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International Arbitration 2023

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Australia: Law & Practice and Trends & Developments

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Gilbert + Tobin

AUSTRALIA

Law and Practice

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Gilbert + Tobin is a leading Australian law firm, with a disputes and investigations practice comprising 26 partners and special counsel, supported by over 100 lawyers across the firm's offices in Sydney, Melbourne and Perth. The team specialises in assisting clients to navigate complex and significant contentious issues. Many cases involve multiple parties and novel legal or factual issues. Gilbert + Tobin's lawyers have been, and continue to be, involved in Australia's most high-profile commercial disputes, litigation, arbitrations, investigations and inquiries. Gilbert + Tobin's experienced team provides sophisticated and strategic litigation, arbitration and dispute resolution services across a broad range of areas.

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1. General

1.1 Prevalence of Arbitration

In Australia, international arbitration is a popular form of alternative dispute resolution. The 2020 Report of the Australian Centre for International Commercial Arbitration (ACICA) stated that between 2016 and 2019:

- there were 223 arbitrations connected to Australia;
- the aggregated amounts in dispute exceeded AUD35 billion; and
- about 60% of Australian solicitors and in-house counsel (who participated in the survey) included, or recommended, the inclusion of arbitration clauses in international contracts worth more than AUD5 million.

In 2022, ACICA issued a further report, "Reflections on the Last Decade of Activity", which indicates that international arbitration activity in Australia continues to grow, with a steady increase in cases being submitted to ACICA over the past four years.

That said, Australia is yet to gain the status of the preferred seat of arbitration for disputes with a connection to the Asia-Pacific region. Indeed, in ACICA's 2020 survey, which evaluated the insights of 111 Australian arbitration practitioners and data regarding 223 arbitrations with a connection to Australia that were conducted between 2016 and 2019, only five of 28 respondents indicated that it was typical for an Australian seat to be specified, whereas 75% of survey participants indicated that Singapore was typically a seat.

1.2 Key Industries

The 2020 ACICA Report referred to in **1.1 Prevalence of Arbitration** found that just under 50% of international arbitrations involving Australia in the 2016–19 period related to construction and engineering. Oil and gas was the second most common Australian industry represented in international arbitrations, accounting for approximately 25% of disputes.

That trend has continued, with the 2022 ACICA Reflections Report noting that the industries that dominated matters referred to ACICA in the four years prior to the Report were energy and resources, construction and infrastructure, and maritime.

Construction disputes are commonly the subject of arbitration, as parties may appoint arbitrators with the required specialist understanding and knowledge of complex construction projects. Most courts, on the other hand, lack judges with construction expertise or specialist construction departments. Oil and gas disputes are commonly internationally arbitrated as they tend to involve international participants.

1.3 Arbitral Institutions

ACICA is the "go-to" institution for conducting international arbitration seated in Australia. It conducts various types of alternative dispute resolution both under its own sets of arbitration rules and under other, ad hoc processes.

Further, ACICA has been appointed under Section 18 of the International Arbitration Act 1974 (Cth) (IAA) as the sole authority capable of appointing arbitrators in default of an express agreement on appointment.

1.4 National Courts

Pursuant to the IAA, Australia has adopted the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and has designated the Federal Court of Australia or – if the

arbitration is to take place in an Australian State or Territory – the Supreme Court of that State or Territory with powers to oversee international arbitrations seated within its jurisdiction and enforce arbitral awards in Australia.

2. Governing Legislation

2.1 Governing Legislation

International commercial arbitrations in Australia are governed by the IAA.

By Section 16 of the IAA, the Model Law (as contained in Schedule 2 of the IAA) has been formally adopted and has the force of law in Australia with respect to the conduct of international arbitrations in the country. However, the IAA made some adjustments to the Model Law. Briefly stated, these adjustments include:

- imposing a higher threshold for requisite "justifiable doubt" in challenging the impartiality or independence of an arbitrator (see **4.1 Limits on Selection** for more detail as to impartiality and independence);
- disallowing Australian domestic and international tribunals from making ex parte orders under Article 17B of the Model Law;
- limiting the meaning of "full opportunity" (for a party to present its case) under Article 18 of the Model Law to require only a reasonable opportunity being given;
- providing clarity to the meaning of "public policy" under Articles 17I, 34 and 36 of the Model Law;
- empowering Australian tribunals to make orders for the consolidation of arbitration proceedings;
- empowering Australian courts to make orders for gathering evidence in international arbitrations; and
- adopting express provisions that empower Australian tribunals to award a sum for interest and to award costs.

Part II of the IAA deals with recognition and enforcement of international arbitral awards. In particular, it sets out Australia's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

2.2 Changes to National Law

There have been no changes to the IAA since 2018. The latest changes in 2018 were made to:

- clarify the procedure for enforcing an award;
- confirm the meaning of "competent court" under the Model Law;
- provide clarification around confidentiality in certain investor-state arbitrations; and
- amend the power of an arbitral tribunal to award costs.

There are no pending legislative reforms for Australia's arbitration laws.

That said, in 2021 ACICA released the updated version of its arbitration rules in replacement of the ACICA Rules published in 2016. The 2021 ACICA Rules came into force on 1 April 2021 and only apply to arbitration agreements formed after that date.

In summary, the ACICA Rules adopted the following key changes:

- Joinder of parties and consolidation – claims arising out of multiple arbitrations may be consolidated into one arbitration where there are common questions of law and common questions of fact, and the relief claimed arises from the same or similar transactions.

- Multi-contract disputes – parties may now commence a single arbitration proceeding for claims arising from more than one contract where those contracts are sufficiently connected to one another on the basis of the principles for joinder of parties expressed above.
- Virtual arbitrations –
  (a) hearings conducted virtually are considered to have been conducted at the seat of the arbitration;
  (b) all hearings may be conducted virtually at the direction of the tribunal; and
  (c) all materials may be delivered electronically.

It was proposed that the 2021 Rules would include 'Med-Arb' rules in light of their increasing popularity in other Asia-Pacific institutions. Med-Arb rules permit arbitration proceedings to be stayed in favour of mediation, whereby the arbitrator adopts the role of both mediator and arbitrator. Although these changes were not ultimately adopted, as part of the changes introduced in the 2021 Rules, the tribunal is required to raise the possibility of mediation and other forms of alternative dispute resolution with the parties.

3. The Arbitration Agreement

3.1 Enforceability

An arbitration agreement, like any other form of a contract, is governed by the general principles of contract law. For an arbitration agreement to be valid and enforceable, it must satisfy the common law requirements for formation of a contract (eg, offer, acceptance and consideration).

The IAA sets out further legal requirements for an arbitration agreement to be enforceable. In particular, Section 3 of the IAA requires an arbitration agreement to:

- be in writing;
- evidence the parties' intention to submit the differences between them to arbitration; and
- concern a subject matter that is capable of settlement by arbitration.

The "in writing" requirement does not require a formal/standalone agreement to be drawn up and executed by the parties. Instead, it could be met by an arbitration clause in the agreement that governs the commercial relationship between the parties or by an exchange of written communications including electronic communications. Further, it is still possible for a party to bypass the "in writing" requirement by alleging that a verbal arbitration agreement exists at common law or that the party is estopped from denying the promise to arbitrate.

The "submission" requirement connotes that the arbitration agreement must make arbitration compulsory instead of merely contemplating arbitration as one of the possible means of dispute resolution (Jemena Gas Networks (NSW) Ltd v AGL Energy Limited [2017] NSWCA 266, affirmed in Lee v Lin & Anor [2022] QCA 140).

The third requirement is commonly known as "arbitrability", which is further addressed in **3.2 Arbitrability**.

3.2 Arbitrability

The IAA does not specify which matters are or are not arbitrable. The general approach adopted by the Australian courts in considering whether a particular dispute is arbitrable is set out by Allsop J (as His Honour then was) in Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192. The courts will consider:

- whether there is a sufficient element of legitimate public interest in these subject matters making resolution of these matters outside the national court system inappropriate; and
- whether the identification and control of these subjects is the legitimate domain of national legislatures and courts.

When approaching statutory claims, it is important to consider the question of arbitrability on an individual basis with reference to the preamble, purpose and scope of application of the particular legislation concerned.

The various pieces of legislation and decisions by the courts together provide some guidance on which matters cannot be referred to arbitration. Briefly stated, these include the following:

- criminal matters;
- certain aspects of family law (eg, divorce and custody of children);
- intellectual property disputes;
- antitrust and competition law matters;
- certain bankruptcy and insolvency matters (see WDR Delaware Corporation v Hydrox Holdings Pty Ltd (2016) 245 FCR 452). The Federal Court of Australia recently provided further clarification on the arbitrability of such matters in Mansfield (Liquidator) v Fortrust International Pty Ltd, in the matter of Palladium Investments International Pty Ltd (in liq) [2023] FCA 350. In that case, the court held that a claim to have a contract declared void under Sections 120 and 121 of the Bankruptcy Act 1996 (Cth) (which provides that certain transfers of property by bankrupt persons are void as against the trustee in bankruptcy) was not a claim that could have been made by the primary party to the arbitration agreement, was actionable only by the trustee in bankruptcy, and was therefore not arbitrable;
- an arbitration agreement included in bills of lading or similar documents relating to the carriage of goods to or from Australia (which is void under the Carriage of Goods by Sea Act 1991 (Cth)); and
- an arbitration agreement within a contract of insurance (which is void under the Insurance Contracts Act 1984 (Cth)).

It has been held that a dispute arising out of misleading and deceptive conduct under Section 18 of the Australian Consumer Law is arbitrable.

3.3 National Courts' Approach

The Australian courts have long held a reputation of being "pro-arbitration" by both being cautious to intervene in an ongoing arbitration process and endeavouring to enforce foreign arbitral awards.

A number of distinguished Australian judges have spoken for the pro-arbitration approach. For instance, Warren CJ (the former Chief Justice of Victoria Supreme Court) has said:

"In arbitration, the directive role of the Court needs to be minimised. The focus instead turns to ways in which the Court can support the arbitration process and enforce arbitral awards in a timely and cost-effective manner."

The above sentiment was echoed by Allsop CJ (Chief Justice of the Federal Court of Australia from 2013 to April 2023). His Honour stated in a speech delivered at the 2021 CIArb Asia Pacific Conference:

"The clear trend in judicial decision-making about arbitration in Australia [has transformed] from suspicion, to respect and support... In terms of intervention [by the judiciary], restraint is essential. Arbitration depends for its success

on the informed and sympathetic attitude of the courts."

Relevantly, the High Court of Australia in Rinehart & Another v Hancock Prospecting Pty Ltd & Others [2019] HCA 13 considered whether a dispute over the validity of a deed fell within the scope of an arbitration clause for disputes arising "under" the deed and "thereunder". In staying the court proceeding and upholding the validity of the arbitration agreement, the Court, while adopting the orthodox approach of literal interpretation, held that in light of the context and purpose of the deed, the arbitration agreement contained in it clearly had "wide coverage with respect to what was to be the subject of confidential processes of dispute resolution". This decision is a clear endeavour of the Court to give maximum effect to the arbitration agreement reached by parties.

The willingness of the Australian courts to enforce an arbitration agreement is further exemplified by the more recent decision of Queensland's Supreme Court in Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd [2021] QSC 75. The Court held in that case, in determining the scope of an arbitration agreement, an expansive approach ought to be taken – considering whether a dispute had "sufficiently close and consequential connection" with the contract.

3.4 Validity

In Australia, the doctrine of separability is well recognised and enforced – an arbitration agreement (clause) is treated as separable from the main commercial contract between the parties. As such, the arbitration agreement may still be valid even if the main commercial contract is found to be invalid (Hancock Prospecting v Rinehart (2017) 257 FCR 442; Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192).

4. The Arbitral Tribunal

4.1 Limits on Selection

There are two key limitations on parties' autonomy in respect of their selection of arbitrators. Firstly, the arbitrator(s) must be independent and impartial. This is required by Article 12 of the Model Law, which provides that a proposed arbitrator must disclose any circumstances likely to give rise to "justifiable doubts" as to his or her impartiality or independence. The IAA sets a higher threshold for establishing "justifiable doubts" in respect of impartiality or independence, requiring that there is a "real danger" of bias on the part of the arbitrator (IAA, Section 18A). The New South Wales Court of Appeal recently provided clarification on the nature of "justifiable doubts" as to an arbitrator's impartiality or independence, in circumstances where the arbitrator's wife had, when in a relationship with the arbitrator, previously acted for the respondents in connection with transactions relevant to the arbitration (Hancock v Hancock Prospecting Pty Limited [2022] NSWCA 152).

Secondly, the arbitrator(s) must possess the qualifications agreed by the parties (Article 12(2) of the Model Law).

Further, parties must follow the procedure for appointment provided by the arbitration agreement or otherwise agreed by the parties. A failure to follow the requisite procedure can render any subsequent award unenforceable (Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company [2021] FCAFC 110).

Article 11(1) of the Model Law expressly provides that nationality shall not be a bar to acting as an arbitrator (unless the parties agree otherwise).

4.2 Default Procedures

Pursuant to Article 10 of the Model Law, the parties are free to agree the number of arbitrators, but the default number is three. The parties are likewise free to choose their own procedure for appointing their arbitrator(s) (Article 11(2)).

If the parties do not agree a procedure for appointment, Article 11(3) sets out a default procedure. In summary, for an arbitral tribunal with three arbitrators, this involves each party appointing one arbitrator, and the two party-appointed arbitrators together appointing a third arbitrator. If a party fails to appoint its arbitrator within 30 days of receiving a request to do so from the other party, or the two party-appointed arbitrators fail to agree on a third arbitrator within 30 days of their appointment, a party can request the court to make the appointment.

If the arbitration agreement provides for only one arbitrator and the parties cannot agree as to the appointment, either party can request the court to make the appointment.

If the parties have agreed to a particular appointment procedure and either the parties, arbitrators or a third party fail to act as required under the procedure, any party may request the court to make the appointment (unless the procedure specifies a different method for securing the appointment (Article 11(4)).

Where the court is to make the appointment under Article 11(3) or 11(4), the only prescribed appointing authority in Australia at present is ACICA.

There is no default procedure in Australia for multiparty arbitrations. Parties should consider whether a multiparty dispute is likely to arise under an arbitration agreement, and if so, ensure that a set of rules is adopted which provides a mechanism for appointing arbitrators, such as the ACICA Rules.

4.3 Court Intervention

The Australian courts' powers under the Model Law to intervene in the selection of arbitrators is limited. Under the Model Law, courts may:

- appoint arbitrators where the parties or the two party-appointed arbitrators fail to agree on an arbitrator (Articles 11(3) and 11(4)). As noted in **4.2 Default Procedures**, the only prescribed appointing authority in Australia at present for this purpose is ACICA;
- rule on a challenge of an arbitrator, upon request by a party (Article 13(3)); and
- rule on the termination of a mandate of an arbitrator as a result of the arbitrator being unable to perform his or her functions or failing to act without undue delay, upon request by a party (Article 14).

4.4 Challenge and Removal of Arbitrators

See **4.1 Limits on Selection** in respect of challenging an arbitrator on the grounds of lack of independence or impartiality, or lack of agreed credentials.

In addition to those grounds, as noted in **4.3 Court Intervention** a party may ask the court to decide on the termination of an arbitrator's mandate in the event that the arbitrator becomes unable to perform his or her functions or fails to act without undue delay (Article 14).

4.5 Arbitrator Requirements

Article 12 of the Model Law requires arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. This obligation applies at the time of being approached in connection with a possible appointment and continues as an ongoing obligation throughout the arbitral proceedings.

These requirements are also found in the ACICA Rules, which require a prospective arbitrator to sign a statement of availability, impartiality and independence prior to accepting an appointment and, if appointed, the arbitrator has an ongoing obligation to disclose any potential conflicts of interest. As to what comprises a conflict of interest, the ACICA Rules expressly incorporate the IBA Guidelines on Conflicts of Interest in International Arbitration, which contain guidance on this issue.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

The competence-competence principle is applicable in Australia. Article 16(1) of the Model Law provides that an arbitral tribunal may rule on its own jurisdiction, including issues as to the existence or validity of the arbitration agreement itself.

Article 8 of the Model Law provides that, where a proceeding is brought before it on a matter which is the subject of an arbitration agreement, the court must, if a party requests it no later than submitting its first statement on the substance of the dispute, refer the parties to arbitration unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

In this context, the Australian courts have found that, if there is a prima facie valid arbitration agreement which appears to cover the matter in dispute, a jurisdictional challenge should be referred to the arbitral tribunal (Rinehart v Hancock Prospecting Pty Ltd (2019) 366 ALR 635).

However, where a court considers it is better placed than the arbitral tribunal to deal with matters relating to the existence, validity or scope of an arbitration agreement (eg, if such matters can be dealt with as a discrete exercise and are not relevant to the substantive matters in dispute between the parties), it may do so (Dialogue Consulting Pty Ltd v Instagram, Inc [2020] FCA 1846, upheld on appeal in Instagram Inc v Dialogue Consulting Pty Ltd [2022] FCAFC 7).

Also note the ability for a party to seek relief from the court in circumstances where an arbitral tribunal has already ruled that it does have jurisdiction (see **5.4 Timing of Challenge**).

5.3 Circumstances for Court Intervention

As noted in **5.2 Challenges to Jurisdiction**, Australian courts have the discretion to deal with questions relating to the existence, validity or scope of an arbitration agreement, including issues as to the jurisdiction of the arbitral tribunal, and may exercise such discretion if the court considers it is better placed than the arbitral tribunal to deal with such matters (Dialogue Consulting Pty Ltd v Instagram, Inc [2020] FCA 1846). Nevertheless, as a general proposition and as noted in **3.3 National Courts' Approach**, Australian courts have long been considered pro-arbitration and generally show a reluctance to intervene where possible.

In addition, a party may challenge an arbitral tribunal's preliminary determination that it has jurisdiction by applying to the relevant competent court (being either the Federal Court or, if the seat of arbitration is a particular State or Territory, then the Supreme Court of such State or Territory) to decide the matter (Section 18 of the IAA and Article 16(3) of the Model Law).

Commentators have noted that Article 16(3) is unclear as to whether it applies only to an arbitral tribunal's ruling where it does have jurisdiction, or whether it also extends to a ruling where it does not have jurisdiction.

The decision of the Federal Court in respect of jurisdiction is not subject to any right of appeal, and while any such challenge is pending before the court, the arbitral tribunal may continue the arbitral proceedings and make an award (Article 16(3) of the Model Law).

5.4 Timing of Challenge

A party must bring the initial challenge to the jurisdiction of an arbitral tribunal within the arbitral proceedings and no later than after the filing of the statement of defence. A party may also bring a plea that the tribunal has exceeded its jurisdiction; such a plea must be brought as soon as the matter alleged to be beyond the scope of the tribunal's authority is raised during the arbitral proceedings. In either case, the tribunal may admit a later plea if it considers the delay justified (Article 16(2) of the Model Law).

The arbitral tribunal may rule on the plea either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days of receiving notice of the arbitral tribunal's ruling, that the court decide the matter (Article 16(3) of the Model Law).

It is implicit in Article 16 that a party must first obtain a ruling from the arbitral tribunal in respect of jurisdiction before being able to seek relief from the Australian courts pursuant to that Article. However, see **5.2 Challenges to Jurisdiction** in respect of the courts' discretion to rule on jurisdiction where a party brings court proceedings in respect of a matter which is the subject of an arbitration agreement.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Jurisdiction

The court will review the decision of an arbitral tribunal as to jurisdiction de novo.

This is consistent with the decision in IMC Aviation Solutions Pty Ltd v Altain Khuder LL [2011] VSCA 248, which confirmed that the court was able to "determine for itself not only whether the Tribunal made crucial findings of fact that enabled it to exercise jurisdiction over [a party], but also whether the Tribunal had jurisdiction over [that party]". This was affirmed in Armada (Singapore) Pte v Gujarat NRE Coke Ltd [2014] FCA 636.

The arbitral tribunal's reasons can be before the court and the court can have regard to those reasons if they are helpful, but it is neither bound nor restricted by them (Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd (2018) 57 VR 576; CBI Constructors Pty Ltd v Chevron Australia Pty Ltd [2023] WASCA 1).

Admissibility

Recent authorities from other jurisdictions indicate that issues relating to a failure to comply with dispute resolution mechanisms and procedures contained in an arbitration agreement are likely to be held by courts as being questions of admissibility (ie, whether pre-arbitration proce-

dural requirements have been met) and not of jurisdiction. Questions of admissibility are not within the courts' jurisdiction and must be dealt with by the arbitral tribunal. See, for example, the UK cases of NWA & Others v NVF & Others [2021] EWHC 2666 (Comm) and Sierra Leone v SL Mining Ltd [2021] EWHC 286 (Comm). A similar position has been taken in Hong Kong and Singapore. Although there is no clear authority in Australia on this point, it is likely that a similar approach would be taken.

5.6 Breach of Arbitration Agreement

The Australian courts are obliged to stay a court proceeding in certain circumstances, if the proceeding relates to matters which are the subject of an arbitration agreement.

This obligation arises under Section 7(2) of the IAA, which provides that where a party to an arbitration agreement commences proceedings against another party to such agreement in respect of a matter that is capable of settlement by arbitration, and a party to the agreement applies to a court for a stay, the court will stay the proceeding and refer the parties to arbitration. The court may order a stay upon such conditions (if any) as it thinks fit. A recent example can be seen in Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co. KG (The BBC Nile) [2022] FCAFC 171 in which the Full Court of the Federal Court of Australia stayed the plaintiff's claim in favour of arbitration pursuant to Section 7(2) of the IAA, on the basis that, as the prerequisites in Section 7(2) were satisfied, there was no residual discretion in the Court to refuse a stay.

The exception to this obligation is set out in Section 7(5) of the IAA, which provides that a court will not make a stay order if it finds that the arbitration agreement itself is null and void, inoperative or incapable of being performed.

Section 8 of the Model Law provides further procedural requirements in respect of an application to court to refer the parties to arbitration, with any such application having to be made no later than when the applicant submits its first "statement on the substance of the dispute".

5.7 Jurisdiction Over Third Parties

Section 7(4) of the IAA provides that, for the purposes of Section 7(2) (see **5.6 Breach of Arbitration Agreement**), a reference to a "party" includes a reference to "a person claiming through or under a party".

There remains some uncertainty in Australia as to the precise scope of the phrase "through or under a party". However, case law has established that the following third parties may rely on Section 7(4) of the IAA to enforce arbitration agreements contained in a contract or deed to which they are not a party:

- a liquidator or trustee in bankruptcy who is not a party to the arbitration agreement provided that the underlying contractual right is vested in or exercisable by the primary party to the arbitration agreement (Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332; Mansfield (Liquidator) v Fortrust International Pty Ltd, in the matter of Palladium Investments International Pty Ltd (in liq) [2023] FCA 350);
- a subsidiary of a parent company where the parent company is party to the arbitration agreement but the subsidiary is not, but only where the subject matter of the dispute is encompassed by the relevant arbitration clause (McHutchison v Western Research and Development Ltd [2004] FCA 419);

- an assignee of trust assets who receives the assets in the knowledge that the assignment constituted a breach of trust (Rinehart v Hancock Prospecting [2019] HCA 13). This decision was recently applied in DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd [2022] WASCA 97, in which the Court of Appeal of Western Australia noted: "The focus is on the nature and source of the claims and defences of the person said to be claiming through or under a signatory to the arbitration agreement, not on the relationship between the two parties or on the relationship of the first person to the arbitration agreement"; and
- a director of a company in administration where the company is party to an arbitration agreement but the director is not, in circumstances where the director's defence would also be available to the company and the matter would be decided in the same way as if the company were party to the dispute (King River Digital Assets Opportunities SPC v Salerno [2023] NSWSC 510).

In Rinehart v Hancock [2019] HCA 13, the High Court of Australia found that the third parties in question could rely on the arbitration agreement contained in deeds to which they were not themselves party, on the basis that they were assignees of certain assets alleged to have been assigned to them in breach of the deeds. (It is noted that the relevant Act in this case was the Commercial Arbitration Act 2010 (NSW), which contains a similar provision to Section 7(4) of the IAA.)

Where Section 7(4) does not apply, an arbitration agreement is governed by ordinary contractual principles, and therefore an arbitrator is not usually able to assume jurisdiction over third parties. There are some exceptions, for example where a principal is bound by the actions of an authorised agent under applicable law.

Third parties may also be the subject of subpoenas. Under Section 23 of the IAA, a party to arbitral proceedings, with the permission of the arbitral tribunal, may apply to the relevant Australian court for a subpoena requiring a person to attend for examination before the tribunal, or produce specified documents to the tribunal. The court must only issue a subpoena to a non-party if it is satisfied that it is reasonable in all the circumstances to do so (Section 23(5)). Further, the Federal Court of Australia has held that Australian courts cannot issue subpoenas in respect of an arbitration with a seat other than Australia (Re Samsung C&T Corp [2017] FCA 1169). The Court in that case indicated that parties to a foreign-seated arbitration could instead request evidence in Australia under the Hague Evidence Convention (if it applies).

6. Preliminary and Interim Relief

6.1 Types of Relief

An arbitral tribunal in Australia has broad powers to take interim measures under Article 17 of the Model Law. Briefly stated, these include orders to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; and
- preserve evidence that may be relevant and material to the resolution of the dispute.

In Australia, an application for interim measures cannot be made on an ex parte basis: IAA, Section 18B.

In addition, a tribunal is also conferred with the power to make an order assisting a party with taking of evidence (unless the parties opted out of this provision by agreement): IAA, Section 23J.

6.2 Role of Courts

In Australia, the court has the same power to grant interim relief in relation to arbitration proceedings as it has in relation to proceedings in the court: IAA, Section 16/Model Law, Article 17J. It follows that the interim measures listed in Article 17 of the Model Law can also be granted by the court. Some examples of the court ordering interim relief are set out below.

- An interim injunction restraining a party from calling for the surety bonds pending constitution of the arbitral tribunal: Kawasaki Heavy Industries Ltd v Laing O'Rourke Australia Construction Pty Ltd [2017] NSWCA 291.
- A freezing order over assets pending constitution of the arbitral tribunal: Duro Felguera Pty Ltd v Trans Global Projects Pty Ltd (in liq) [2018] WASCA 174.
- A freezing order over Australian assets subject to an ongoing foreign arbitral proceeding: ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat" [2011] FCA 1371.

In exercising such power, the court is conscious of not making orders that might undermine the competence of the arbitral tribunal. For instance, the court has refused to make procedural orders which had previously been rejected by the arbitral tribunal: ENRC Marketing AG v OJSC 'Magnitogorsk Metallurgical Kombinat' (2011) 285 ALR 444. More recently, in Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd [2022] NSWSC, the Supreme Court of New South Wales refused to extend an interim injunction to prevent a bank guarantee being called upon pending an arbitral resolution. In doing so, the Court noted that while it was entitled to exercise its injunctive powers "in accordance with its own procedures" (pursuant to Article 17J of the Model Law), this power should be exercised sparingly and should not be exercised to usurp the powers of the arbitrator. The Court also noted that although it needed to construe the relevant contractual provisions to determine whether the applicant had a strong prima facie case, any view as to the meaning of the relevant contract expressed by the Court in doing so would not bind the arbitral tribunal.

It can be observed from the cases touched upon above that:

- the Australian court is willing to grant interim relief in aid of foreign-seated arbitration; and
- the need of approaching the court for assistance/interim relief is largely due to the arbitral tribunal's inability to act during the appointment/constitution process.

With respect to the latter observation, approaching the court for interim relief might become less likely given many arbitral institutions have adopted procedures for appointing emergency arbitrators. For example, the ACICA Arbitration Rules allow a party to apply to ACICA for appointment of an emergency arbitrator and make emergency interim measures prior to the constitution of the arbitral tribunal and further provides that the decisions made by the emergency arbitrator shall be binding on the parties: ACICA Rules, Schedule 1, Sections 2–4.

Under applicable law, the court must recognise an interim measure issued by an arbitral tribunal as binding and enforceable on application to the court: Model Law, Article 17H.

6.3 Security for Costs

Section 23K of the IAA provides that an arbitral tribunal may order security for costs. However, Section 22 of the IAA allows the parties to oust the tribunal's power to make such an order by agreement.

7. Procedure

7.1 Governing Rules

The IAA governs international commercial arbitrations in Australia. The IAA sets out Australia's accession to, and implementation of, the New York Convention and provides that the Model Law has force of law in Australia. In addition to the Model Law, the IAA contains a series of opt-in and opt-out provisions which parties may agree to incorporate into their agreement. These additional provisions regulate different aspects of an arbitration, including:

- the procedure for obtaining subpoenas (Section 23);
- the circumstances in which confidential information may be disclosed (Section 23D); and
- the provision of security for costs (Section 23K).

Domestic arbitrations are governed by relevant State and Territory legislation; for example, the Commercial Arbitration Act 2010 (NSW) applies to domestic arbitrations seated in New South Wales.

7.2 Procedural Steps

The Model Law requires the claimant to submit a statement of claim with evidence to commence proceedings (Article 23(1)). After the tribunal has received the claimant's statement of claim and the respondent's defence, it will rule on the dispute on the documents or by a hearing.

Any additional procedural steps will depend on whether the parties have reached an agreement on the procedure to be used.

The parties are generally free to determine the rules of procedure and evidence to be used (Article 19(1) of the Model Law).

In practice, evidentiary rules used in international arbitrations tend to draw heavily from the common law rules of evidence. The parties may also agree to adopt, or to be guided by, the IBA Rules on the Taking of Evidence in International Arbitration.

In the absence of any agreement between the parties, the tribunal is free to decide on the procedural steps to be used to conduct the proceedings and the rules of evidence to apply.

7.3 Powers and Duties of Arbitrators

In Australia, arbitrators have the powers and duties which are set out in the Model Law. Unless the parties agree otherwise, and subject to the provisions of the Model Law, the tribunal has the power to conduct the proceedings as it sees fit (Article 19 of the Model Law). The Model Law confers the tribunal with the following powers:

- to grant interim measures (Articles 17–17A);
- to grant and modify preliminary orders (Articles 17B–17C);

- to determine the place of arbitration and the language to be used (failing agreement by the parties) (Articles 20, 22);
- to determine whether to conduct oral hearings or to conduct the proceedings on the documents (subject to any contrary agreement by the parties) (Article 24); and
- to determine, settle or terminate any proceedings or award (Articles 28–33).

The Model Law obliges arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence (Article 12(1)). The Model Law also requires that parties are treated with equality and that each party is given an opportunity to present its case (Article 18).

Under the IAA, the tribunal has a duty to maintain the confidentiality of information relating to the proceedings, with some exceptions (Section 23C(2)).

7.4 Legal Representatives

There are very few restrictions on who may represent a party to an arbitration. Representatives are not required to be legally qualified and a party is entitled to represent itself. If a party is represented by a legal representative, the only requirement is that the practitioner is duly qualified under the rules of a legal jurisdiction of the party's choice: IAA, Section 29(2)(b).

8. Evidence

8.1 Collection and Submission of Evidence

The rules for the collection and submission of evidence may be determined by the parties. In the absence of an agreement between the parties, the tribunal will be responsible for determining the approach to the collection and submission of evidence.

The tribunal itself may not compel the production of evidence, though it may request the assistance of a relevant court to assist in the taking of evidence (Article 27 of the Model Law and Section 23 of the IAA). See **5.7 Jurisdiction Over Third Parties**.

As a matter of general practice, discovery is usually conducted and evidence is usually given in the same manner as in a court proceeding; that is, evidence is usually provided in written statements and the parties are then given a chance to cross-examine and re-examine the witness giving that evidence, similar to court procedure under the common law system in Australia.

8.2 Rules of Evidence

See **7.2 Procedural Steps**.

8.3 Powers of Compulsion

A tribunal may order a party to disclose documents or request another party unrelated to the proceedings to produce a document or provide evidence to the tribunal. A tribunal does not have any powers of compulsion, so if a party refuses a request to provide evidence, the tribunal (or a party with the approval of the tribunal) must apply to a court for assistance. See **5.7 Jurisdiction Over Third Parties** and **8.1 Collection and Submission of Evidence**.

9. Confidentiality

9.1 Extent of Confidentiality

There is no implied obligation of confidentiality in arbitrations in Australia. The IAA protects the confidentiality of arbitrations to the extent that

parties have not opted out of the confidentiality provisions in Sections 23C–23G.

Assuming the parties do not opt out of the confidentiality provisions of the IAA, the statute prohibits the parties from disclosing confidential information in relation to the arbitral proceedings except in certain enumerated circumstances, including:

- where the parties consent to the disclosure (Section 23C(2));
- where the information is disclosed to a professional advisor of the party (Section 23C(3));
- where it is necessary to protect the legal rights of a party to the proceedings (Section 23C(5)); and
- where it is otherwise ordered by the tribunal (Section 23E(1)).

Under the IAA, "confidential information" is defined broadly as comprising information that relates to the proceedings. This may include any of the evidence, any documents tendered as part of the tribunal and any rulings or awards made by the tribunal.

10. The Award

10.1 Legal Requirements

Section 16 of the IAA provides that the Model Law has force in Australia (adopted in Schedule 2 of the IAA). The form and contents of an award are prescribed by Article 31 of the Model Law. Those requirements are that:

- the award shall be in writing and be signed by the arbitrator(s). In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated;
- the award shall state the reasons on which it is based unless the parties to the arbitration have agreed that no reasons are to be given or if the award is on agreed terms under Article 30 of the Model Law;
- the award shall state its date and the place of arbitration as determined in accordance with Article 20(1) of the Model Law; and
- after it is made, a copy of the award signed by the arbitrators shall be delivered to each party.

No time limits are prescribed for delivery of the award.

10.2 Types of Remedies

Under Australian law, parties are able to obtain the same remedies from arbitrators which could be sought from an Australian court. The remedies are not limited by the IAA. Thus, available remedies include, but are not limited to, rectification and nullification of contracts, specific performance, interim or permanent injunctive relief, declaratory relief and statutory remedies.

However, it is possible for the terms of an arbitration agreement to provide limits on the types of remedies that an arbitral tribunal constituted under that agreement may award.

10.3 Recovering Interest and Legal Costs

In Australia, subject to whether the parties have agreed otherwise, an arbitrator will have a broad discretion to award costs under Section 27 of the IAA, including:

- which party should pay costs;
- the manner for payment of those costs; and
- the amount and any limit of a costs award.

The ordinary approach is that, as is the case in an Australian court proceeding, a successful party will be awarded its reasonable costs, although this general principle may be displaced if warranted in the circumstances (such as where a party's conduct has caused substantial delay or prejudice).

In Australia, unless the parties have agreed otherwise, an arbitrator is also empowered to make an award for interest. Under Section 25 of the IAA, an arbitrator may order payment of pre-award interest. Under Section 26 of the IAA, an arbitrator may award post-award interest at a "reasonable rate" from a specified date.

11. Review of an Award

11.1 Grounds for Appeal

There is no right of appeal under the IAA.

The only method for challenging an award is to bring an application to set aside the award in accordance with Article 34 of the Model Law. Applications must be made to the Federal Court of Australia or a Supreme Court of a State or Territory within three months of the date on which the applicant party received the award.

The grounds on which an award can be challenged and set aside are:

- incapacity of a party or invalidity of the arbitration agreement;
- proper notice of an arbitrator's appointment or the arbitration itself was not given, or a party was otherwise unable to present its case;
- the award relates to a dispute not falling within the arbitration agreement;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration agreement or the Model Law;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of the relevant state; and
- enforcing the award would be contrary to public policy of the state.

Article 19 of the IAA provides that, without limiting the generality of the public policy challenge ground in Article 34, an award is contrary to public policy in Australia if the award was affected by fraud or corruption, or a breach of natural justice occurred in connection with the making of the award.

In light of the language used in Article 34 of the Model Law of "may set aside", if one of the grounds under Article 34 of the Model Law is established, an Australian court still retains a residual discretion to decide whether the award should be upheld or set aside (Cameron Australasia Pty Ltd v AED Oil Ltd [2015] VSC 163 at [23], citing TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83 at [111]). Australian courts will, "consistent with the 'pro-enforcement bias' of the legislation" exercise "significant judicial constraint in considering and determining an article 34 challenge" (Lieschke v Lieschke [2022] NSWSC 1705 at [14], [15]).

11.2 Excluding/Expanding the Scope of Appeal

The grounds for challenging an award and the bases for setting aside an award are limited to those provided by Article 34 of the Model Law.

An application to set aside an arbitral award is not the same as an appeal and is limited to the grounds set out in Article 34 of the Model Law.

Parties to an arbitration cannot agree to exclude or expand the scope of the application to set aside the award.

11.3 Standard of Judicial Review

Given that there is no right of appeal, there can be no judicial review of the merits of an award (see, for example: Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131 at [73]).

12. Enforcement of an Award

12.1 New York Convention

Australia has ratified the New York Convention with no reservations.

12.2 Enforcement Procedure

International and foreign awards are recognised and enforceable as if they were a judgment of an Australian court (subject to the limited grounds for refusal of enforcement under Article V of the New York Convention).

For foreign awards, Section 8 of the IAA implements Australia's obligations under Article V of the New York Convention. Foreign awards may be enforced by application to one of the Supreme Courts of the States or Territories or the Federal Court of Australia. The applicant must comply with the procedural requirements set out in Article IV of the New York Convention, namely, produce to the court the original award and arbitration agreement, or duly certified copies, and a certified English translation if the award was not made in English (IAA, Section 9).

For international arbitration awards made within Australia, Article 35 of the Model Law applies. International awards may be enforced by application to one of the Supreme Courts of the States or Territories or the Federal Court of Australia. The applicant must comply with the procedural requirements set out in Article 35(2) of the Model Law, namely supply the original award, or a copy and a translation if the award was not made in English.

Under Article V(1)(e) of the New York Convention, an Australian court retains a discretion to enforce a foreign award even if it has been set aside in the seat of arbitration (Ye v Zeng [2015] FCA 1192).

In respect of enforcement of awards against foreign states, the Foreign States Immunities Act 1985 (Cth) (Immunities Act) grants immunity to a foreign state from the jurisdiction of the courts of Australia, with various exceptions, including where the foreign state has submitted to the jurisdiction by treaty. In Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2023] HCA 11, the High Court of Australia held that the effect of Spain's agreement to Articles 53, 54 and 55 of the ICSID Convention (concerning "Recognition and Enforcement of the Award") amounted to a waiver of foreign state immunity from the jurisdiction of the courts of Australia to recognise and enforce, but not to execute, an ICSID arbitration award obtained in the respondents' favour requiring Spain to pay them EUR101 million plus interest. The effect of the High Court decision is that the respondents now have an enforceable court order requiring Spain to pay them EUR101 million plus interest, while at the same time Spain continues to enjoy immunity from execution of that order under Sections 30 and 32 of the Immunities Act (except in relation to any commercial property owned by Spain in Australia).

12.3 Approach of the Courts

Australia is considered a "pro-arbitration" jurisdiction, and this extends to the courts' approach to the recognition and enforcement of arbitration awards. This approach was highlighted in the recent Federal Court decision to enforce a Chinese award and reject arguments that to enforce the award would be contrary to public policy (Guoao Holding Group Co Ltd v Xue (No 2) [2022] FCA 1584). The Federal Court reaffirmed the high threshold required for an Australian court to refuse to enforce a foreign award on public policy grounds finding that "the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection". The Federal Court also recently recognised and enforced a London and UAE award further affirming Australia's "pro-enforcement" approach (Siemens WLL v BIC Contracting LLC [2022] FCA 1029).

However, despite being generally arbitration-friendly, Australian courts will refuse to recognise and enforce an award if there are established grounds for doing so. This includes, for example, where the arbitral tribunal was not appointed in accordance with the agreement of the parties (Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company [2021] FCAFC 11) or where there is a "real unfairness or real practical injustice" by reference to the accepted principles of natural justice in relation to how the dispute was dealt with (TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83) at [110]–[111]). "Unfairness" refers to a realistic as opposed to fanciful possibility that an award may not have been granted or may have been materially different but for the denial of natural justice (Hui Esposito Holdings Pty Ltd [2017] FCA 648). Recently, the Court of Appeal in Western Australia in CBI Constructors Pty Ltd v Chevron Australia Pty Ltd [2023] WASCA 1 upheld a decision to set aside an award made beyond the scope of the submission to arbitration. The arbitration proceedings were bifurcated on questions of liability and quantum and the Court set aside a second interim award issued by the Tribunal as it purported to determine a liability issue that was belatedly raised after the first interim award which was to deal with "all issues of liability". The issuance of the first interim award rendered the Tribunal functus officio on all liability issues (ie, the authority of the Tribunal had been exhausted on questions of liability).

13. Miscellaneous

13.1 Class Action or Group Arbitration

In Australia, the IAA does not provide for class action arbitration or group arbitration. However, Section 24 of the IAA provides a procedure for consolidation of multiple arbitral proceedings which, in effect, can permit the determination of common questions across multiple proceedings in a manner similar to class action or group proceedings. A party to arbitral proceedings may apply to the arbitral tribunal for an order under this provision on one or more of the following grounds:

- a common question of law or fact arises in the proceedings;
- the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
- for some other reason specified in the application, it is desirable that an order be made.

13.2 Ethical Codes

There are no ethical codes in Australia that apply specifically to arbitration practitioners. However, the law societies in each State establish the pro-

fessional and ethical obligations applicable to Australian lawyers. These rules apply to Australian practitioners in both court and arbitral proceedings. Among other things, the rules require Australian legal practitioners to:

- act in a client's best interests;
- be honest and courteous during practice;
- deliver competent and diligent legal services; and
- avoid "compromise to their integrity and professional independence".

Foreign practitioners practising in proceedings in Australia must abide by any applicable rules and ethical codes that may apply to them in the foreign jurisdiction.

In addition, the IBA has published guidelines for use in international arbitration which apply to arbitrations conducted in Australia. The ACICA Arbitration Rules 2021 and the Expedited Arbitration Rules 2021 incorporate guidelines from the IBA relating to the taking of evidence, conflicts of interest and party representation.

13.3 Third-Party Funding

In Australia, third-party funding of proceedings is permitted. The Australian courts do not consider third-party funding to be an abuse of process or contrary to public policy, and it has now become common, particularly for class action proceedings (Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386).

13.4 Consolidation

In Australia, a party may apply to an arbitrator for an order for consolidation of arbitral proceedings (IAA, Section 24). The provision does not apply automatically. An order for consolidation under Section 24 may be made for the reasons set out in **13.1 Class Action or Group Arbitration**.

The parties to arbitral proceedings may also agree among themselves to consolidate proceedings on the terms on which they may agree.

13.5 Binding of Third Parties

In Australia, typically only parties to an arbitration agreement can enforce its terms and be bound by it and any award made pursuant to it. This is in accordance with the common law doctrine of "privity" of contract.

However, as set out in **5.7 Jurisdiction Over Third Parties**, by virtue of Section 7(4) of the IAA, a third party "claiming through or under a party" to a foreign arbitration agreement can apply to the court to enforce that arbitration agreement.

Trends and Developments

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Gilbert + Tobin is a leading Australian law firm, with a disputes and investigations practice comprising 26 partners and special counsel, supported by over 100 lawyers across the firm's offices in Sydney, Melbourne and Perth. The team specialises in assisting clients to navigate complex and significant contentious issues. Many cases involve multiple parties and novel legal or factual issues. Gilbert + Tobin's lawyers have been, and continue to be, involved in Australia's most high-profile commercial disputes, litigation, arbitrations, investigations and inquiries. Gilbert + Tobin's experienced team provides sophisticated and strategic litigation, arbitration and dispute resolution services across a broad range of areas.

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In the past year, Australia's premier arbitration institute, ACICA, published a report reflecting on the transformative last decade for international arbitration in Australia and predicting the growth of international arbitration in Australia in the future.

In jurisprudence, the most noteworthy legal development from the past year was the "pro-arbitration" decision of Australia's highest court, the High Court of Australia, in the *Kingdom of Spain* case, in which an ICSID arbitration award against Spain was recognised and enforced, and Spain's arguments that it enjoyed immunity from recognition and enforcement of the award were rejected. That decision is consistent with a long line of Australian decisions, and legislative and institutional developments, over the past decade that have strengthened Australia's role in the international arbitration field. We discuss these trends and developments further below.

Trends

In November 2022, ACICA released its report 'Reflections on the Last Decade of Activity at the Australian Centre for International Commercial Arbitration',which showcased the achievements and developments made in the field of international arbitration in Australia, and by ACICA, over the last decade. The report highlights:

- over 100 cases have been submitted to ACICA over the last decade, with a combined value of around AUD24 billion;
- the vast majority were disputes arising in the energy and resources sector (almost AUD19 billion), followed by the construction and infrastructure sector (almost AUD4 billion);
- more than half of ACICA-administered arbitrations that proceeded to awards were concluded within 12 months (54%);
- 39% of ACICA cases had at least one party that was not based in Australia and in 11% of cases neither party was based in Australia (noting that is common practice for foreign entities involved in major projects in Australia to register a local entity or subsidiary vehicle for contracting purposes and these statistics do not capture where that might be the case); and
- Sydney was the most popular seat (42%), followed by Melbourne (20%).

The report commented on Australia's "ideal conditions for international arbitration due to its stable and transparent legislative framework, the quality of the legal expertise of Australian practitioners and the leading internationalist approach of the judiciary". Some recent cases highlight this internationalist and pro-arbitration approach:

- [*Kingdom of Spain* 2023] HCA 11, where the High Court of Australia recognised and enforced an ICSID arbitration award against Spain (discussed further in the "Developments" section below);
- [*Lieschke v Lieschke* 2022] NSWSC 1705, where the Supreme Court of NSW, in considering whether to set aside an arbitral award, commented on the "pro-enforcement bias" of the Australian legislation regime governing commercial arbitration (at [15]);
- [*Guoao Holding Group Co Ltd v Xue (No 2)* 2022] FCA 1584, where the Federal Court of Australia enforced a Chinese award and in doing so rejected arguments that to enforce the award would be contrary to public policy; and
- [*Siemens WLL v BIC Contracting LLC* 2022] FCA 1029, where the Federal Court of Australia enforced a London and a UAE award, finding that they were "foreign awards" for the

purposes of the New York Convention and the International Arbitration Act 1974 (Cth), and noting that when Australia acceded to the Convention with effect from 24 June 1975 it did so without a reservation as to reciprocity (ie, Australia did not declare that it would only recognise and enforce awards made in foreign States which also acceded to the New York Convention). In any event, as the Judge noted, both the UK, with effect from 23 December 1975, and the UAE, with effect from 19 November 2006, have acceded to the New York Convention.

The report also commented on Australia's "significant trade with North and Southeast Asian countries (China, Japan, Singapore, Malaysia, India and others), the United States and United Kingdom, and several South American jurisdictions". On that note, Australia recently entered into two new free trade agreements, which should only serve to strengthen Australia's investment ties with Asia:

- the Regional Comprehensive Economic Partnership Agreement (RCEP) entered into force on 1 January 2022, with the original member countries being Australia, Brunei Darussalam, Cambodia, China, Japan, Laos, New Zealand, Singapore, Thailand and Vietnam. Over the last 18 months, South Korea, Malaysia and Indonesia have also joined RCEP; and
- on 29 December 2022, the Australia-India free trade agreement, the "Australia-India Economic Cooperation and Trade Agreement" (AI-ECTA) entered into force.

Both the RCEP and AI-ECTA feature arbitration-like dispute resolution panels as the mandatory dispute resolution mechanism for investor-State disputes.

The past decade has been a significant one for international arbitration in Australia, during which the International Arbitration Act 1974 (Cth) was significantly amended in 2018 to align with global best practice and ACICA amended its rules four times (the most recent have been in force since 1 April 2021). Looking forward, there is now significant momentum behind Australia's development as an international arbitration hub, and that trend is only predicted to grow in the future.

Developments

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2023] HCA 11

In April this year, the full bench of the High Court of Australia handed down its decision in the appeal brought by the Kingdom of Spain on the earlier findings made by the Full Court of the Federal Court of Australia recognising an award under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (ICSID Convention) as having the status of an Australian judgment and being "enforceable as such".

This decision by the highest court of appeal in Australia provides important and timely guidance on the interface between the well-established doctrine of State immunity and the policy thrust behind the ICSID Convention for promotion of equality of rights and obligations between states and private investors in the era of proliferation of investor-state arbitration; reinforces the status of the Australian courts as a "pro-enforcement" jurisdiction in the context of international commercial arbitration; and offers international investors assurance as to the enforceability of arbitral awards in Australia.

Background

In early 2000s, Spain introduced, by legislation, a renewable energy subsidy system essentially providing commercially favourable electricity price guarantees to solar power providers. Against this background, Infrastructure Services Luxembourg S.A.R.L. and Energia Termosolar B.V. (Investors) invested in solar power projects in Spain. From 2012 to 2014, Spain withdrew the relevant subsidies, which eventually led to a flurry of cases filed against Spain. This case was one of them.

The investments were made under the Energy Charter Treaty 1998 (**ECT**), which provided for dispute resolution by arbitration under the ICSID Convention. The arbitration award (**Award**) found that Spain had breached the ECT by failing to accord fair and equitable treatment to the Investors and ordered Spain to pay the Investors EUR101 million plus interest.

The Investors sought to have the Award recognised and enforced in Australia by commencing a proceeding in the Federal Court of Australia. At first instance, Stewart J held in favour of the Investors by holding that by entering into the ICSID Convention (in particular, its Articles 53 to 55), Spain waived its immunity from recognition and enforcement of the Award.

Spain unsuccessfully appealed the decision by Stewart J ([2020] FCA 157) to the Full Court of the Federal Court of Australia (Full Court). The Full Court upheld the orders made by Stewart J, recognising the Award as binding on Spain and ordering "that judgment be entered in favour of the applicants against the respondent for the pecuniary obligations under the Award in the sum of [EUR101 million plus interest]" (*Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)* [2021] FCAFC 112). Spain then sought and was granted special leave to have this issue determined by the High Court of Australia.

Decision

After careful consideration of the public international law doctrine of foreign State immunity (given effect in Australia by the Foreign States Immunities Act 1985 (Cth)) and the purpose and operation of the ICSID Convention (given effect in Australia by the International Arbitration Act 1974 (Cth)), the High Court made the following findings:

There is a substantive (not merely linguistic) distinction between the terms "recognition", "enforcement" and "execution". In particular:

- recognition – the Court's determination that an international arbitral award is entitled to be treated as binding, involving the court's acceptance of the award's binding character and its preclusive effects (giving force to the award as a *res judicata*);
- enforcement – the legal process by which an international award is converted into a judgment of the court that enjoys the same status as any judgment of that court; and
- execution – the means by which a judgment enforcing an international arbitral award is given effect, which commonly involves measures taken against the property of the judgment debtor by a law-enforcement official acting pursuant to a writ of execution.

Spain's agreement to Articles 53 to 55 of the ICSID Convention constituted a waiver of foreign State immunity from the jurisdiction of the courts of Australia in respect of recognition and enforcement (but not execution) of the Award.

The orders made by the Full Court are properly characterised as orders for recognition and enforcement and should not be disturbed.

In making these findings, the Court rejected Spain's submissions that waiver of its foreign State immunity requires express language in the ICSID Convention. After having regard to decisions of the International Court of Justice and the Supreme Court of United States, the Court formed the view that such waiver can be inferred, although "a high level of clarity and necessity are required before inferring that a foreign State has waived its immunity in a treaty because it is so unusual, and the consequence is so significant" (at [28]).

The High Court confirmed that Articles 53 to 55 of the ICSID Convention do not encroach upon foreign State immunity from execution. The High Court referred to the "slight awkwardness" (at [47]) and the "curiosity" of the ICSID Convention in that a foreign State that has signed up to the ICSID Convention and agreed to investor-State arbitration under its terms "is not deemed to also accept the consequence of execution" (at [73]) of a recognisable and enforceable award made against it. The High Court referred to commentary regarding the negotiation of the terms of the ICSID Convention and the political and economic reasons why execution was left off the table: "Execution is commonly felt to be 'a more intensive interference with the rights of a State'. From the economic point of view, restrictive immunity principles applied to execution could result in foreign States refraining from investment in countries in which they know their property could be subject to execution" (at [73]). This could potentially discourage investment, "contrary to the primary purpose of the ICSID Convention to promote the flow of private capital to sovereign nations, especially developing countries, by the mitigation of sovereign risk" (at [34]).

Impact

Following the High Court's decision, an ICSID award against a foreign State (if successfully recognised and enforced in Australia) is placed on the same footing as a final judgment of an Australian court. As such, executing an ICSID award in Australia is subject to the same restrictions that would otherwise apply to execution of a domestic judgment against a foreign State under Part IV of the Foreign States Immunities Act 1985(Cth) – execution can be taken against the property of a foreign State if the immunity from execution is waived or the property the subject of the execution is "commercial property", being property that is not diplomatic or military property and that is in use substantially for commercial purposes.

The leading Australian authority on the "commercial property" exception is the High Court decision in *Firebird v Nauru* [2015] HCA 43. In that case, judgment creditors had obtained a garnishee order over Nauru's Australian bank accounts. Nauru applied to set aside the order on grounds, inter alia, that it had immunity from execution. The issue was whether the bank accounts were commercial property of Nauru that was "in use by the foreign State concerned substantially for commercial purposes" (Section 32(2) of the Foreign States Immunities Act 1985 (Cth)). The High Court held that the funds in the bank accounts were for governmental non-commercial purposes and therefore the commercial property exception did not apply.

However, the High Court placed emphasis on the "particular circumstances" of Nauru, a remote country with a small population and with no central bank, noting that "the accounts held in the

Australian bank are effectively Nauru's source of revenue and are therefore more likely to be for government purposes" (at [122]). The High Court seemingly left open the possibility to distinguish the *Firebird* decision if the particular circumstances of the sovereign State are different.

In light of this, while the approach taken by the High Court is welcome from the perspective of providing clarity regarding the distinction between recognition, enforcement and execution of an award, it remains to be seen whether the award creditors (now also judgment creditors) are able to execute the judgment against any Spanish "commercial property" located in Australia.

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