International Arbitration in Australia: Selected Case Notes and Trends

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Abstract

This article briefly considers caseload statistics and aggregate trends regarding *International Arbitration Act 1974* (Cth) matters heard by Australian courts. It then provides selective case notes on 11 judgments rendered since 2010, querying the reasoning and application of the Act in several cases. In light also of some drafting infelicities in the 2010 amendments, the article concludes that Australia should consider another round of broader statutory reforms. This should be inspired by the legislative activism of major Asia-Pacific venues for international commercial arbitration, especially Hong Kong and Singapore, with similar legislation based on the UNCITRAL *Model Law*.

I Introduction: Australia's New Regime for International Arbitration

On 6 July 2010, Australia amended its *International Arbitration Act 1974* (Cth) ('*IAA*'), partly to give effect to most of the revisions made in 2006 to the United Nations Commission on International Trade Law ('UNCITRAL') *Model Law on International Commercial Arbitration* ('*Model Law*'), included as sch 2 to the *IAA*. The original *Model Law*, approved by UNCITRAL in 1985 as a template aimed at harmonising and modernising national arbitration legislation, was given force of law in Australia by s 16 of the *IAA*, added in 1989 along with other provisions in pt III aimed primarily at supporting international arbitrations with the seat in Australia. The original *IAA*, enacted in 1974, aimed to give effect to Australia's obligations under the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*'), included as sch 2 to the *IAA*.[1]

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[1] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

Those provisions, with some amendments added in 2010, are still found in pt II of the *IAA*.[2]

The Australian states and territories are in the process of updating their uniform commercial arbitration Acts ('*Uniform Acts*').[3] Once the new *Uniform Acts* are enacted throughout Australia, there will be a harmonised arbitral legislative regime for both international and domestic arbitration. However, the new *Uniform Acts* introduced maintain some differences from the *Model Law* regime, given that their focus is solely on domestic arbitrations.[4]

A previous article co-written by one of the present authors has outlined the amended *IAA*'s aims and its provisions on writing requirements for arbitration agreements, enforcement of foreign awards, exclusion of the *Model Law*, interim measures, confidentiality, other substantive matters, and the temporal application of the 2010 amendments. It concluded that the scope of the 2010 amendments was somewhat limited and unadventurous, but that nevertheless they should significantly enhance the legal regime for international commercial arbitration in Australia.[5] An article written by another of the present authors argued that it would have been better for the Commonwealth to enact a single arbitration Act covering both domestic and international arbitration and conferring exclusive jurisdiction on a single court.[6]

These recent amendments to the *IAA* were introduced after a consultation period of about 18 months, without scrutiny by a select committee in the Commonwealth Parliament. Regrettably, there are a number of drafting problems with the amending legislation. Some are relatively minor. For example, the amended *IAA* usefully adopts art 17J of the revised *Model Law*, allowing parties to international arbitration agreements (even with the seat abroad) to apply to specified Australian courts to issue interim measures regarding the arbitral proceedings.[7] It also adopts most revisions providing for

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2 For a useful history of the enactment and progressive amendments of the *IAA*, see Malcolm Holmes and Chester Brown, *The International Arbitration Act, 1974: A Commentary* (LexisNexis, 2011) 3–8. For more detail on the legislative history of the 2010 amendments, and the broader context of international arbitration in Australia, see Luke Nottage and Richard Garnett, 'Introduction' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 1. For a discussion of the most recent developments in international arbitration following the 2010 amendments, see Albert Monichino and Alex Fawke, 'International Arbitration in Australia: 2011/2012 in Review' (2012) 23 *Australian Dispute Resolution Journal* 234.

3 Uniform commercial arbitration Acts have been introduced in New South Wales, the Northern Territory, South Australia and Victoria: see *Commercial Arbitration Act 2010* (NSW) ('*NSW Act*'); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Vic).

4 See, eg, Albert Monichino, 'Arbitration Law in Victoria Comes of Age' (2012) 31 *The Arbitrator & Mediator* 41. For example, the new *Uniform Acts* provide, in addition to the grounds set out in art 34 of the *Model Law*, the possibility of challenging an award on the ground of error of law, provided that the parties have opted into this additional ground of challenge: *Uniform Acts* s 34A.

5 See further Richard Garnett and Luke R Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (2011) 7 *Asian International Arbitration Journal* 29. For a further overview of the background and extent of the 2010 amendments, see Albert Monichino, 'Arbitration Reform in Australia: Striving for International Best Practice' (2010) 29 *The Arbitrator & Mediator* 29.

6 Albert Monichino, 'Reform of the Australian Domestic Arbitration Acts — It's Time' (2009) 28 *The Arbitrator & Mediator* 83, 100. Cf Luke Nottage and Richard Garnett, 'The Top Twenty Things to Change in or Around Australia's International Arbitration Act' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 149, 174–5.

7 For a recent example of a successful ex parte application to the Federal Court of Australia, ordering a freezing order extending to assets in Australia potentially held by a third party in relation to an arbitration between Russian and English parties with the seat in Switzerland, see *ENRC Marketing AG v OJSC 'Magnitogorsk Metallurgical Kombinat* (2011) 285 ALR 444.

greater enforceability of interim measures issued by the arbitral tribunal. However, s 18B of the *IAA* prohibits applications for 'a preliminary order directing another party not to frustrate the purpose of an interim measure requested', without clarifying whether a party may apply ex parte to the tribunal simply for an interim measure.[8]

Other amendments to the *IAA* create more serious problems. Most significantly, there is uncertainty as to the temporal operation of the new s 21 which, in effect, provides that the *IAA* and *Model Law* cover the field in respect of international arbitration seated in Australia. If s 21 has prospective effect, parties' choices to opt out of the *Model Law* in arbitration agreements made before 6 July 2010 remain effective. Thus, although the *lex arbitri* would be the former commercial arbitration Acts, if an arbitration is commenced following enactment of new uniform legislation (which repeals the old legislation) in the state or territory in which the arbitration was seated, there will not be any arbitral law to regulate that arbitration.[9] As states and territories adopt the new uniform legislation, this 'legislative black hole' will only get bigger. Conceptually, the black hole arises:

- if an arbitration is commenced pursuant to a pre-6 July 2010 international arbitration agreement;
- following the enactment in the relevant state or territory in which the arbitration is seated of new domestic arbitration legislation (repealing the old) which is confined in its operation to domestic arbitration; and
- importantly, if the view is taken that *IAA* new s 21 has prospective operation only.[10]

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[8] Almost all other jurisdictions adopting the revised *Model Law* have included its compromise provisions on preliminary orders (including also *Model Law* art 17B, expressly precluded by *IAA* s 18B). See Garnett and Nottage, above n 5; Richard Garnett and Luke Nottage, 'What Law (If Any) Now Applies to International Commercial Arbitration in Australia?' (2012) 35 *University of New South Wales Law Journal* 953.

[9] The question about which parts of the *IAA* had prospective or retrospective effect, especially pt III s 21, was first highlighted by Nottage and Garnett, above n 2, 27–8, 58–61. They emphasised the related 'black hole' problem in a Research Paper published in 2010 (see <http://ssrn.com/abstract=1676604>), subsequently published as Garnett and Nottage, above n 5. In light of case law including conflicting obiter statements from Australian courts, Garnett and Nottage, above n 8, revisited the problem in a Research Paper published in May 2012. In *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1 ('*Rizhao*'), the Western Australian Court of Appeal suggested that new s 21 of the *IAA* was not intended to have retrospective effect, thus disagreeing with Murphy J in the Federal Court in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209. (For summaries of both cases, see also Monichino and Fawke, above n 2.) A subsequent decision on the merits dismissed an application to set aside the award and instead enforced the award: *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 (2 November 2012). See Albert Monichino and Luke Nottage, 'Blowing Hot and Cold on the *International Arbitration Act*: Three Waves of Litigation in the *Castel v TCL Air Conditioner* Dispute' (2013) *Law Society Journal* 56. These proceedings also generated a constitutional challenge to the *Model Law*'s enforcement regime, which was rejected by the High Court of Australia: *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 (13 March 2013). See Albert Monichino, 'Australia: Today's Decision of the Apex Court' (13 March 2013) Global Arbitration Review <http://www.globalarbitrationreview.com/journal/article/31405/>. Australia's consequent legislative black hole arguably encompasses not only international arbitrations (where parties have excluded the *Model Law*) which are (a) commenced before 6 July 2010 and following introduction of the new *Uniform Acts* (repealing the old), but also those (b) commenced after 6 July 2010 and before the introduction of the new *Uniform Acts*. See Albert Monichino, 'The Temporal Operation of the New Section 21 — Beware of the Black Hole', *The ACICA News* (December 2012) ACICA, 25 <http://acica.org.au/assets/media/news/ACICA-News-Dec12.pdf>.

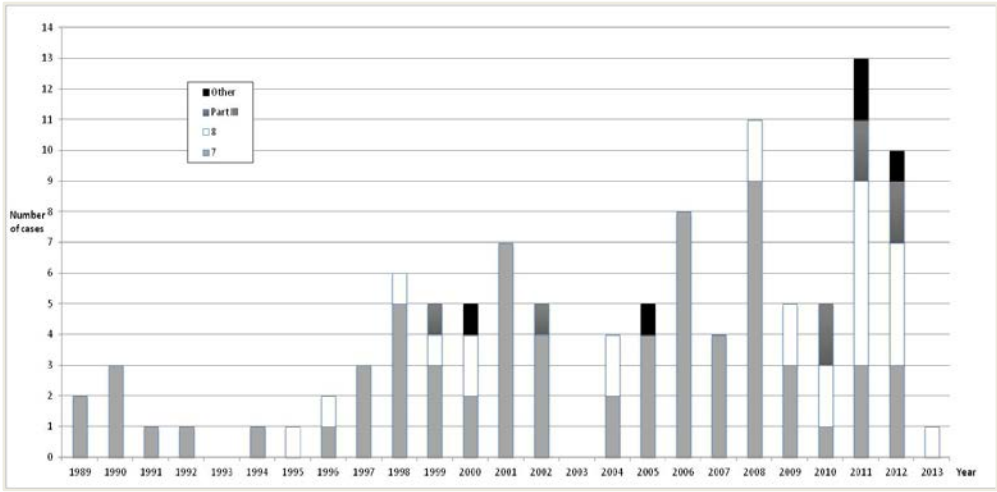
[10] In *Rizhao* (2012) 262 FLR 1, Murphy JA agreed with Martin CJ and Buss JA ([149]), noting that there is no express provision in the amending legislation that gives new *IAA* s 21 retrospective effect. Nor could such an intervention

In this article the authors briefly consider caseload statistics and aggregate trends regarding *IAA* matters before Australian courts, then provide selective case notes on some of those judgments rendered since 2010. This is followed by a questioning of the reasoning and application of the *IAA* in several judgments, before concluding that Australia should consider another round of broader statutory reforms.

II Aggregate Trends in Caseloads

Judgments referring to the *IAA* have been increasing in recent years. This may partly reflect heightened awareness of Australia's legal framework for international commercial arbitration, as well as a worldwide expansion in international arbitration filings, particularly in the Asia-Pacific region.[11] The growing case law is evident from Figure 1.[12]

Figure 1: Total *IAA* cases (1989 to March 2013)



be inferred from the legislation ([200]). However, Murphy JA went further than Martin CJ and Buss JA by expressly reserving the position ([207]) in the case where a dispute between the parties, although crystallised, had not been 'referred to arbitration' prior to 6 July 2010. Cf Garnett and Nottage, above n 8, 967–8.

11 Nottage and Garnett, above n 2, 32–3; Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2010) 33–43.

12 An Appendix listing the judgments for Figures 1–3 is available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133763>. This data does not include international arbitration cases decided under *Uniform Acts* legislation or other background law, such as *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427. The majority of these *IAA* judgments were obtained through searching the following legal databases: LexisNexis AU and LegalOnline. Some extra judgments were found via Westlaw AU and Austlii, in particular: *Transfield ER Futures Ltd v Ship 'Giovanna Iuliano'* (2012) 292 ALR 17; *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (2011) 112 SASR 297; *McConnell Dowell Constructors (Aust) Pty Ltd v The Ship Asian Atlas* [2011] FCA 174 (4 March 2011); *Shanghai Wool and Jute Textile Co Ltd v Phillip Jones Pty Ltd* [2010] VCC 0742 (28 June 2010, revised 29 June 2010); *Mack Innovations (Aust) Pty Ltd v Rotorco Pty Ltd* [2009] QSC 243 (21 August 2009); *Parharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2007] WASC 234 (12 October 2007); *KDB Capital Corp v BHP Mitsui Coal Pty Ltd* [2007] FCA 1150 (27 July 2007); *Flowtech Engineering Pty Ltd v VA Tech Australia Pty Ltd* [2005] WADC 68 (15 April 2005); *Campbell v Metway Leasing Ltd* (2002) 126 FCR 14; *Electronic Tracking Systems Pty Limited v Pronet Inc* [1999] NSW IR Comm 325 (29 July 1999); *Hi-Fert Pty Ltd v United Shipping Adriatic Inc* (1998) 89 FCR 166; *American Diagnostica Ltd v Gradipore Ltd* (1998) 44 NSWLR 312; *Hi-Fert Pty Ltd v Kuikiang Maritime Carriers Inc (No 2)* (1997) 75 FCR 583; *Aerospatiale Holdings Australia Pty Ltd v Elspan International Ltd* (1992) 28 NSWLR 321.

Figure 1 reflects not only more judgments dealing with s 7 of the *IAA* (approximating *New York Convention* art II: stay of proceedings in Australian courts where there is purportedly agreement to arbitrate abroad), but also a growing proportion of cases involving enforcement of foreign awards in Australia (under *IAA* s 8, approximating *New York Convention* art V). There are also now a few judgments dealing with pt III of the *IAA*; in particular, judgments dealing with aspects of the *Model Law*, mainly involving arbitrations where the seat is in Australia.

Figure 2 reveals the preference for the federal over state or territory courts for *IAA* proceedings, and shows the predominance of Victorian and New South Wales courts where *IAA* matters are litigated in state or territory courts.

Figure 2: Total *IAA* judgments by court (1989 to March 2013)

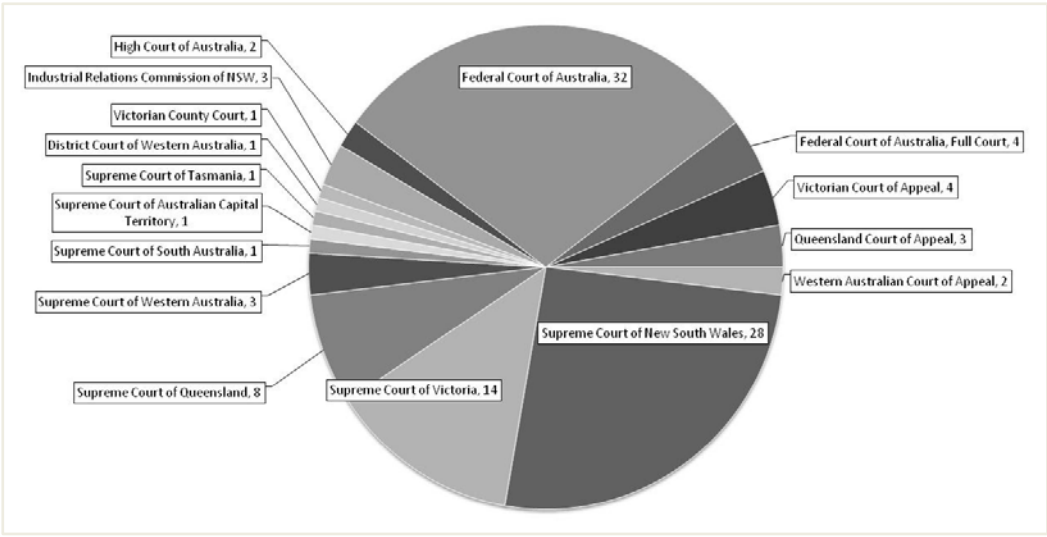
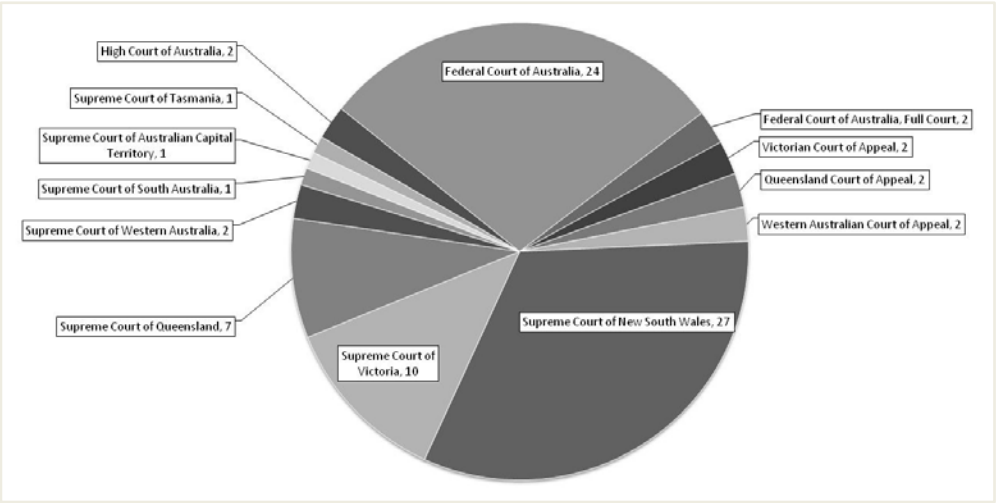


Figure 3 provides the proportions after grouping together related proceedings, where multiple proceedings relating to a case (including appeals) are counted only once. In New South Wales, no appeals have been pursued from the Supreme Court through to the Court of Appeal since the High Court of Australia decision in *Tanning Research Laboratories Inc v O'Brien*.[13] There have been more appeals from first-instance federal and Victorian courts.

13 (1990) 169 CLR 332.

Figure 3: Unrelated *IAA* cases by court[14] (1989 to March 2013)



III Selected Case Notes

To further explore and enhance familiarity with Australia's legislative regime for international arbitration, the rest of this article presents selected case notes of recent Australian judgments. They were developed partly for the online CLOUT database,[15] and as materials for public seminars held in 2012 in Tokyo, Brisbane and Sydney.[16] Part A deals with three cases involving arbitrations with the seat in Australia, pt B covers three cases involving stay applications for arbitrations with a seat outside Australia and pt C deals with five cases involving enforcement of foreign awards.

A *Arbitrations with the Seat in Australia*

1 *teleMates v Standard SoftTel Solutions*

In *teleMates Pty Ltd v Standard SoftTel Solutions Pvt Ltd*,[17] the applicant (an Australian company) and the respondent (an Indian company) entered into a written agreement which

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14 Related litigation proceedings are counted only once (for the highest appellate court decision).

15 Case Law on UNCITRAL Texts. This valuable resource maintained by UNCITRAL (see <http://www.uncitral.org/uncitral/en/case_law.html>) focuses on how national courts interpret UNCITRAL's international instruments, such as the *Model Law* and *New York Convention*. Monichino and Nottage serve as national correspondents for Australia. CLOUT is supplemented now by the very useful (242-page) *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, free to download at <http://www.uncitral.org/uncitral/en/case_law/digests/mal2012.html>. Some of the following Australian case notes draw on Albert Monichino, 'International Arbitration in Australia — 2010/2011 in Review' (2011) 22 *Australian Dispute Resolution Journal* 215 (containing further references, plus some case notes also specifically on recent cases based solely on Australia's *Uniform Acts* legislation). For further developments and case notes (especially regarding the *Traxys* and *Dampskibsselskabet* judgments detailed below), see Monichino and Fawke, above n 2.

16 See Luke Nottage, 'International Commercial Arbitration in Japan and Australia: Addressing Australia's "Legislative Black Hole" and Comparing Case Law' on The University of Sydney, *Japanese Law and the Asia-Pacific* (13 June 2012) <http://blogs.usyd.edu.au/japaneselaw/2012/06/international_commercial_arbit_2.html>.

17 (2011) 257 FLR 75.

included a dispute resolution clause providing that all disputes be referred to arbitration 'in accordance with the provisions of "The Institute of Arbitrators & Mediators Australia" ['IAMA'] … [and that the] venue of arbitration shall be mutually decided within New South Wales Australia'. IAMA is a non-profit company that provides arbitration and mediation services in Australia, including administering domestic and international arbitrations where parties adopt the IAMA Arbitration Rules (published in 2007).

A dispute arose and the respondent subsequently requested IAMA to nominate an arbitrator. An arbitrator (X) was nominated by IAMA, but this was disputed on the basis that the applicant had not consented to the referral or appointment. X published an 'interim award' holding that, as a preliminary question, he had jurisdiction to hear the dispute, and found against the applicant on the merits.

The applicant sought three separate declarations from the Court: first, that X had not been appointed as arbitrator; second, that the parties failed to agree on the procedures of appointment (or, in the alternative, that the respondent failed to follow the required procedures); and third, that an arbitrator should be nominated by the Australian Centre for International Commercial Arbitration ('ACICA').

The applicant submitted to the Court that X should not have been appointed as arbitrator, as the parties failed to agree on a procedure for appointing an arbitrator under *Model Law* art 11(3). The applicant alternatively argued that the respondent failed to comply with the procedure for appointing an arbitrator under *Model Law* art 11(4), on the basis that no reasonable steps were taken to seek the applicant's agreement on who would be appointed as arbitrator.

Both the applicant's primary and alternative submissions were held to be relevant to the issue of jurisdiction. Hammerschlag J rejected each of these arguments because (a) *Model Law* art 16(1) states that an arbitral tribunal may rule on its own jurisdiction, and (b) the applicant failed to apply for a court determination within 30 days of receiving notice of the tribunal's interim 'award' maintaining that the arbitrator had jurisdiction, as required under *Model Law* art 16(3). The Court held that it may not intervene on the question of a tribunal's jurisdiction after expiry of this 30-day period. Hammerschlag J emphasised *Model Law* arts 5 and 16, understood as reflecting the underlying principle of the need for a speedy resolution of disputes and minimal court intervention. For these reasons, the Court did not intervene.

The Court commented at [44] that it was 'undoubtedly arguable' that the IAMA Arbitration Rules would apply where the parties fail to reach agreement on appointment of an arbitrator. This could have disposed of the case in a straightforward manner. However, the Court expressly did not consider this point, as it held the applicant could not overcome the initial issue of the time bar for judicial intervention in respect of the tribunal's ruling on jurisdiction. The Court also did not discuss whether any final award from the tribunal may be later set aside under *Model Law* art 34, including on the basis that the tribunal was not composed in accordance with the agreement of the parties. However, considerable commentary suggests that this avenue is not available where the tribunal has made a preliminary ruling on its jurisdiction that has not been challenged within 30 days.[18]

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[18] See, eg, Greenberg, Kee and Weeramantry, above n 11, 235–6.

2 *Cargill International SA v Peabody Australia Mining*

Cargill International SA v Peabody Australia Mining Ltd[19] involved an international contract for the delivery of coal containing an arbitration clause referring future disputes to arbitration, with the seat in Sydney and subject to International Chamber of Commerce Rules ('ICC Rules'). A dispute arose and the arbitrator rendered a partial award in favour of the claimant (Peabody). It was conceded that the arbitration was an international commercial arbitration for the purposes of the *IAA*. The respondent (Cargill) challenged the award on two alternative bases. First, Cargill sought to set aside the award for serious error of law under s 38(4)(b) of the *NSW Act*. Second, Cargill argued that the award should be set aside on the ground that it violated public policy under art 34(2)(b)(ii) of the *Model Law*, which is given the force of law in Australia by *IAA* s 16, because the arbitrator failed to consider one of its arguments. Cargill contended that this amounted to a denial of natural justice and, in turn, a violation of public policy for the purposes of art 34 of the *Model Law*.

These arguments raised the important question of whether the *Model Law* was the applicable arbitral law or if the parties had opted out of it by adopting the ICC Rules. This required consideration of the so-called '*Eisenwerk* principle'. In *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing GmbH*,[20] the Queensland Court of Appeal had interpreted *IAA* s 21 (as it stood prior to its amendment in 2010), allowing parties to opt out of the *Model Law*, as applying where parties choose (putatively) inconsistent arbitration rules, such as (in that case) the ICC Rules.[21]

In *Cargill*, Ward J held that the adoption of arbitral procedural rules did not in itself constitute an implied exclusion of the *Model Law* under s 21 of the *IAA* (as it stood prior to its amendment in 2010). After referring to leading texts on international arbitration and the numerous policy criticisms made of *Eisenwerk*, her Honour held unequivocally ([91]) that *Eisenwerk* was wrong in principle. Her Honour also rejected Cargill's argument that, because the parties should have been aware of the existence of *Eisenwerk*, their choice to adopt procedural rules reflected, as a matter of contractual interpretation, an objective intention to opt out of the *Model Law*. Ward J thus rejected Cargill's application to set aside the award under legislation other than the *Model Law* and the *IAA*. In other words, her Honour held that the *NSW Act* — which was intended principally to govern domestic arbitration — had no application to the instant case.

Ward J then considered Cargill's natural justice argument, based on the public policy ground under the *IAA*. In particular, s 19(b) of the *IAA* relevantly provides that an award is in conflict with, or is contrary to, the public policy of Australia for the purposes of art 34(2)(b)(ii) of the *Model Law* if 'a breach of the rules of natural justice occurred in connection with the making of the … award'. Her Honour did not accept that the argument that Cargill contended the arbitrator ignored was ever clearly articulated to the arbitrator. Thus, Ward J held (at [241]) that the arbitrator's failure to consider it was not a denial of natural justice.

This decision demonstrates a mature understanding of international commercial arbitration and is consistent with its key principles.

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19 (2010) 78 NSWLR 533 ('*Cargill*').

20 (2001) 1 Qd R 461 ('*Eisenwerk*').

21 While the Court in *Eisenwerk* found that the ICC Rules were inconsistent with the *Model Law*, this view is unpersuasive. *Model Law* art 19 allows the parties to choose procedural rules.

3 *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS*

Nine days after the decision in *Cargill*,[22] the Queensland Court of Appeal had the opportunity to overrule *Eisenwerk*.[23] But the Court declined to do so, stating that it was unnecessary to make a finding as to the correctness or otherwise of its earlier decision in *Eisenwerk*.

Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS[24] arose out of a contract with a dispute resolution clause providing for arbitration under the UNCITRAL Arbitration Rules ('UNCITRAL Rules') with the seat in Brisbane.[25] Although the judgment does not mention this specifically, it is apparent that at least one of the parties had its place of business outside of Australia. Accordingly, the arbitration was 'international' under art 1(1) of the *Model Law*, given force of law by s 16 of the *IAA*, so the *IAA* was engaged. The respondent initiated arbitration proceedings, but the parties were unable to agree on whether the *Model Law* was the applicable arbitral law. By agreement, the question of the applicable supervisory law of the arbitration was referred to the Queensland Court of Appeal for determination by way of a case stated, pursuant to r 483 of the *Uniform Civil Procedure Rules 1999* (Qld).

The appellant argued that by selecting the UNCITRAL Rules, the parties had opted out of the *Model Law* under s 21 of the *IAA* (prior to its amendment in 2010). It noted that the UNCITRAL Rules provided a comprehensive arbitral framework, from composition of the tribunal through to the award. It invited the Court to follow its earlier decision in *Eisenwerk*. It also stressed the apparent differences between the UNCITRAL Rules and the *Model Law* (although the judgment does not specifically mention any differences). An interesting question that was not considered in the judgment is what arbitral law applied if the parties had opted out of the *Model Law* by choosing the UNCITRAL rules.

On the other hand, the respondent argued that arbitration rules are conceptually distinct from an arbitration law, such as the *Model Law*. It also argued that the UNCITRAL Rules were not inconsistent with the *Model Law*, noting that the UNCITRAL Rules were silent on important issues which are only dealt with by the *Model Law*, such as the role of the courts in setting aside or enforcing an award.

In answer to the question whether, by selecting the UNCITRAL Rules, the parties had opted out of the *Model Law*, the Court's answer was 'no': the parties' choice of the UNCITRAL Rules did not mean they had opted out of the *Model Law*. Muir JA, who delivered the leading judgment (with whom McMurdo P and White JA agreed), emphasised ([33]) the 'wealth of commentary' available on how the *Model Law* operates alongside the UNCITRAL Rules. His Honour noted that there were significant differences between the ICC Rules (before the Court in *Eisenwerk*) and the UNCITRAL Rules. Accordingly, Muir JA held ([46]) that the decision in *Eisenwerk* was 'plainly distinguishable'. The Court also expressly declined to consider whether *Eisenwerk* was correctly decided. It treated *Eisenwerk* as merely a particular factual ascertainment of the parties' objective intentions in that case. Muir JA stated ([42]) that the *Eisenwerk* principle is 'in truth, no principle at all', but rather 'a conclusion as to the contractual intention of particular parties in particular

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22 (2010) 78 NSWLR 533.

23 (2001) 1 Qd R 461.

24 [2010] QCA 219 (20 August 2010) ('*Wagners*').

25 The dispute resolution clause did not nominate any particular arbitral law.

circumstances'. In a footnote to his judgment, White JA acknowledged that Ward J in *Cargill* had argued persuasively that the reasoning in *Eisenwerk* was plainly wrong and should not be followed.

The decision in *Wagners* is disappointing. There was no need for the Court to compare (and distinguish) the ICC Rules and the UNCITRAL Rules. The Court (with the exception of White JA at [52]) failed, with respect, to grasp the fundamental difference between arbitration rules (amplifying the agreement of the parties) and the *Model Law* (or the *lex arbitri*). Article 19 of the *Model Law* allows parties to a *Model Law* arbitration to choose their own procedural rules. Many of the *Model Law* articles are expressed to be subject to the agreement of the parties so, therefore, it is permissible for these parties to alter many of the provisions of the *Model Law* by agreement; for example, by adoption of procedural rules which provide otherwise than provided for in the *Model Law*. The *Model Law*, unlike procedural rules, deals with judicial recourse against arbitral awards and, further, enforcement of awards.

B *Stays of Australian Court Proceedings*

1 *Lightsource Technologies Australia v Pointsec Mobile Technologies AB*

Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB[26] arose out of a non-exclusive distributorship agreement between Swedish and Australian software companies to develop products for the Australian Department of Defence. The agreement contained an arbitration clause referring disputes to arbitration under the expedited arbitration rules of the Stockholm Chamber of Commerce ('SCC'). It provided that 'arbitration shall take place in Stockholm, Sweden'. Swedish law was nominated as the governing law of the agreement. The agreement also contained the following time-bar clause: 'No action or claim of any type relating to this Agreement may be brought or made by [either party] more than six months after [the relevant party] first knew or should have known of the basis of the action or claim.'

Lightsource initiated proceedings against the Swedish company (Pointsec) in the Supreme Court of the Australian Capital Territory alleging, inter alia, unconscionable conduct contrary to ss 51AA and 51AC of the *Trade Practices Act 1974* (Cth) (*'Trade Practices Act'*), replaced in 2010 by similar provisions in the *Australian Consumer Law*.[27] Pointsec applied for the proceedings to be permanently stayed in favour of arbitration as contemplated by the parties' agreement. The Court heard the application in May 2008, but did not render judgment until April 2011.

Refshauge J accepted that *IAA* s 7 applied, after considering the four preconditions to its application. (Section 7 aims to restate art II of the *New York Convention*.) However, his Honour held that the stay should not be granted due to s 7(5), which prevents a stay where the arbitration agreement is 'null and void, inoperative or incapable of being performed'. In particular, his Honour relied on the time-bar clause in the agreement. The Court concluded that the Swedish defendant failed to bring arbitration proceedings within six months of becoming aware of the dispute under the agreement and that therefore the time-bar clause

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26 (2011) 250 FLR 63 ('*Lightsource*').

27 The *Australian Consumer Law* is set out in sch 2 to the *Competition and Consumer Act 2010* (Cth), which became the new name for the *Trade Practices Act*.

was engaged. Based on this, his Honour held ([168]–[169]) that the arbitration agreement was essentially 'waived' and thus was 'inoperative or incapable of being performed'. In particular, Refshauge J found that, on its proper interpretation, the time-bar clause precluded arbitration proceedings, but did not bar the substantive claim (or at least, at [170], his Honour was not persuaded without full argument that the time-bar clause barred the substantive claim). Therefore, the arbitration agreement was rendered inoperative, but the plaintiff was able to continue with its proceeding in the Supreme Court.[28]

Refshauge J rejected Pointsec's separate argument for a stay under art 8 of the *Model Law* (given the force of law by s 16 of the *IAA*), concluding that the parties had opted out of the *Model Law*. In doing so, his Honour applied *Eisenwerk*[29] ([177]–[179]), holding that, by agreeing to arbitrate in accordance with the arbitration rules of the SCC, the parties had impliedly opted out of the *Model Law* under s 21 of the *IAA* (before its amendment in 2010). Refshauge J did not refer to *Cargill*[30] (finding *Eisenwerk* to be 'plainly wrong'), nor *Wagners*[31] (declining to overturn the *Eisenwerk* principle, but distinguishing it on the facts).

Finally, his Honour considered whether the proceeding should be stayed under s 53 of the *Commercial Arbitration Act 1986* (ACT) ('*ACT CAA*'). He refused a stay on the basis ([193]) that there was 'sufficient reason' for the purposes of s 53 why the matter should not be referred to arbitration. One of the matters relied upon in this regard was that unconscionability proceedings under the *Trade Practices Act* may not be susceptible to determination in Sweden under Swedish law.

Aside from the three-year delay in determining the stay application, there are seriously worrying aspects about this decision. First, Refshauge J's treatment of the discretion to stay under art 8 of the *Model Law* was, with respect, flawed. His Honour followed *Eisenwerk*, disapproved in *Cargill* and widely criticised by commentators.

Second, Refshauge J did not accept that Swedish law governed the procedure of the arbitration for the purposes of *IAA* s 7(1)(a) (which applies where 'the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country'). His Honour concluded that there was insufficient evidence to establish that the procedure in relation to the arbitration was governed by the laws of Sweden. His Honour said ([110]–[111]) that there was no evidence before him to establish that the SCC arbitration rules were part of the law of Sweden. This failed to properly understand the reference in the arbitration clause to the words 'arbitration shall take place in Stockholm, Sweden'. Properly understood, it was a reference to the seat of the arbitration, and therefore the law governing the procedure in relation to the arbitration (the *lex arbitri*). Accordingly, Swedish law governed the procedure in relation to the arbitration and *IAA* s 7(1)(a) applied. It was not necessary to consider whether the SCC arbitral rules formed part of Swedish law. However, this error did not, in the end, matter because Refshauge J was satisfied that s 7(1)(d) applied, due to Sweden being a *New York Convention* member state.

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28 The Court determined that whether or not the plaintiff was able to prosecute the Supreme Court proceeding in the face of the time-bar clause would be determined in the proceeding.

29 (2001) 1 Qd R 461.

30 (2010) 78 NSWLR 533.

31 [2010] QCA 219 (20 August 2010).

Third, the Court erred in considering the time-bar clause. There is much to be said for the proposition that it is for the arbitrator, not the Court, to determine the proper interpretation and operation of the time-bar clause.[32] A contrary argument is that the court at the seat, faced with an application to stay court proceedings on the ground of an international arbitration agreement, must decide if the ground under art II of the *New York Convention* is made out. This question is not completely abandoned to the arbitral tribunal. A similar question arises regarding stay applications under art 8 of the *Model Law*. A compelling view is that if a court entertaining such an application is satisfied, on a prima facie basis, that a valid arbitration agreement exists, it should stay its proceeding to allow the arbitral tribunal to rule fully on any questions of jurisdiction (including the validity or otherwise of the arbitration agreement).[33]

In any event, the Court's determination of the factual matters necessary to determine the proper application of the time-bar was cursory ([159]–[160], [167]). It is submitted that the time-bar clause was better interpreted (on the facts which transpired) as a provision that could be prayed in aid by the Swedish defendant in answer to the claim brought by the plaintiff who, after all, was the agitator of the relevant claims. Indeed, the defendant could have waived reliance on the time-bar clause. What sort of pre-emptive claim could the Swedish party have brought by arbitration anyway? To enable the plaintiff, who was agitating the claim, to rely on the time-bar clause to circumvent the arbitration agreement was a perverse result.

Fourth, Refshauge J erred in his consideration of the possibility of a stay under s 53 of the *ACT CAA*. One of the factors that his Honour considered in that context was that the Australian party's claims under the Australian *Trade Practices Act* may not be susceptible to determination in Sweden under Swedish law. This ignored the fact that the parties had agreed to Swedish law as the substantive law governing the merits of their dispute. The better starting point would have been to stay proceedings and let the arbitrators determine any similar claims for relief available under Swedish law (perhaps after applying Swedish private international law to categorise the nature of the claims allegedly arising under Australian law). Hollingworth J adopted a similar approach in *Transfield Philippines Inc v Pacific Hydro Ltd*,[34] where the parties (from Australia and the Philippines respectively) had agreed to subject their contract to Philippines law and the Australian party sought to agitate claims based on contravention of the *Trade Practices Act*.

Section 53 of the *ACT CAA* had no application because it is inconsistent with *IAA* s 7, rendering the former inoperative under s 109 of the *Australian Constitution*. In *AED Oil Ltd v Puffin FPSO Ltd*[35] (discussed below), the Victorian Court of Appeal noted that the application for a stay had been made under the *Commercial Arbitration Act 1984* (Vic)

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32 See, eg, *Bechtel do Brasil Construções Ltda v UEG Araucária Ltda*, 638 F 3d 150 (2nd Cir, 2011).

33 See Frédéric Bachand, 'Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?' (2006) 22 *Arbitration International* 463; see also Greenberg, Kee and Weeramantry, above n 11, [5.59]–[5.68]. The court at the seat may later undertake a full review of the tribunal's jurisdictional ruling (under art 16(3)).

34 [2006] VSC 175 (4 December 2006) [68]–[73].

35 (2010) 27 VR 22.

('*Vic CAA*') as well as the *IAA* ([9]), and then proceeded to deal with the stay application under the *IAA* only.[36]

Under *IAA* s 7(5), an Australian court cannot stay proceedings if the arbitration agreement is 'null and void'. In *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd*,[37] Gilmour J granted an ex parte interim injunction interfering with an arbitration with the seat in India and governed by Indian substantive law, by preventing the Indian party from calling on performance bonds provided by the Australian party's banks, partly on the basis that the *Trade Practices Act* is a 'public policy statute'. Accordingly, under the *IAA*, Gilmour J held ([41]) that any attempt to contract out of its statutory remedies 'may be void', including relief against unconscionable conduct — also alleged in that case. However, that injunction was then set aside, as confirmed on appeal.[38]

In the absence of clear legislative direction to the contrary, an Australian court should generally stay its proceedings and allow the arbitral tribunal to consider whether and how to apply Australian legislation, and then perhaps resist enforcement in Australia of any award that ignores any sufficiently serious provision of Australian legislation.[39]

2 Re ACN 103 753 484

Both the plaintiffs and defendants in *Re ACN 103 753 484 Pty Ltd (in liq)*[40] were Australian parties. No arbitration proceedings were on foot. Clause 1 of their agreement required the parties to submit to arbitration 'all or any disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'. In addition, cl 12 required the party seeking arbitration to pay A$20 000 to the other party and full costs to the arbitrator, as well as giving power to appoint a specific person (Mr Knell) related to the defendants as sole arbitrator.

The primary issue was whether the arbitration agreement should be disclaimed for imposing a harsh and unnecessary burden on the plaintiff, who had commenced proceedings in court, but not by arbitration. In response, the defendant sought a stay of the court proceedings, arguing that the matter should be referred to arbitration.

The plaintiff argued the arbitration agreement imposed an 'undue and burdensome financial obligation' as it required the claimant (as the party referring the dispute to arbitration) to pay A$20 000 to each respondent as that party's 'anticipated costs', as well as all anticipated costs of the arbitrator. It also provided that the parties would submit disputes to arbitration with the seat in New Zealand. The arbitration fell under the *Model Law* art 1(3)(b)(i) definition of 'international arbitration', where the place of arbitration determined in the agreement is situated outside the state in which the parties have their places of business.

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36 New uniform legislation is being introduced nationwide to replace the old *Vic CAA* and its counterparts in other Australian states and territories and is applicable only to domestic arbitration, so this particular issue should not arise in future. See generally Monichino, above n 4.

37 (2007) ATPR 42-166. Not cited by Refshauge J.

38 *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* (2008) 249 ALR 458.

39 See obiter dicta in *Mitsubishi v Soler Chrysler-Plymouth*, 473 US 614 (1985); see below regarding *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161.

40 (2011) 86 ACSR 112. In *Prime Property Investment Pty Ltd v Van Der Velde* (2011) 199 FCR 34, the Federal Court declined jurisdiction to entertain an appeal from this judgment.

Under the *Corporations Act 2001* (Cth) div 7A s 568(1A), a liquidator may apply for leave to a court to disclaim a contract, releasing the company from any rights and liabilities not yet accrued. The Court held that the arbitration agreement should be disclaimed under this provision. It therefore declined the defendants' request for a stay of Court proceedings pursuant to s 7 of the *IAA*, which gives effect to art II(3) of the *New York Convention*, on the basis that the arbitration agreement was 'null and void [or] inoperative'.

The Court held that the mandatory referral to arbitration and associated costs would unnecessarily cause detriment to the creditors of the plaintiff company, as it was in liquidation at the time of the Court proceedings. The plaintiff was therefore able to continue with its claim in court against the defendants.

The defendants argued that requiring the party commencing the arbitration to pay costs of the other parties and the arbitrator is not an unusual requirement. They relied on *Tanning Research Laboratories Inc v O'Brien*[41] to contend that an international arbitration agreement should be binding on a company's liquidator where the dispute involves a general claim.

The Court stated ([18]–[20]):

> [18] The arbitration agreement imposes harsh and unnecessary burdens upon the applicants to the detriment of creditors in the winding up of the company [that is, the plaintiff]. Those burdens require the company to pay large sums to the defendants, as well as to pay all the arbitrator's costs. The defendants are related to Mr Knell who has the sole power to appoint the arbitrator. Whilst it is contended arbitration will be cheaper than Court proceedings, that contention does not have regard to the fact that as there is no connection between the proposed place of arbitration [that is, New Zealand] and the proceeding, which relates solely to Queensland and [is] governed by Queensland law, costs are likely to be significant.
>
> [19] In that respect it is noteworthy that the defendants did not, and do not, seek to refer the matter to arbitration pursuant to the arbitration agreement. To do so would trigger financial obligations on them to the plaintiff, namely, the payment of $20,000 pursuant to cl 12 of the arbitration agreement and payment of the arbitrator's costs. The defendant's failure to seek to refer the dispute to arbitration is a relevant factor in my conclusion that leave ought to be given to the applicants to disclaim the arbitration agreement.
>
> [20] Further, there is no suggestion there was ever any international trade or commerce in the activities undertaken by the parties to the agreement. Against that background, to allow the applicants leave to disclaim will not contravene the objects of the [*IAA*] or its purposes. It will also not jeopardise international trade and commerce.

In any event, seemingly pursuant to *IAA* s 7(2) allowing a court to stay its proceedings 'upon such conditions (if any) as it thinks fit', Boddice J remarked ([24]):

> I would only have been prepared to consider granting a stay if the defendants agreed to refer the proceeding to arbitration pursuant to the agreement, necessitating that they pay the required sum of $20,000 to the plaintiff pursuant to cl 12 of the arbitration agreement and the arbitrator's costs. Any grant would have been subject

41 (1990) 169 CLR 332.

> to other conditions, including a requirement that the person appointed as arbitrator be legally qualified and admitted to practise as a legal practitioner.

This judgment raises an issue that has rarely been raised in international arbitration case law in Australia: whether an arbitration agreement may be impugned as excessively one-sided or unfair. Such arguments can be raised under contract law principles applicable to the agreement, but also (as in this case) under insolvency law. In addition to the factors emphasised by Boddice J and contrary to the defendants' argument, it would be unusual for a claimant in international arbitration to have to pay, as a precondition to activating its right to resolve disputes through arbitration, the costs of the respondents and the arbitrator's fees — even if the claimant was ultimately successful. International arbitration rules and practices usually provide that the costs of the arbitration (such as the arbitrators' fees) are borne by the unsuccessful party. Also, arbitrators usually have discretion to award reasonable legal costs to the successful party.

Agreements between parties as to costs may also be subject to the *lex arbitri*, but the *Model Law* contains no provisions on this topic. Part III of the *IAA* added (in 1989) some provisions dealing with costs (s 27), which parties may opt into in writing — but this was not done in this case. Revised provisions introduced in 2010, which apply instead on an opt-out basis (s 22(2)(h)), apply only to agreements concluded after 6 July 2010 (apparently not so here, although the judgment does not record the date of the arbitration agreement) unless the parties to prior agreements opt in to the revised provisions.

3 AED Oil; AED Services v Puffin FPSO

In *AED Oil Ltd v Puffin FPSO Ltd*,[42] a contract existed between a Singaporean company (AED Services) and the defendant (Puffin), a company incorporated in Malta. The applicant (AED Oil) was a related Australian company which guaranteed AED Services' performance under the contract. This guarantee was secured by a charge over AED Oil's assets. The contract included a clause submitting all disputes to arbitration. An exception was provided in the arbitration clause, which allowed either party to apply for 'urgent interlocutory or declaratory relief'. This exception was only available if, in the reasonable opinion of the party seeking relief, the proceedings were necessary to protect its rights.

A dispute arose between AED Oil and Puffin over the tax liabilities of Puffin. Under the contract, AED Oil agreed to bear and indemnify Puffin's tax obligations. Puffin had demanded payment from AED Services (its direct contracting party) to meet Puffin's obligations for GST and income tax. This was contested by AED Services on the bases that Puffin had no income tax liability and that Puffin had breached its obligations under the contract. A proceeding was commenced in the Supreme Court of Victoria by AED Oil against Puffin, seeking a declaration as to the effectiveness of Puffin's demand for payment. AED Oil also sought an injunction, restraining Puffin from enforcing the charge held by it over AED Oil's assets.

The trial judge granted an interlocutory injunction against Puffin, restraining it from making a demand against AED Services to meet Puffin's tax obligations. Puffin then cross-claimed against both AED Oil and AED Services, and sought a declaration as to the obligations AED Service owed in respect of Puffin's tax liabilities under the contract. AED

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42 (2010) 27 VR 22.

Oil, relying on the arbitration clause, sought a stay of the cross-claim under s 7 of the *IAA*, which governs enforcement of international arbitration agreements in Australia. Both at first instance and on appeal, the Court found that AED Oil had standing to apply for a stay of proceedings under the *IAA* s 7(4), as it was a party 'claiming through or under a party' (namely, AED Services). This requirement was satisfied because AED Oil guaranteed the obligations of AED Services, which was a wholly owned subsidiary of AED Oil.

Puffin argued the cross-claim should be allowed to proceed before the court as it fell within the exception provided in the arbitration clause, which allowed either party to apply for 'urgent interlocutory or declaratory relief'. Alternatively, it submitted that even if an arbitral award was handed down on the question of AED Services' obligations in respect of Puffin's tax liabilities under the contract, it was uncertain whether such an award would be enforced by the courts. That is, Puffin argued that it was 'doubtful whether the courts will recognise and enforce a declaration contained in an arbitral award' ([17]). It relied on the English Court of Appeal decision in *Margulies Brothers Ltd v Dafnis Thomaides and Co (UK) Ltd*[43] as authority for the proposition that a 'purely declaratory' arbitration award cannot be enforced. By virtue of this uncertainty over enforcement, it argued that it should be free to continue with the court proceedings, even if the arbitration clause applied.

At first instance Judd J held that *IAA* s 7 was engaged. However, as a question of fact his Honour held that Puffin's claim fell within the exception in the arbitration clause as its cross-claim was 'urgent'. Therefore, it could proceed with its cross-claim. The Court of Appeal reversed this finding and ordered a stay of Puffin's cross-claim so the dispute could be referred to arbitration.

The key factual issue before the Court of Appeal was the proper construction of the word 'urgent' within the arbitration clause. The Court found that the cross-claim raised a non-urgent issue over whether AED Oil was 'required to consent to Puffin filing an income tax return' ([31]). In addition, the Court rejected Puffin's argument that AED Oil's financial position was deteriorating, and overall found the evidence did not support a finding that the cross-claim was urgent.

On Puffin's alternative submission on the issue of enforceability, the Court of Appeal rejected the argument that a declaratory award by an arbitrator would not be enforceable. Various authorities were cited in support of enforcement of declaratory arbitral awards, including *Electra Air Conditioning BV v Seeley International Pty Ltd*.[44] Overall, the Court of Appeal's decision is to be applauded as an arbitration-friendly decision.

C *Enforcement of Foreign Awards*

1 *ESCO Corporation v Bradken Resources*

In *ESCO Corporation v Bradken Resources*,[45] ESCO (a US company) concluded a manufacturing agreement with Bradken Resources ('Bradken') (an Australian company), referring disputes to arbitration according to the ICC Rules. Bradken initiated ICC arbitration in Oregon, USA. The arbitrator dismissed its claims and ordered costs in favour of ESCO, which sought to have the award enforced by a US District Court in Oregon.

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43 [1958] 1 Lloyds Rep 205.
44 [2008] FCAFC 169 (8 October 2008).
45 (2011) 282 ALR 282.

Bradken objected to paying a certain portion of the US$7.7 million in legal costs found by the arbitrator to have been incurred by ESCO — in particular, the costs pertaining to that part of the dispute concerning US antitrust law. Bradken contended this portion might comprise up to US$6 million and that, in this respect, the award showed a 'manifest disregard for the law' and that to enforce this aspect of it would be contrary to public policy. The award was enforced by the US District Court and Bradken was ordered to pay all of the costs awarded by the arbitrator, plus post-judgment interest at the US federal interest rate. Bradken immediately appealed the decision.

Meanwhile, ESCO sought to enforce the award in Australia. Bradken applied for an adjournment of the enforcement proceedings until the matter was finally resolved by the appeal court in Oregon. It relied on s 8(8) of the *IAA*, equivalent to art VI of the *New York Convention*. This gives an Australian superior court a discretion to adjourn enforcement proceedings where an application to set aside the award has been made to the appropriate authority (in this case, the Oregon Court).

Foster J accepted Bradken's application and adjourned the enforcement proceeding, on condition that Bradken provide security to protect ESCO against any loss arising from enforcement being delayed. The security required ([90]) was the full amount due under the award, excluding interest. His Honour refused to accept ESCO's submissions for greater security to be provided because ([91]) such submissions paid:

> [N]o regard to the possibility that Bradken might succeed in having its liability to pay money under the Award reduced from US$7,747,087.88 to approximately US$1.7 million and thus its exposure to enforcement in Australia similarly reduced, nor do those submissions accord sufficient weight to the fact that the US District Court did not award to ESCO any post-Award pre-judgment interest and only awarded post-judgment interest at the US Federal interest rate which is but a fraction of the Oregon State interest rate and a tiny fraction of the rates currently usually awarded in this Court under s 51A and s 52 of the Federal Court Act. Furthermore, the quantum of 'suitable security' [under that Act] will hardly ever be that amount which represents the largest possible verdict in favour of the enforcing party based upon the most favourable view of all potential outcomes.

In deciding to exercise the discretion to adjourn the enforcement proceedings, Foster J emphasised ([86]) that Bradken's challenge to the award in Oregon's courts appeared to be bona fide. Foster J also noted that, as a company with annual revenue of over US$1 billion, it was unlikely that Bradken would try to hide its assets or be unable to pay damages at the end of the adjournment period. Thus, Bradken's offer to provide security would fully cover ESCO against any loss arising out of the adjournment.

Foster J ordered that Bradken pay its own costs, despite the fact that it had essentially succeeded in its application. His Honour's reason for this appeared to be that the adjournment involved 'the grant of an indulgence by the Court' ([95]).

2 *IMC Aviation Solutions v Altain Khuder LLC*

The case of *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*[46] arose out of a mining operations contract between Altain Khuder (a Mongolian company) and IMC Mining

[46] (2011) 282 ALR 717 ('*Altain Khuder*').

(a company registered in the British Virgin Islands). The contract contained a clause referring future disputes to arbitration in Mongolia. A dispute arose concerning the provision of engineering services under the contract, so Altain Khuder commenced an arbitration in Mongolia.

The arbitral tribunal rendered an award in Altain Khuder's favour against IMC Mining, requiring it to pay Altain Khuder over US$6 million. The tribunal also ordered that an Australian company, IMC Mining Solutions Pty Ltd ('IMC Solutions'), pay these damages on behalf of IMC Mining. IMC Solutions was not a signatory to the arbitration agreement. The two companies were related, but IMC Solutions had not participated in the arbitration. The award did not explain how the arbitral tribunal had jurisdiction to make any order against IMC Solutions.[47]

Altain Khuder sought to enforce the award in Australia against both companies. IMC Mining did not appear in the enforcement proceedings, but IMC Solutions did, objecting to the enforcement of the award against it. In *Altain Khuder LLC v IMC Mining Inc*,[48] Croft J dismissed IMC Solutions' objections and ordered enforcement of the foreign award.

The trial judge (Croft J) held that, upon the award creditor producing a copy of the award and the arbitration agreement (as required by *IAA* s 9(1)), the award debtor bore the onus of establishing that it was not a party to the arbitration agreement as a ground for resisting enforcement under *IAA* s 8(5)(b) (equivalent to art V(1)(a) of the *New York Convention*). His Honour held that the award debtor had not, on the evidence, discharged this onus. Accordingly, Croft J enforced the Mongolian award. IMC Solutions appealed.

The Victorian Court of Appeal overturned the trial judge's decision. There were two different approaches taken in the Court of Appeal. First, Warren CJ held that where enforcement of a foreign award was sought against a non-signatory to the arbitration agreement, the legal onus (on the balance of probabilities) was on the award creditor to establish, at the threshold stage of the enforcement process, that the award debtor was a party to the arbitration agreement. In this regard, her Honour departed from recent English cases,[49] which treated 'party-hood' as a question to be determined at the second stage under art V of the *New York Convention*.

In contrast, the majority (Hansen JA and Kyrou AJA at [172]–[173]) followed the English cases and accepted that the award debtor had the legal onus of establishing at the second stage of the enforcement process that there was no valid arbitration agreement between it and the award creditor. Nonetheless, the majority held that the award creditor at the first stage bore an 'evidential' onus of establishing that there was a prima facie arbitration agreement between the award debtor and the award creditor. In their Honours' view, where enforcement of a foreign award was sought against a non-signatory to the arbitration agreement, the mere production of the award and the arbitration agreement, pursuant to which the award was purportedly made, would not be enough to satisfy this evidential onus. The majority suggested that there was support for this approach in the English cases referred to above.

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47 The arbitrators were arguably required to state reasons for their award under art 37.3.2 of Mongolia's *Arbitration Law 2003*, which adopts the *Model Law*.

48 (2011) 276 ALR 733.

49 Such as *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 ('*Dallah*'); *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543.

Irrespective of the onus question, the Court of Appeal held (reversing the trial judge) that the award debtor had, on the evidence, established a ground for refusal of the foreign award under s 8(5)(b) of the *IAA*, on the basis that IMC Solutions was not party to the arbitration agreement and that therefore the arbitral tribunal had no jurisdiction over it.

The Court of Appeal considered that it was not bound by the arbitral tribunal's conclusions as to its jurisdiction. In doing so, it endorsed the recent views expressed by the English Supreme Court in *Dallah*.[50] In contrast, the trial judge took the approach that the Court should pay proper deference to the arbitral tribunal's findings on jurisdiction and should simply review the arbitral tribunal's findings, as opposed to determining the jurisdictional question afresh.

The trial judge also considered that the award debtor was estopped from challenging the validity of the arbitration agreement on the basis that the award had been 'verified' by the courts of Mongolia and that the award debtor had sat by and taken no step to challenge the awards in the Mongolian courts. By contrast, the Court of Appeal held that no estoppel arose. In this regard, its approach was consonant with the approach taken by the UK Supreme court in *Dallah*. In effect, the Court of Appeal said that the award debtor was not bound to take any step to challenge the arbitral tribunal's findings on jurisdiction before the court at the seat of the arbitration.

The Court of Appeal departed from the approach taken by courts and commentators from other leading arbitration jurisdictions concerning the enforcement of foreign arbitral awards under arts IV and V of the *New York Convention*. The conventional position is that the applicant for enforcement need only provide evidence of the arbitral award and the arbitration agreement pursuant to which the award is purportedly made. The onus is then cast on the respondent to prove a defence under art V, such as lack of a valid arbitration agreement.[51]

Admittedly, the approach of Warren CJ represents a greater departure than the approach taken by the majority. While it may be argued that the imposition of an additional evidential onus at stage one of the enforcement process does not impose any great burden on the award creditor,[52] the point that requires exposure is that this amounts to a departure from the manner in which the *New York Convention* has been interpreted in leading jurisdictions around the world and by leading commentators.

The majority suggested that the requirement that the award creditor produce at the first stage of the enforcement process additional evidence (over and above production of the award and the arbitration agreement pursuant to which the award was purportedly made), where enforcement was sought against a non-signatory to the arbitration agreement, was supported by the English cases on proper analysis; however, those cases do not support such an approach.

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50 *Dallah* [2011] 1 AC 763, 812–13 (Mance JSC), 850 (Saville JSC).

51 Albert Monichino, 'International Arbitration in Australia — The Need to Centralise Judicial Power' (2012) 86 *Australian Law Journal* 118, 123 (referring to Albert van den Berg, quoted recently regarding the Victorian Court of Appeal's decision in Alison Ross, *Australian Court Forges Own Path on Enforcement* (31 August 2011) GAR <http://www.globalarbitrationreview.com/news/article/29792/australian-court-forges-own-path-enforcement>); Gary Born, *International Commercial Arbitration* (Kluwer, 2009) vol 2, 2705–6.

52 See Gregory Nell, 'Recent Developments in the Enforcement of Foreign Arbitral Awards in Australia' (2012) 26 *Australian and New Zealand Maritime Law Journal* 24.

The only justification for the departure in approach from the English cases may be the existence of linguistic differences between ss 8 and 9 of the *IAA* — in particular, s 8(1) — and the equivalent provisions in the English Act. Warren CJ expressly acknowledged those linguistic differences as justifying departure from the approach taken in the English cases ([37], [42]). The majority also acknowledged the existence of linguistic differences ([184]).

The differences in judicial views as expressed in *Altain Khuder* may need to be addressed by amending s 8(1) of the *IAA* to bring it in line with the equivalent provisions of the English, Singaporean and Hong Kong international arbitration legislation. These provide that a foreign award is enforceable between the persons between whom it was made (subject to the specified grounds for resisting enforcement, as found in *New York Convention* art V). In the subsequent decision of the Federal Court in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*,[53] Foster J declined to follow the majority in *Altain Khuder*, instead preferring to follow more closely the English case law. In our view, the diverging judicial approaches to the interpretation of *IAA* s 8(1) need to be addressed by legislative reform.

Altain Khuder was an extraordinary case in that the award did not make clear on what basis the arbitral tribunal assumed jurisdiction over the non-signatory to the arbitration agreement (IMC Solutions). The case should be limited to its facts.[54] Usually in cases in which an award is made against a non-signatory to the arbitration agreement, it may reasonably be expected that the award will explain the basis on which the arbitral tribunal has assumed jurisdiction. In that event, the production of the award, together with the arbitration agreement according to which the award was purportedly made, will be expected to satisfy the evidential onus contained in art IV of the *New York Convention* (s 9(1) of the *IAA*). Where this is not the case, additional evidence will need to be tendered by the award creditor to satisfy the evidential onus cast upon it. However, the majority did not rest their decision on this basis.

3 *Uganda Telecom v Hi-Tech Telecom*

In *Uganda Telecom Pty Ltd v Hi-Tech Telecom*,[55] Uganda Telecom (a Ugandan corporation) entered into a services contract with Hi-Tech Telecom (an Australian corporation). It contained an arbitration clause, although it did not specify the seat, the arbitral law or the procedural rules to be followed in any arbitration. Uganda Telecom claimed that Hi-Tech Telecom, in breach of the services contract, failed to provide a guarantee or pay invoices. Uganda Telecom commenced an arbitration in Uganda before a sole arbitrator. The arbitration appears to have been administered by the Centre for Arbitration and Dispute Resolution in Kampala. Hi-Tech Telecom did not participate, and an award was made in Uganda Telecom's favour. The latter applied in the Federal Court of Australia to seek enforcement of the award under s 8 of the *IAA*, which gives effect to art V of the *New York Convention*. Hi-Tech Telecom raised several arguments in resisting enforcement of the award, all of which were rejected by Foster J.

First, Hi-Tech Telecom submitted that the arbitration agreement was void for uncertainty because it did not specify the seat of the arbitration, the number of arbitrators,

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53 (2012) 292 ALR 161.

54 See John Digby, 'Is Australia Unfriendly to Arbitration?' (2012) 7 *Construction Law International* 38.

55 (2011) 277 ALR 415 ('*Uganda Telecom*').

the arbitral law or the procedural rules to apply. Foster J rejected this argument ([68]–[84]). He noted that the services contract was made in Uganda and was expressly governed by Ugandan law and (more importantly) that a mechanism for resolving all of the omissions raised by Hi-Tech Telecom was provided by the *Arbitration and Conciliation Act 2000* (Uganda) (similar to the *Model Law*, and applicable because Uganda was the agreed seat).

Second, Hi-Tech Telecom contended that the award was neither an 'arbitral award' nor a 'foreign award' within the meaning of the *IAA*. Foster J held ([90]–[91]) that the award met the definition of an arbitral award under both the Ugandan Act and the *IAA* and that, having been rendered in Uganda, it was clearly a foreign award.

Finally, Hi-Tech Telecom submitted that the award should not be enforced because it contained errors of fact and law; in particular, that the arbitrator had miscalculated the quantum of damages. Foster J decided that no such ground to resist enforcement existed under the *IAA*. His Honour also rejected Hi-Tech Telecom's submission that errors of fact and law could fall under the public policy ground in s 8(7)(b) of the *IAA* (equivalent to art V(2)(b) of the *New York Convention*). His Honour stated ([126], [132]–[133]) that erroneous legal reasoning or misapplication of law is not a violation of public policy; rather, Australia's public policy is to enforce arbitral awards 'wherever possible'. Importantly, Foster J held that, under the *IAA* (as amended in 2010), the grounds for resisting enforcement of a foreign award were set out exhaustively in s 8(5) and (7) and the Court had no residual discretion to refuse enforcement.

The decision of Foster J in *Uganda Telecom* is welcome. It gives effect to the new objects of the *IAA*, set out in s 2D, and the interpretative provision, s 39, introduced by amendment in 2010, and especially the pro-enforcement bias that those reforms sought to introduce. The judgment circumscribes the 'public policy' exception to enforcement of foreign arbitral awards. It also suggests a move away from past Australian decisions, which held that courts had a general discretion to refuse enforcement of foreign awards.[56] Those decisions had been based partly on the fact that the *IAA* had omitted the word 'only' in s 8(5) when listing the grounds for resisting enforcement of a foreign award, compared to art V(1) of the *New York Convention*. *IAA* s 8(3A), introduced as part of the 2010 amendments, now makes it clear that the grounds set out in s 8(5) and (7) for resisting enforcement of a foreign award are exhaustive.

4 *Traxys Europe SA v Balaji Coke Industry*

In the case of *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)*,[57] Traxys (a Luxembourg company) had a contract with Balaji (an Indian company) regarding coke supplied by an Egyptian company. The contract was governed by English law and provided for arbitration in London under the London Court of International Arbitration Rules. Balaji refused to pay Traxys for the coke. Traxys duly commenced an arbitration against Balaji in accordance with the arbitration agreement, and the arbitrators rendered an award in favour of Traxys. Enforcement was sought by Traxys in the Federal Court of Australia as Balaji appeared to own shares in Booyan Coal Pty Ltd (another Australian company). At the same time as it sought enforcement of the foreign award, Traxys sought a freezing order in respect of the shares that it sought to attach by way of enforcement.

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56 Such as *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406, 428–32.

57 (2012) 201 FCR 535.

Meanwhile, the Indian High Court had made an order purportedly setting aside the award and restrained Traxys from taking any step to enforce the award. This order was made upon an ex parte injunction, and Traxys was only notified a month after the order was made.

Balaji (the award debtor) raised various arguments in an attempt to resist enforcement of the award. First, it argued that the Federal Court had no power under s 8 of the *IAA* to enter judgment or to make an order giving effect to the award, and that this was distinct from 'executing' the award as if it were a court order ([46]). It argued that the Court's only power was to enforce the award, which was a different concept to the entry of judgment. Since Traxys had not yet applied for enforcement under s 8(3) of the *IAA*, the Court could only execute, but not enforce, the award. Foster J noted ([77]) the appointment of receivers to the shares cannot be regarded as a measure properly within the notion of 'enforcement' under pt II of the *IAA*. Foster J noted ([77]) that s 53 of the *Federal Court of Australia Act 1976* (Cth) 'does not confine the enforcement of judgments to execution … [and] expressly contemplates other methods of enforcement'. Section 8 of the *IAA* therefore did grant the Court the power to make the orders sought by Traxys (including an order in terms of the award).[58]

Second, Balaji argued that the award creditor had an evidentiary onus of establishing that the award debtor had assets in the jurisdiction that were capable of being the subject of an order for enforcement. Foster J held ([82]) that:

> [N]othing in the *IAA* ... as a matter of law, prevents ... entry of judgment or the making of an order in the terms of the relevant award if there is evidence which proves ... there may be or, even, definitely are, no assets within Australia against which execution may be levied.

Third, it argued that seeking to enforce an award where the award debtor may not have assets in the jurisdiction is contrary to 'public policy', pursuant to s 8 of the *IAA* (giving effect to art V of the *New York Convention*). Foster J rejected this argument ([108]).

Fourth, it relied on the fact that an Indian court had set aside the award. It contended that it was a breach of public policy under *IAA* 8(7) to allow Traxys to enforce the award in the face of the Indian court order. Foster J held ([111]) no public policy violation arising from Traxys seeking enforcement in Australia 'simply because Balaji has pursued an appeal in India from an unfavourable decision [which had refused its application for a stay of the award from the arbitration in London] … and has somehow persuaded the Indian High Court to grant an *ex parte* interim injunction against Traxys', restraining the latter from 'putting the award into execution' ([21]). Indeed, the Indian Court went further and purportedly set aside the award.

Foster J held ([110]) that the Indian court order purporting to set aside the award made in an arbitration seated outside of India was ineffectual. The well-established view is that an award can only be set aside by a court at the seat of the arbitration.

Repeating ([132]–[133]) his views in *Uganda Telecom*,[59] and following case law from the United States[60] and Hong Kong,[61] Foster J reasoned ([105]):

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58 Foster J noted ([77]) that the appointment of receivers to the shares cannot be regarded as a measure properly within the notion of 'enforcement' under pt II of the *IAA*.

59 (2011) 277 ALR 415, 439. Murphy J also subsequently cited Foster J's general view on public policy in *Traxys* ([105]) in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 (2 November

> [T]he scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defence of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state.

This approach arguably interprets the *New York Convention* as referring to 'international public policy', namely public policy viewed from the perspective of the enforcing state's court while allowing leeway (compared to 'domestic public policy') for the fact that various international elements are involved in enforcing foreign awards. Less clear is what the Australian position is regarding 'transnational public policy', namely 'public policy which is common to many States'.[62] As in the International Law Association's authoritative Report outlining that concept, however, this decision ([90]) confirms the narrow contemporary scope to be given in Australia to the public policy exception, and the 'pro-enforcement bias of the Convention, as reflected in the *IAA*'.

Specifically, Foster J correctly refused to support the tendency for some courts in India (and certain other states in Asia, such as Indonesia) to purportedly 'set aside' or otherwise interfere with awards from an arbitration with the seat abroad.[63] The scheme of the *New York Convention* and modern arbitration legislation is instead for such courts to await possible enforcement proceedings in their own jurisdiction.

5 *Dampskibsselskabet Norden A/S v Beach Building & Civil Group*

In *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*,[64] Dampskibsselskabet Norden ('DKN', the applicant shipowner) chartered a vessel through an Australian broker to 'Beach Building and Construction Group (of which Bowen Basis Coal Group forms a part), Australia'. Disputes arising out of this charter party were, under cl 32, to be governed by English law and settled by arbitration with the seat in London. DKN claimed demurrage resulting from the charterer's delayed transportation of coal from Australia to China. It agreed with the respondent, Beach Building and Civil Group Pty Ltd ('Beach Civil') on a sole arbitrator. DKN then sought and obtained from the arbitrator a first 'Declaratory Arbitration Award' that held that the charterer's name was incorrectly recorded in the charter party documentation, and ordered rectification to state that the

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2012) [49], enforcing (and refusing to set aside) an international arbitration award with the seat in Australia. See also Luke Nottage and Albert Monichino, 'International Commercial Arbitration Developments in Model Law Jurisdictions: Japan Seen from Australia' (2013) 1 *International Arbitration Law Review* 34, 40–1.

60 See, eg, *MGM Productions Group Inc v Aeroflot Russian Airlines*, 91 Fed Appx 716 (2nd Cir, 2004).

61 *Hebei Import and Export Corporation v Polytek Engineering Co Ltd* (1999) 2 HKC 205, [28]–[29] (Bokhary PJ).

62 International Law Association, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (Paper presented at New Delhi Conference, New Delhi, 2002) <http://www.ila-hq.org/download.cfm/docid/BD0F9192-2E98-4B17-8D56FFE03B80B3EA> [11]. A recent decision of the Supreme Court of India has put a stop to this practice: *Bharat Aluminium Co v Kaiser Aluminium Techinal Services Inc* (unreported, Civil Appeal No 7019 of 2005, 6 September 2012).

63 See, eg, Greenberg, Kee and Weeramantry, above n 11, 77–8, 418–19.

64 (2012) 292 ALR 161 ('*Dampskibsselskabet*').

charterer was Beach Civil.[65] The arbitrator later issued a final arbitration award against Beach Civil, comprising damages with interest, and costs. DKN sought enforcement of both awards against Beach Civil in Australia under s 8 of the *IAA*, which gives effect to art V of the *New York Convention*.

As required by *IAA* s 9(1), DKN produced to the Federal Court a duly certified copy of the charter party together with a duly certified copy of each of the awards. Foster J accepted that the production of these documents constituted prima facie evidence that the awards were purportedly made pursuant to the arbitration clause in the charter party and that Beach Civil (notwithstanding the misdescription in the charter party) was the charterer under the charter party. No additional evidence was sought to be adduced by DKN to satisfy its evidentiary onus.

Beach Civil resisted the enforcement application on the basis that it was not the named charterer under the charter party and therefore was not bound by the awards. It did not attempt to adduce any evidence in support of this submission. Rather, it simply pointed to the fact that it was not named in the charter party.

As in *Altain Khuder*,[66] a question arose as to which party had the burden of establishing that Beach Civil was a party to the arbitration agreement (contained in the charter party) and the nature of that onus. Foster J departed from the approach taken by the majority in *Altain Khuder*. His Honour noted that, although the majority suggested that the approach adopted by them was supported by the English cases, on proper analysis those cases did not support the view that the award creditor at the first stage of the enforcement process (under the equivalent of art IV of the *New York Convention*) needs to do any more than produce an authenticated copy of the award and the arbitration agreement pursuant to which the award was 'purportedly' made before the relevant enquiry and onus of proof shifted onto the award debtor ([89]).

Foster J noted ([71]) that, for enforcement, s 9(1) of the *IAA* (substantially reproducing *New York Convention* art IV) required the applicant to produce to the court the award and the arbitration agreement under which the award 'purports' to have been made (or certified copies of either document). Further, under s 9(5), such a document filed in accordance with s 9(1) "'is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates'" ([72]). By producing such documents, Foster J found ([74]) that Beach Civil had provided:

> [*P*]*rima facie* evidence of:
>
> (a) The fact that each Award was made as it purports to have been made;
>
> (b) The subject matter of each Award; and
>
> (c) The fact that each Award purports to have been made pursuant to cl 32 of the Charterparty … the only place suggested either by the Arbitrator or by DKN as the place where the relevant arbitration clause was to be found.

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65 That is, the arbitrator accepted that it was the common intention of those who negotiated the charter party that the charterer would be Beach Civil.

66 (2011) 253 FLR 9.

Foster J noted ([76]) that Beach Civil had not attempted to demonstrate by evidence that it was not truly the charterer, and held that merely asserting that it was not named as charterer on the face of the charter party did not overcome the evidentiary effect. Accordingly, his Honour concluded ([77]) that DKN had established to a prima facie level that each award was a foreign award within *IAA* s 8(1). To resist enforcement, Beach Civil therefore needed to identify which ground applied under s 8(5) or (7) — and then to 'prove to the satisfaction of the Court' that such a ground was applicable.

Foster J therefore declined to follow Warren CJ in *Altain Khuder*, and preferred the approach of Hansen JA and Kyrou AJA in that decision by the Victorian Court of Appeal refusing enforcement of an award from Mongolia.[67] However, to the extent that Hansen JA and Kyrou AJA seemed to have required more from the award creditor than Lord Mance had suggested in *Dallah*,[68] Foster J ([89], [91]) favoured the approach of Lord Mance. Foster J ([89]) understood Lord Mance to have reasoned that:

> [A]s long as the documents produced to the Court at the first stage established that the arbitrators had '*purported*' to act pursuant to the relevant arbitration agreement, that was sufficient to move the relevant enquiry and the onus of proof onto the award debtor.

Accordingly, the onus was cast upon Beach Civil to establish that there was no valid arbitration agreement between it and DKN. As Beach Civil had adduced no evidence about this, it failed to satisfy the onus cast upon it to do so under s 8(5) of the *IAA*.

Nevertheless, Foster J refused enforcement because the charter party was 'a sea carriage document' and s 11 of the *Carriage of Goods by Sea Act 1991* (Cth) ('*Carriage of Goods Act*') operated to render an arbitration clause (which required disputes to be arbitrated in London) to be of no effect. Therefore, the arbitrator had no jurisdiction to make an award against Beach Civil.

By way of background, *IAA* s 2C provides that nothing in the *IAA* affects the operation of the *Carriage of Goods Act*. The latter states that an 'agreement (whether made in Australia or elsewhere) has no effect so far as it purports to' restrict the jurisdiction of Australian courts to resolve certain disputes (s 11(2)), unless the parties agree on 'arbitration … conducted in Australia' (s 11(3)). In other words, s 11 of the *Carriage of Goods Act* makes certain disputes non-arbitrable unless the seat of the arbitration is within Australia (or possibly, as the *Carriage of Goods Act* wording is unclear, foreign-seated arbitrations if hearings are conducted in Australia). Under *Carriage of Goods Act* s 11(1), such disputes encompass those arising from:

> (a) a sea carriage document relating the carriage of goods from any place in Australia to any place outside Australia; or
>
> (b) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii), relating to such a carriage of goods.

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67 For a detailed analysis of *Altain Khuder* (2011) 253 FLR 9 by co-counsel for the applicant DKN in the case decided by Foster J, see Nell, above n 53.

68 [2011] 1 AC 763.

Foster J held ([142]) that the charter party fell within category (a), based on the wording and legislative history of the *Carriage of Goods Act* (including 1997 amendments), although it was not a 'non-negotiable instrument' pursuant to category (b) ([144]).[69] Thus Foster J disagreed ([147]) with a contrary recent short 'Ruling on Preliminary Question' by Anderson J in the Supreme Court of South Australia, who had decided that s 11 of the *Carriage of Goods Act* covered persons holding bills of lading or similar instruments, not charter parties.[70] Accordingly, Foster J held ([143], [146]) that the parties' agreement on arbitration in London had 'no effect', and refused enforcement of the awards.

Foster J noted that the onus of establishing one or more of the grounds on which enforcement may be refused under *IAA* s 8(5) and (7) rests upon the party resisting enforcement. Section 8(7) is the counterpart to *New York Convention* art V.2, whereby a foreign award can be refused enforcement if (a) the dispute's subject matter is not capable of enforcement (that is, not arbitrable) under the laws of the state where enforcement is sought (here: Australia), or (b) enforcement would be contrary to its public policy. His Honour did not specify which ground for resisting enforcement had been made out in the present case.

It is submitted that the clearest ground in this case is lack of objective arbitrability of the dispute under *New York Convention* art V.2(a) or *IAA* s 8(7)(a). Another possible ground was public policy under art V(2)(b) (or s 8(7)(b)). Even though the intention behind the *New York Convention*, and the tendency of courts and commentators in applying this exception, is to construe 'public policy' as 'international public policy',[71] this is to be judged from the perspective of the enforcing state. In this situation the Australian legislature has specified that certain disputes with international elements are to be decided only by courts or arbitral tribunals in Australia.

Foster J made this point earlier in the judgment in a different context, namely the respondent's alternative objection that Beach Civil was never a party to the original arbitration agreement. His Honour noted ([99]), following *IAA* s 8(5)(b), that this question was to be decided according to English law. However, since no evidence was adduced 'as to the relevant principles of construction of contracts under English law', Foster J was entitled to assume it is the same as Australian law ([100]), which enabled errors of misdescription of parties to be rectified as in this sort of case (see [96]–[97]).

Foster J also justified the rectification of the arbitration agreement by another line of reasoning. His Honour pointed out that s 30 of the *English Arbitration Act 1996* (UK), the *lex arbitri*, empowers the tribunal to rule on its own substantive jurisdiction — including

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69 As a policy matter, however, it could be queried why the *Carriage of Goods Act* should extend to this sort of charter party agreement. Bills of lading, for example, have traditionally raised questions of unequal bargaining power. By contrast, '[c]harterparties are usually not subject to international regimes because they are presumed as being contracts concluded between persons of equal bargaining power, so there is no need for government regulation to protect the interests of the vulnerable shipper': Robyn Burnett and Vivienne Bath, *Law of International Business in Australasia* (Federation Press, 2009) 174.

70 *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (2011) 112 SASR 297. In his 2012 Australian Maritime and Transport Arbitration Commission Address, the Chief Justice of the Federal Court of Australia questioned whether, as a matter of public policy, an expansive interpretation of 'sea carriage document' to encompass a voyage charter party was warranted: Patrick Keane, 'The Prospects for International Arbitration in Australia' (AMTAC Address, Brisbane, 25 September 2012), 7 <http://www.amtac.org.au/assets/media/AMAMTACAddressKeaneCJ25September-2012.pdf>. Justice Keane was appointed to the High Court of Australia on 6 March 2013.

71 Greenberg, Kee and Weeramantry, above n 11, 461–7.

the validity of the arbitration agreement; s 48(5)(c) gives arbitrators the same powers as the English Commercial Court to order rectification of documents. Under s 67, a party who has unsuccessfully challenged jurisdiction before the arbitrator may appeal to the Court, but within 28 days of the arbitrator's decision. Because that had not occurred, Foster J concluded ([102]) that 'the first Award cannot now be challenged under English law and is therefore determinative of the point at issue'.

This alternative reasoning is debatable, as it may give excessive deference to the *lex arbitri* — contrary to the general intention behind the *New York Convention* system. Imagine, for example, if the latter provided for strict time limits for any appeals to courts at the seat regarding other matters, such as seeking replacement of arbitrators for bias or setting aside awards for serious irregularities. A court in another state should not be precluded from resisting enforcement based on grounds set out in the *New York Convention*. In the specific case of an arbitral tribunal's jurisdictional ruling, moreover, English courts have recently affirmed that de novo review is available when resisting enforcement, even if no appeal or challenge had been lodged with courts at the seat of the arbitration.[72]

Finally, one recent commentator on Foster J's judgment in *DKN* has suggested that:[73]

> This decision demonstrates that where a party is misdescribed in an arbitration agreement and that appears to be a mistake, *it may be prudent to apply to the local courts of the sea***t** to obtain a declaration as to who the parties to the arbitration agreement are *prior to commencing the arbitration*. This would remove any arguments with respect to the jurisdiction of the Arbitrator to determine the dispute because of a misdescription of the parties, and would provide further certainty at the time of enforcement.

However, this will depend on the arbitration law at the agreed seat. In the present case, the seat was London and the relevant arbitral law was the English *Arbitration Act 1996*. Under s 32(2) a court may only determine a preliminary point of jurisdiction, *on an application of a party to arbitral proceedings*, either if (a) all parties agree or (b) the tribunal allows it and 'the court is satisfied (i) that the determination of the question is likely to produce substantial savings in costs; (ii) that the application was made without delay, and (iii) that there is good reason why the matter should be decided by the court'. Furthermore, a party may lose its right to object (as set out in s 73). Section 32(2) would not have sanctioned an application to the court by the misdescribed party to the arbitration agreement for a declaration as to arbitral jurisdiction (or lack thereof) *prior to the commencement of the arbitration*.

The above-mentioned commentator's suggestion also leads to a second and difficult question under many arbitration statutes. What happens if: (a) the claimant instead does commence the arbitration and asks the tribunal to determine the scope and validity of the arbitration agreement, but (b) the respondent ignores the arbitral proceedings and instead approaches the court at the seat, whereupon (c) the claimant asks the court to stay (or dismiss) the proceedings and refer the issue back to the arbitral tribunal?

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72 In *Dallah* [2011] 1 AC 763 the seat for the arbitration was France. Enforcement was declined in the UK because the Supreme Court disagreed with the arbitral tribunal's decision that (under French law) Pakistan was party to the arbitration agreement.

73 J M Healy, 'Misdescription of Parties and Enforcement Issues: *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*', *The Arbitrator & Mediator* (November 2012) 73, 75 (emphasis added).

Under s 72(1) of the English *Arbitration Act 1996*: 'a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings' can generally approach the local court in order to contest the tribunal's jurisdiction. In Germany, which adopts the *Model Law* framework, s 1032(2) of the Arbitration Law 1998 added an extra provision specifying that a respondent may bring its objection to jurisdiction before the local court at the seat, but only before the arbitral tribunal is constituted. Thereafter, the court cannot intervene until the tribunal has ruled on its jurisdiction.[74]

By contrast, if the seat is for example in France (not a *Model Law* jurisdiction), the objection essentially must be heard first by the arbitral tribunal.[75] At the other extreme, US law generally allows a party to approach the court for a jurisdictional ruling at any stage.[76]

The *Model Law* allows objections to be heard by the tribunal (under art 16) and the local court at the seat (art 16), but some argue that the text and legislative history are not entirely clear on the demarcation. One view is that the court may generally rule at least on some aspects concerning the jurisdiction of the arbitral tribunal, before a determination by the tribunal (at least in the context of a stay application under art 8).[77] Another view is that, absent some special provision (such as s 1032(2) of the German Arbitration Law), a court at the seat has no pre-emptive role to play in terms of determining arbitral jurisdiction, before the arbitral tribunal has ruled on arbitral jurisdiction under Article 16, and certainly does not have any such role before an arbitration has been commenced.[78] One of the present authors (Nottage) maintains the view, originally outlined in 2010, that the *IAA* could be usefully amended to clarify this point in Australia.[79]

IV Conclusions

Australian case law on the *IAA* since 2010 presents a very 'mixed bag' in terms of appropriate engagement with international commercial arbitration, as intended by the recent statutory reforms.[80] Some of the decisions analysed above reflect a mature

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74 Bachand, above n 34, 467–9.

75 See also J Lew, L Mistelis and S Kroell, *Comparative International Commercial Arbitration* (Kluwer, 2003) 347, [14-55], [14-56].

76 W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' in A van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer, 2007) 55, 79–80.

77 See, eg, Park, above n 76, 80 (locating the *Model Law*, England and Switzerland as 'hybrids' on this timing issue, between France at one extreme and the US at the other); M Holmes and C Brown, *The International Arbitration Act 1974: A Commentary* (LexisNexis, 2011) 159, sch 2 art 8-4; *Jean Estate v Wires Jolley LLP* [2009] ONCA 339. The latter draws in turn on *Dell Computer Corp v Union des consommateurs* [2007] 2 SCR 801. However, a court in this scenario should limit itself to a prima facie review of the arbitration agreement; if a tribunal upholds jurisdiction, a dissatisfied party should then be able to apply to the court for a full review. See, eg, Greenberg, Kee and Weeramantry, above n 11, 218–28. Nottage is tentatively attracted to this view on both timing and standard of review.

78 See eg *Dens Tech-Dens, kg v Netdent Technologies Inc* [2008] QCCA 1245 and *El Nino Ventures Inc v GCP Group Ltd* [2010] BCSC 1859; D Williams and A Kawharu (eds), *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) 208, [7.4.1] and especially 211, [7.5.1] (citing at n 80: *McDonnell Dowell Contractors Ltd v Pipeflow Technology Ltd*, High Court of New Zealand at Auckland, M2029/98, 25 March 1999). See also Bachand, above n 34, 473–4 (referring to art 5, which provides that in matters governed by the *Model Law*, no court must intervene except where so provided in the *Model Law*). Monichino is attracted to this view.

79 Cf Nottage and Garnett, above n 6, 178.

80 Cf PA Keane, 'Judicial Support for Arbitration in Australia' (2010) 34 *Australian Bar Review* 1, 2. The then Chief Justice of the Federal Court (appointed on 6 March 2013 to the High Court of Australia) argued that in recent times there has been a considerable change within the Australian judiciary towards greater support for arbitration.

understanding and compelling application of international arbitration principles. Others, however, do not. In fact, the recent case law reveals conflicting approaches.[81]

In addition, the case law reviewed above supports the argument that the present regulatory system, whereby eight state and territory Supreme Courts and the Federal Court are provided with supervisory jurisdiction under the *IAA*, is not conducive to the promotion of uniformity in the interpretation of the *IAA*. One solution might be to establish the Federal Court as the single intermediate appellate court in all matters arising under the *IAA*.[82]

Analysis of recent case law indicates that further statutory amendments in Australia might be useful to clarify international commercial arbitration principles. For example, is the scope of Australia's 'public policy' exception to enforcement the same as or similar to that set out in the 2002 Report of the International Law Association?[83] Are charter parties really 'sea carriage documents'?[84] Is it still sound policy to prescribe that charter party disputes (relating to outbound shipments) should only ever be resolved in Australian courts or arbitral proceedings 'conducted in Australia' — and what does that phrase mean, anyway? Should Australia also tailor legislation to deal with the effect of international arbitration agreements involving insolvent parties?[85]

Further legislative reform should not be limited to issues that happen to crop up, directly or indirectly, in Australian judgments. The legislature could reconsider many issues raised by commentators in the lead-up to the 2010 amendments — issues that have generated considerable discussion both within Australia and abroad.[86] One example, out of many, is whether the *IAA* needs additional statutory provisions encouraging arbitrators to facilitate early settlement ('Arb-Med').[87] Another question not covered by the *IAA*, but

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81 For example, *Cargill* (2010) 78 NSWLR 533; cf *Lightsource* (2011) 250 FLR 63 and *Wagners* [2010] QCA 219 (20 August 2010); *Altain Khuder* (2011) 253 FLR 9; cf *Dampskibsselskabet* (2012) 292 ALR 161.

82 Monichino, above n 5.

83 Cf *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535.

84 *Dampskibsselskabet* (2012) 292 ALR 161; cf *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (2011) 112 SASR 297.

85 Cf *Re ACN 103 753 484 Pty Ltd (in liq)* (2011) 86 ACSR 112.

86 For views by one of the present authors, see Nottage and Garnett, above n 6 (based on an article related to their detailed public submission for the *IAA* amendment process). An example related to questions of arbitrability and public policy is whether and how different parts of the *Australian Consumer Law* (sch 2 of the *Australian Competition and Consumer Act 2010* (Cth)) should apply in international arbitrations. See also Luke Villiers, 'Breaking the "Unruly Horse": The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards' (2011) 18 *Australian International Law Journal* 155. The *Australian Consumer Law* issue may need to be revisited anyway as part of a broader possible reform of Australian contract law, suggested in April 2012 by the federal Attorney-General's Department: see Luke R Nottage, 'The Government's Proposed "Review of Australian Contract Law": A Preliminary Positive Response' (Research Paper No 12/49, Sydney Law School, 18 July 2012), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111826>. It also arises under the Department's Private International Law Consultation, which is underway: see Luke Nottage, 'Reforming Private International Law: Finally "Australia in the Asian Century"?' on The University of Sydney, *Japanese Law and the Asia-Pacific* (21 November 2012) <http://blogs.usyd.edu.au/japaneselaw/2012/11/reforming_private_internationa.html>.

87 See Nottage and Garnett, above n 6. Nottage argues that it would be useful to demarcate more precisely the authority of courts at the seat and arbitral tribunals regarding jurisdictional challenges (see text at above n 78ff). The desirability of clear statutory provisions on Arb-Med is even more apparent in the light of recent litigation in Hong Kong, culminating in *Gao Haiyan v Keeneye Holdings Ltd* [2011] HKCA 459. See further, Friven Yeoh and Desmond Ang, 'Reflections on *Gao Haiyan* — Of "Arb-Med", "Waivers", and Cultural Contextualisation of Public Policy Arguments' (2012) 29 *Journal of International Arbitration* 285. Comparing legislative provisions and practice in another *Model Law* jurisdiction and major trading partner for Australia, see also Luke Nottage, 'Arb-Med and New International Commercial Mediation Rules in Japan' on The University of Sydney, *Japanese Law and the Asia-Pacific*

which could be because it is now central to arbitration law in Australia, is when Australian court proceedings involving non-parties to an arbitration agreement should be discontinued as constituting an 'abuse of process', if the matter involves issues identical or similar to those subject to foreign arbitral proceedings.[88]

A further round of reforms to the *IAA* is necessary to correct uncertainties created by the drafting of the 2010 amendments. Those are becoming increasingly apparent — especially the 'legislative black hole' problem for certain pre-existing international arbitration agreements.[89]

One view is that Australia does not need more arbitration law reform as it has 'state of the art legislation'. But another is that even the 2010 *IAA* amendments were 'too little too late', and that a constitutional challenge to Australia's enforcement regime filed in mid-2012 represented a further significant setback.[90] Although fortunately the challenge was unanimously dismissed by the High Court of Australia on 13 March 2013, some concerns have been voiced about the fact that it was brought.[91] More generally, a senior member of the judiciary suggested that, compared to Hong Kong and Singapore as the 'principal competitors', Australia's attitude towards international arbitration 'may perhaps be described as two steps forward and one step back'.[92]

The former Attorney-General responsible for the 2010 reforms, the Hon Robert McClelland, recently argued that the appointment of Justice James Allsop (currently President of the New South Wales Court of Appeal) as 'chief justice of the Federal Court gives Australia a real opportunity to develop as a centre for international commercial

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(21 July 2009) <http://blogs.usyd.edu.au/japaneselaw/ 2009/07/arbmed_and_new_international_c_1.html>. Comparing recent Japanese case law developments more broadly, see also Luke Nottage, 'International Commercial Arbitration Developments in Model Law Jurisdictions: Japan Seen from Australia' (December 2012) 29 *Japan Commercial Arbitration Association Newsletter* 3 <http://www.jcaa.or.jp/e/arbitration/newsletter.html>.

88 *Michael Wilson and Partners Limited v Robert Nicholls* (2011) 244 CLR 247. See Albert Monichino and Alex Fawke, 'Parallel Litigation and Arbitration: Abuse of Process?' (October 2012) *Asian Dispute Review* 121. Even if the outcome of reform deliberations is that the High Court of Australia's approach was correct in that case, and it is too difficult or inappropriate to restate those principles in further amendments to the *IAA*, these questions should be raised as part of a further comprehensive review of arbitration law in Australia.

89 See discussion, above n 9. As noted by Garnett and Nottage (above n 8, 964), Castel (above n 9) also highlights the lacuna in the *IAA* as to which Australian courts have jurisdiction to hear setting aside applications under the *Model Law*.

90 'High Court Stoush Puts Arbitration Standing at Risk', *The Australian Financial Review* (Sydney), 16 November 2012, 31. The former cited view is from the current President of ACICA (perhaps understandably, given its role in promoting Australia as an arbitral venue). The latter cited view is from Nottage: see also Greg Sherrington, *International Commercial Arbitration — Australia in the Asian Century?* (16 November 2012) Sydney Law School <http://sydney.edu.au/news/law/436.html?newscategoryid=64&newsstoryid=10547>. For a critical summary of the constitutional challenge, see Monichino, above n 9. See also John Wakefield and Georgina Philpott, *Constitutional Heat — Air Conditioner Distribution Agreement Sparks Challenge to Constitutional Validity of Arbitration Legislation in Australia* (21 September 2012) Holman Webb Lawyers <http://www.holmanwebb.com.au/publications/constitutional-heat-air-conditioner-distribution-agreement-sparks-challenge-to-constitutional-validi>; Monichino and Fawke, above n 2, 247–8 (both published before the High Court handed down its recent decision).

91 Marianna Papadakis, 'Arbitration Businesss Hit Despite Chinese Defeat' (15 April 2013) *Business Review Weekly* <http://www.brw.com.au/p/professions/arbitration_business_hit_despite_WfWrTnI43IpoBCDv8fdQvO> (concern expressed by Nottage); see also Greg Sherrington, *Australia's Role in International Commercial Arbitration* (14 March 2013) Sydney Law School <http://sydney.edu.au/news/law/436.html?newsstoryid=11171>; Howard Rapke and Kathryn Howard, *Sense Prevails — Finally* (20 March 2013) Holding Redlich <http://www.holdingredlich.com.au/dispute-resolution-litigation/sense-prevails-finally>.

92 Keane, above n 71, 2, referring also to the views of two Australian practitioners: I-Ching Tseng and Khory McCormick, 'One Step Forward, One Step Back (Part I)' (September 2011) 16(2) *Arbitration Newsletter* 46; I-Ching Tseng and Khory McCormick, 'One Step Forward, One Step Back (Part 2)' (April 2012) 17(1) *Arbitration Newsletter* 35.

arbitration'.[93] The experience of persistently more popular venues for international commercial arbitration the Asia-Pacific region, such as Hong Kong[94] and Singapore,[95] suggests that frequent legislative amendments would demonstrate sustained commitment to a complex and rapidly evolving field of law.[96] In Australia, a key feature of ongoing reforms to arbitration law should be a broadly based and open consultation process.[97]

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93 Michael Pelly, 'Allsop Posting Gets McClelland's Seal', *The Australian* (Sydney), 23 November 2012, 30.

94 Dean Lewis, 'The Hong Kong Arbitration Ordinance — Proposed Changes' (2009) 5 *Asian International Arbitration Journal* 109; John Choong and J Romesh Weeramantry (eds), *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Thomson Reuters, 2011); J Romesh Weeramantry, 'Recent Developments in Hong Kong Arbitration Law' (December 2012) 29 *Japan Commercial Arbitration Association Newsletter* 11.

95 See, eg, Charles Lim Aeng Cheng, 'The Developmental Life Cycle of International Arbitration Legislation — Singapore IAA Case Study' (2011) 7 *Asian International Arbitration Journal* 1; Calvin Chan, *The Upcoming Amendments to Singapore's International Arbitration Regime — Some Preliminary Observations* (2012) Singapore International Arbitration Centre <http://www.siac.org.sg/index.php?option=com_content&view=article&id=338:the-upcoming-amendments-to-singapores-international-arbitration-regime-some-preliminary-observations&catid=56:articles&Itemid=171>. Note that Singapore's *International Arbitration (Amendment) Act 2012* includes several further innovations which are absent from the *Model Law* regime in Australia, such as the power to appeal to local courts to review a tribunal's *negative* ruling on its jurisdiction (amending s 10 of the *International Arbitration Act 1994*) and statutory recognition of 'emergency arbitrator' provisions (amending s 2 of the principal Act), in addition to those agreed by the parties, such as provisions recently added to the ACICA Arbitration Rules.

96 For a comparison of how Hong Kong, Singapore, New Zealand and Japan have approached the temporal application of successive amendments to their arbitration legislation, now all based on the *Model Law*, see Garnett and Nottage, above n 8.

97 For a critical assessment of the process resulting in the 2010 amendments of the *IAA*, see Luke Nottage, 'Addressing International Arbitration's Ambivalence: Hard Lessons from Australia' in Vijay Bhatia, Christopher Candlin and Maurizio Gotti (eds), *Discourse and Practice in International Commercial Arbitration* (Ashgate, 2012) 11.