usually in the form of gross delay or other conduct indicating a willingness to litigate) before accepting such an argument.²⁰

2.2.2 Awards

Under section 8 of the IAA, a foreign arbitral award is enforceable in Australia if it was made in a New York Convention Country or any other country if the party seeking enforcement is incorporated in or has its principal place of business in a Convention country (including Australia).²¹ Section 8(2) of the IAA provides that a foreign award may be enforced in a court of a State or Territory as if it were a judgment of that court. Alternatively, the plaintiff can apply to enforce the award under the *Foreign Judgments Act* 1991 (Cth). This last option may be useful where the defendant is resident outside Australia and the rules for service out of the jurisdiction will need to be employed to secure jurisdiction over the defendant.²²

Note that section 8 of the IAA also restricts the range of available defences to enforcement to ensure that awards circulate freely throughout the world with minimal obstruction by national courts or laws. Generally it will only be where the tribunal exceeded its jurisdiction, the arbitration agreement was invalid, there was a serious irregularity in the arbitral process (for example, a party lacked notice of the

¹⁸*Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2013] FCAFC 107; *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (2011) 112 SASR 297.

¹⁹*Ferris v Plaister* (1994) 34 NSWLR 474; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [229].

²⁰*Zhang v Shanghai Wool and Jute Textile Co Ltd* (2006) 201 FLR 178; *Australian Granites Ltd v Eisenwerk* [2001] 1 Qd R 461; *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 [69].

²¹IAA ss 3(3), 8(1), (4).

²²*ML Ubase Holdings Co Ltd v Trigem Computer Inc* [2005] NSWSC 224.

arbitration proceedings, was unable to present its case²³ or the tribunal departed from the agreed procedural rules) or a breach of public policy that enforcement will be denied.²⁴ Significantly, there is no defence to the effect that the tribunal made an error of law or fact in the award; the enforcing court must not retry the merits or act as an appellate court.²⁵ Also, the defences in the Convention cannot be supplemented by further defences under a country's domestic law that would be available to block enforcement of a domestic award. The defences in section 8 are therefore exclusive and exhaustive.²⁶

A comment should be made about the public policy defence in section 8. Its use in the Convention does not have the broad catch-all meaning that it sometimes receives in domestic law: it refers to conduct which would be considered seriously opprobrious according to international standards, such as fraud, corruption or criminal conduct. For example, in an English decision,²⁷ an award was not enforced where the tribunal had granted damages for breach of a contract to smuggle carpets out of Iran in breach of Iranian law. The court felt that it would offend public policy to lend support to such conduct.

In one rogue Australian decision, however, a court refused to enforce an award made in the United States on the basis of public policy where the court found that many of the orders made by the arbitrator could not have been made by a Queensland court applying Queensland law.²⁸ Acceptance of such a view would open the way to a general review of arbitrators' decisions based on whether they mirrored the law and practice in the enforcing country. This approach is clearly inconsistent with the Convention and fortunately has not been followed in later Australian cases. Recent authority has now clearly established that a violation of public policy will only exist where enforcement of the award would constitute 'an offence to fundamental norms of fairness or justice'.²⁹ The public policy defence should therefore be only 'sparingly' applied.³⁰

²³Such an argument was recently rejected in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109. Further, in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, it was stated that this defence will not be available unless there is demonstrated 'real unfairness' or 'real practical injustice' in how the dispute resolution was conducted.

²⁴The defences are set out in IAA ss 8(5) and (7).

²⁵An error of law objection also cannot be framed as a violation of public policy: *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 [133].

²⁶IAA s 8(3A).

²⁷*Soleimany v Soleimany* [1999] QB 785.

²⁸*Resort Condominiums International v Bolwell* (1993) 118 ALR 655.

²⁹*Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 1214 [33], [177]; *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 [132]; *Traxys Europe SA v Balaji C Industry Pvt Ltd (No. 2)* (2012) 201 FCR 535 [96].

³⁰*Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 1214 [34].

Section 8 also contains a provision³¹ which allows an Australian court to stay enforcement proceedings where an application has been made to set aside the award in the courts of the country where the award was made. Australian courts have been generally receptive to such a request, provided that the application to set aside the award has a reasonable chance of success, security for payment of the award is pledged by the defendant and no prejudice will be suffered by the plaintiff if the stay is granted. Amendments to the IAA in 2010 also have given courts the power to order proceedings that have been stayed under section 8(8) to be resumed and costs to be awarded against the party seeking the stay in cases where the application to set aside is not being pursued in good faith or with reasonable diligence.³² Such new provisions aim to prevent parties frustrating enforcement through vexatious applications to set aside the award.

Hence, the overall object of the Convention's provisions on recognition and enforcement of awards is to limit judicial review of awards so that finality of dispute resolution is achieved, delays in enforcement are minimised and parties are held to the process which they have chosen.

Note that the Convention has proven to be generally very successful in this respect; it has created an effective global regime for enforcement of awards which is something that is very unlikely ever to be achieved with foreign judgments. While the Hague Choice of Court Convention (which was intended to be a 'litigation' version of the New York Convention) was created in 2005, it has only been ratified by one nation state and has not entered into force. It is also the case today in a number of countries (for example Indonesia and the Netherlands) that no judgment of a foreign court can be enforced; it is necessary for the judgment creditor to re-litigate the matter from the beginning in the place of enforcement. While this unattractive situation exists in cross-border litigation, there will be a strong incentive for parties to choose arbitration in international trade.

2.3 The UNCITRAL Model Law on International Commercial Arbitration

In 1989 the Australian Federal Parliament amended the IAA by enacting the 1985 UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') in section 16 and Schedule 2 of the Act. The Model Law was developed by UNCITRAL (the United Nations Commission on International Trade Law) as a law of arbitral procedure to be adopted by member States for the conduct of arbitrations within their territories. The Law was intended to be a vehicle for global harmonisation of arbitration law on the basis of the principles of party autonomy and

³¹IAA s 8(8) implementing Convention art VI; *Toyo Engineering Corp v John Holland Pty Ltd* [2000] VSC 553; *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905.

³²IAA s 8(9), (10).

reduced judicial interference in the arbitral process. In this way the Model Law would complement the New York Convention by supplying the ‘middle procedural part’ between enforcement of the agreement and the award.

The Model Law now has wide acceptance, having been adopted in over 65 countries, including Australia, Canada, Germany, Hong Kong, India, Iran, Ireland, Japan, Malaysia, Mexico, New Zealand, the Philippines, Russian Federation, Singapore, Sri Lanka, Scotland and seven states of the United States (including California). A number of other countries’ laws (for example the 1996 English *Arbitration Act*), while not adopting its principles directly, nevertheless show strong signs of its influence. Moreover, a number of the leading global arbitral institutions (for example the ICC in Paris, the LCIA in London and the AAA in the United States) have amended their procedural rules to be closer to the Model Law framework.

Australia enacted the Model Law because it was felt that this would assist the country in becoming a centre for international arbitration as foreign parties would be attracted to arbitrating under an internationally agreed framework with no parochial or peculiar provisions of domestic law to trap or deter them.

As mentioned, the Model Law embodies the progressive continental European tradition of arbitration, which is to minimise judicial intervention and maximise party autonomy. Its provisions are framed to allow parties great freedom in their choice of arbitral rules and procedures. For example, article 19 enables parties to choose the rules of an arbitral institution to govern the arbitration which may be very useful in an expensive and complex dispute requiring significant administrative support to resolve. There are only a few mandatory requirements in the Model Law which the parties cannot avoid in their arbitration agreement: such as the obligation that both parties be treated equally in the arbitral process and that each be given a reasonable opportunity to present its case³³ and the requirement that each party supply the other with all information provided to the tribunal.³⁴

The grounds for court challenge of arbitrators and setting aside of awards are also significantly reduced under the Model Law. For example, the only real bases for removal are where the arbitrator is found not to be impartial,³⁵ which requires a showing of a ‘real danger’ of bias,³⁶ where the arbitrator lacks his or her stated qualifications³⁷ or where he or she is unable to perform their functions.³⁸ A party may also, before it has filed its defence, judicially challenge a preliminary decision of the tribunal that it has jurisdiction over an issue.³⁹ The bases for setting aside an

³³Model Law, art 18, IAA s 18C.

³⁴Model Law, art 24(3).

³⁵Model Law art 12(2).

³⁶IAA s 18A.

³⁷Model Law art 12(2).

³⁸Model Law art 14(1).

³⁹Model Law art 16(3); *teleMates (previously Better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd* (2011) 257 FLR 75.

award are also limited with parties to a Model Law arbitration having only the New York Convention grounds to attack an award.⁴⁰ As mentioned above, these grounds focus on serious irregularity in the process rather than the merits of the dispute and have been generally narrowly construed in favour of upholding the tribunal's decision where possible.⁴¹

The Model Law also contains provisions for enforcement of arbitration agreements⁴² and awards⁴³ again closely modelled on the terms of the New York Convention, although in the case of awards, enforcement is not limited to foreign awards but would encompass an award made in Australia in a Model Law arbitration.⁴⁴

In the 2010 amendments to the IAA the Australian Federal Parliament also adopted many of the 2006 revisions to the Model Law made by UNCITRAL. For example, the arbitral tribunal now has the same power to order interim measures of protection as the court at the seat of arbitration⁴⁵ and also there is clear authority given to courts to award interim measures in respect of foreign arbitrations.⁴⁶ Australia did not however adopt the 2006 amendment to the Model Law which allows an arbitral tribunal to issue *ex parte* interlocutory orders.⁴⁷ This omission was apparently due to strong opposition from some Australian practitioners.⁴⁸

2.4 The Scope of Application of the Model Law in Australia

An important issue to consider is when the provisions of the Model Law apply to an international commercial arbitration in Australia. Note first that the Model Law only applies to 'international commercial arbitration' as defined in article 1 para 3 of the Law. An arbitration is defined as 'international' where:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of their agreement, their places of business in different countries;
- (b) one of the following places is situated outside the country in which the parties have their place of business:

⁴⁰Model Law art 34.

⁴¹*Corporacion Transnacional de Inversiones v STET International* (1999) 45 OR (3d) 183.

⁴²Model Law art 8.

⁴³Model Law arts 35–36.

⁴⁴*Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21.

⁴⁵Model Law art 17.

⁴⁶Model Law art 17J; *ENRC Metallurgical Marketing AG v OJSC 'Magnitogorsk Kombinat'* (2011) 285 ALR 444.

⁴⁷Model Law arts 17B, 17C.

⁴⁸For a criticism of this view see L. Nottage and R. Garnett, 'Introduction' in L. Nottage and R. Garnett (eds), *International Arbitration in Australia* (Federation Press 2010) 1, 23.

- (i) the place of arbitration
 - (ii) any place where a substantial part of the contractual obligations is to be performed or the place most closely connected with the subject matter of the dispute; or
- (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

The drafters of the Model Law therefore provided a broad definition of the term ‘international’ and court decisions have similarly taken an expansive view.

As well as being ‘international’, for an arbitration to come within the scope of article 1, it must also be ‘commercial’. There is included in article 1 a footnote that provides a large list of relationships considered commercial. The list includes supply contracts for goods and services, agreements for distribution, agency, leasing, construction, financial services, joint ventures, mineral concessions and transport contracts. The use of the word ‘commercial’ was therefore also intended to be a broad concept, covering almost all situations in international trade. The use of the word ‘commercial’ was also not intended to exclude state parties from the coverage of the Law and allow them to plead sovereign immunity from arbitration proceedings.

In a Canadian case involving an arbitration conducted under Chapter XI of the NAFTA treaty, *Mexico v Metalclad Corp*⁴⁹ the court found a dispute between the Mexican Government and a United States company over a permit to operate a waste dump to be ‘commercial’. While the matter did involve issues of government regulation and policy, the essence of the dispute was an investment and the treatment of investors under the NAFTA treaty.

In practice, therefore, given the wide breadth of the terms ‘international’ and ‘commercial’ in article 1 there will be few arbitration agreements with a foreign element that will not fall within the terms of the Model Law. Where, however, an agreement to arbitrate in Australia is not considered ‘international’ under article 1, then the provisions of the CAA will govern the arbitration as it will be domestic. While the provisions of the CAA are much closer in content and effect to the *International Arbitration Act* than the old 1984 *Commercial Arbitration Act*, a few important differences still exist between the statutes which will be highlighted later.

2.4.1 Can the Model Law Be Excluded?

Once the parties’ agreement is found to fall within article 1, the Model Law will apply to govern the procedure of the arbitration. Before the 2010 amendments to the *International Arbitration Act*, section 21 of the IAA allowed parties to exclude the Model Law by agreement in favour of the 1984 *State Commercial Arbitration Act*

⁴⁹2001 BCTC 664.

for arbitrations taking place in Australia. However, in the 2010 amendments, section 21 was changed to give the Model Law exclusive operation in the case of international arbitration agreements with an Australian seat.

While it is clear that the new section 21 applies to arbitration agreements entered into on or after 6 July 2010, a much more difficult question arises in the case of agreements concluded before that date. In *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*,⁵⁰ Murphy J of the Federal Court held that section 21 has retrospective effect with the result that every international arbitration agreement with an Australian seat, whenever entered into, is subject to the Model Law. By contrast, the Western Australian Court of Appeal in *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*⁵¹ suggested that the Model Law will not apply retrospectively to an arbitration agreement entered into before 6 July 2010, in particular, where the dispute between the parties has crystallized and arbitral proceedings have been commenced before that date.

The Western Australian court's analysis, which is very persuasive, is that parties have vested rights in the application of a particular arbitration regime which they may have consciously chosen and which would be adversely affected by retrospective application of a new law. Such rights should be recognised and so the new section 21 should only be applied to arbitration agreements entered into on or after 6 July 2010. The result therefore, is that for earlier agreements, parties would retain the right to exclude the Model Law in favour of the *Commercial Arbitration Act* 1984 (WA). This approach has been recently adopted by Pritchard J. of the Supreme Court of Western Australia and applied to a case where the arbitral proceedings were commenced *after* 6 July 2010.⁵²

2.4.2 The 'Black Hole'

This conclusion however poses a serious problem given that all States and Territories bar the ACT have now enacted the new CAA. Luke Nottage and I have described this as the '**black hole**' problem.⁵³ What is the black hole? If the parties, according to the *Rizhao* case, are able to choose the CAA for pre-6 July 2010 agreements, the problem is that the 2012 version of the statute cannot apply. While the 2012 legislation is expressed to apply retrospectively and so would pick up pre-6 July 2010 agreements, it is confined to *domestic* arbitration agreements only. The

⁵⁰[2012] FCA 21.

⁵¹(2012) 287 ALR 315.

⁵²*Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290.

⁵³For a detailed discussion, see R. Garnett and L. Nottage, 'What Law (If Any) Now Applies to International Commercial Arbitration in Australia?' (2012) 35 *University of New South Wales Law Journal* 953, 969–971 cited in *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290 [219] n 98.

1984 *Commercial Arbitration Act* also cannot apply because it no longer has any operation apart from in the ACT.

The result, therefore, is that there may now be a category of international arbitration agreements with their seat in Australia to which *no* arbitration statute applies: an absurd and incredible outcome! Obviously, legislative clarification is critical with the best solution being one that supports party autonomy and expectations as far as possible. In this regard, the aim should be to preserve the status quo prior to the 2010 amendments for arbitration agreements entered into pre-6 July 2010. Such an approach would require an amendment to the IAA to provide that it only applies to agreements entered into on or after 6 July 2010 and amendments to the uniform state CAAs to provide that for pre-6 July 2010 agreements, the former CAA which existed at the date of the agreement applies. Note that in November 2014 the Civil Law and Legislation Amendment Bill was introduced into the Federal Parliament. Schedule 2 of the Bill includes a new section 21(2), which provides that section 21(1) applies to ‘an arbitration arising from arbitral proceedings that commence on or after the commencement of this sub-section, whether the arbitration agreement giving rise to the arbitration was made before, on or after 6 July 2010’. The effect of the new section 21(2) is that section 21 will be made retrospective, at least as far as arbitration proceedings commencing on or after the coming into force of the new section 21(2) is concerned.

2.5 Other Provisions of the IAA

Apart from the New York Convention and the Model Law, the IAA also contains other important provisions. First, there are the provisions contained in Part III of the Act which govern matters such as the power of a tribunal to consolidate two or more arbitration proceedings⁵⁴ and the power to award costs and interest.⁵⁵ In the 2010 amendments new provisions were introduced in the IAA on interim measures which go beyond the express Model Law provisions, for example section 23 which gives a party to an arbitral proceeding the right to apply to a court to issue a subpoena against a person to attend for examination or produce documents to the arbitrator and section 23K which gives the tribunal the power to award security for costs. The IAA also contains provisions governing the liability of arbitrators and appointing authorities (only for breach of the duty of good faith and not merely negligence)⁵⁶ and rights of representation in arbitrations (not limited to lawyers).⁵⁷

⁵⁴IAA s 24.

⁵⁵IAA ss 25–27.

⁵⁶IAA s 28.

⁵⁷IAA s 29.

2.6 Confidentiality

A comment should also be made about confidentiality and privacy in international arbitrations in Australia, an issue which is not addressed in the Model Law. The concept of 'privacy' means that the proceedings are closed to all persons except the parties and those persons essential for the conduct of the arbitration such as witnesses and lawyers. The main exception to this principle is where a party approaches a court to seek interim relief during the reference (such as to remove an arbitrator) or where it applies to a court to set aside the award. The High Court in the case of *Esso Australia Resources Ltd v Plowman*⁵⁸ recognised the existence of a right to privacy.

The principle of confidentiality in arbitration is different: under this principle all documents and information revealed in the arbitration remain confidential and cannot be disclosed by either party. The High Court in *Esso* held that there is no implied obligation of confidentiality in respect of matters revealed in an arbitral proceeding and, even where an express provision exists in the arbitration agreement, material may be disclosed where required by a statutory obligation or when it is in the public interest. (In the *Esso* case a number of companies were forced to disclose valuable commercial information to a government minister).

Unfortunately, the federal government in its 2010 amendments chose to retain the existing law on this issue which means that confidentiality will only apply to an international arbitration in Australia where the parties expressly agree such a term⁵⁹ and there is no public interest reason for compelling disclosure.⁶⁰ Many observers see this as a missed opportunity to align Australian law with best international practice.

2.7 Domestic Arbitrations

So, that is a brief survey of the Australian regime for international commercial arbitration which, as was seen, is based closely on international instruments. What is the legislative framework for domestic arbitrations conducted in Australia? It is first important to note that the regime established under the 1984 uniform *Commercial Arbitration Acts* was very different to the IAA and provided much greater scope for judicial intervention in the arbitral process than is permitted under the Model Law. The new uniform CAAs which have been implemented in all States and Territories except the ACT much more closely follow the Model Law provisions with a few important additions and departures of which practitioners need to be aware.

⁵⁸(1995) 183 CLR 10.

⁵⁹IAA ss 22(3), 23C.

⁶⁰IAA s 23G(1)(a).

On the topic of arbitration agreements, the principles mentioned above in the case of the New York Convention now also apply, including a very wide definition of arbitration agreement⁶¹ and a strict obligation on Australian courts to stay proceedings⁶² brought in breach of an obligation to arbitrate. The same principles regarding the conduct of arbitrations⁶³ and the appointment and disqualification of arbitrators⁶⁴ now apply under the new CAAs as under the federal IAA. The departure from the 1984 legislation here is significant: the strict Model Law grounds for removal of arbitrators have replaced the much wider former test which allowed an arbitrator to be removed for misconduct or incompetence.⁶⁵ The grounds for challenge to awards⁶⁶ under the new CAAs are also much more restricted compared to the 1984 legislation. These new provisions will undoubtedly have the effect of reducing challenges to both the tribunal and its decisions and will help to minimise obstructions to the arbitral process.

In some respects, however, the new CAAs depart from the Model Law and the federal IAA. For example, on the issue of confidentiality, the new legislation provides that confidentiality will be imposed as an obligation in domestic arbitrations in Australia, absent exceptional circumstances such as where all the parties agree otherwise.⁶⁷ This approach is a significant improvement to the position under the IAA which provides that the right to confidentiality only exists in an international arbitration seated in Australia where the parties expressly provide for it in their agreement.

Another departure from the federal IAA and the Model Law concerns the preservation in the new CAAs of a right of appeal on a question of law. While under the Model Law the grounds for challenge to an award are limited to the due process issues such as an inability to present one's case in the arbitration and excess of jurisdiction by the tribunal, section 34A of the CAA preserves an error of law appeal, a right which also existed in the 1984 legislation. It is important to note, however, that the right to appeal under the CAA is very circumscribed compared to the earlier version: it will only be available with the consent of all the parties and the leave of the court, with the court having to be persuaded that the tribunal's decision is obviously wrong or of general public importance. In practice, the requirement for the agreement of all the parties to such a right will mean that it will only be rarely available, a result which would be consistent with the Model Law traditions of party autonomy and finality of dispute resolution.

Finally the new CAAs, unlike the Model Law and the federal IAA, have an 'armed' provision whereby an arbitrator may act as a mediator in order to try to

⁶¹CAA s 7.

⁶²CAA s 8.

⁶³CAA ss 18–24, 25–27.

⁶⁴CAA ss 11–12.

⁶⁵CAA (1984) s 44.

⁶⁶CAA s 34.

⁶⁷Sections 27E, 27F.

resolve the dispute.⁶⁸ Arb-med may occur if the parties have expressly agreed to it but the legislation provides that an arbitrator who has acted as mediator in mediation proceedings that have been terminated may not conduct subsequent arbitration proceedings in relation to the dispute unless the parties agree. Such a balanced approach is justified given the greater dangers posed to the integrity of the arbitral process by a mediator moving to arbitration mode compared to when an arbitrator shifts to mediation.⁶⁹ It was unfortunate that an arb-med provision was not included in the federal IAA in the 2010 amendments but apparently this was due to some concern that some foreign countries' courts may hesitate at enforcing an Australian award in which arb-med had been employed, on public policy grounds.

So, it can be seen that since 2010 there have been substantial changes to the legal regime of commercial arbitration in Australia, all aimed at reducing judicial intervention in the process and giving greater autonomy to the parties. Arguably the reforms could have gone further, particularly in the federal legislation, and the black hole problem needs to be addressed. It remains to be seen, however, whether the new reforms will lead to a significant increase in arbitrations being conducted in Australia; certainly Australian practitioners would hope so!

⁶⁸Section 27D.

⁶⁹The Hon M Gleeson AC QC, 'Some Practical Aspects of International Arbitration' in N Perram (ed), *International Commercial Law and Arbitration: Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law 2014) 297, 299.

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