Australia

Clayton Utz Professor Douglas Jones AM, Björn Gehle and Simon Greenberg

USE OF COMMERCIAL ARBITRATION

1. Describe the prevalence of commercial arbitrations as a method of settling disputes, both domestic and international.

Australia has forged strong business relationships with its Asian, and particularly South-East Asian, neighbours. With the expansion and opening up of the Asian economies in the mid-1990s the use of international arbitration in the region has grown significantly. Arbitration has flourished because of its adaptability and neutrality in a region with so many different legal and cultural backgrounds.

However, Australia's history of favouring international arbitration is far longer than the last decade or so. Australia has been a signatory to the New York Convention since 1975 and was one of the first countries to adopt the the Model Law in 1989. Australia is also party to a number of Free Trade Agreements (FTAs), such as the Singapore-Australia Free Trade Agreement. Further, being a Western country with a strategic position in Asia and a rapidly growing expertise in international arbitration, Australia has become a very attractive venue for international arbitrations.

On a domestic level, arbitration is common across all major industries and business sectors. Court annexed compulsory arbitration and alternative dispute resolution (ADR) for commercial disputes is commonly used.

LAW ON ARBITRATION

2. What are the principal sources of law and regulation relating to domestic and international arbitration? (Describe the role of federal or state laws and relevance of court decisions).

Australia is a federation with legislative powers divided between the Commonwealth of Australia, as the federal entity, and six States. In addition there are two federal Territories with their own governments.

International arbitrations are governed by the *International Arbitration Act 1974* (Cth) (*IAA*). Section 16 provides that the Model Law has the force of law in Australia. Unless parties have excluded the Model Law by an agreement in writing, as permitted under section 21 of the *IAA*, the Model Law will apply to international arbitrations seated in Australia. If parties exclude the Model Law the arbitration will still be governed by the *IAA* as the curial law. However, the arbitral procedural law will then be the law the parties have chosen, or in the absence of a choice, the *Commercial Arbitration Act* (*CAA*) of the State or Territory in which the arbitration takes place.

Domestic arbitrations are governed by the relevant *CAA*. Following amendments made in 1984 and 1993, the *CAAs* of the States and Territories are largely uniform.

However, the *CAAs* are significantly different from the Model Law. The most significant differences relate to a greater degree of judicial supervision and the possibility of limited appeals from awards under the *CAAs*.

3. List and briefly describe relevant arbitration statutes, international treaties, and conventions.

The following conventions, acts and treaties are most relevant in relation to arbitrations in Australia:

- *International Arbitration Act 1974* (Cth)
- The Model Law
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention)
- Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)
- *Commercial Arbitration Acts* (Victoria 1984, New South Wales 1984, South Australia 1986, Western Australia 1985, Tasmania 1986, Queensland 1990, Northern Territory 1985, Australian Capital Territory 1986).

The *IAA* comprises four parts: (I) Preliminary, (II) Enforcement of Foreign Awards, (III) International Commercial Arbitration, and (IV) Application of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. There are three annexes to the *IAA*: the New York Convention, the Model Law and the ICSID Convention. Further, the *IAA* supplements the Model Law in several respects. Sections 22 to 27 contain optional provisions to which the parties may agree in writing. These include enforcement of interim measures, consolidation of arbitration proceedings and the payment of interest and costs. Other supplements to the Model Law include provisions on interpretation (section 17), opt out provision (section 21) and a definition of 'public policy' (section 19).

Australia's accession to the New York Convention is without reservation and extends to all external Territories other than Papua New Guinea.

Section 32 of the *IAA* states that subject to any variation within Part IV of the IAA, Chapters II to VII of the ICSID Convention have the force of law in Australia.

PRINCIPAL INSTITUTIONS

4. What are/describe the principal institutions and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

The Australian Centre for International Commercial Arbitration (ACICA) provides a range of arbitration related services and is active in the promotion of international arbitration and the dissemination of related information. Members of ACICA's Board of Directors include nominees of leading organisations in Australia as well as arbitration experts from Australia and abroad. ACICA enjoys the support of Australia's leading law firms that participate as corporate members, as well as support from the Commonwealth Government. ACICA operates in close cooperation with the Australian Commercial Disputes Centre (ACDC), which provides ACICA with administrative support and offers administrative and other services in relation to domestic arbitration and ADR (for ACICA see *www.acica.org.au* and for ACDC see *www.acdcltd.com.au*).

The ICC and the LCIA are both represented in Australia. The LCIA has an Australian Chapter as part of its Asian-Pacific Users Council. ICC-Australia has offices in Sydney and Melbourne. The Chartered Institute of Arbitrators also has an Australian Chapter.

ROLE OF THE NATIONAL COURTS

5. What is the relationship between agreements to arbitrate and access to the courts? Is there a presumption of arbitrability/policy support for arbitration? Will the courts stay court actions in favour of agreements to arbitrate?

Australian courts support the autonomy of international arbitration and will stay court proceedings in the presence of a valid arbitration agreement broad enough to cover the dispute.

For international arbitrations, section 7 of the *IAA* governs applications to stay court proceedings. However, in some cases Article 8 of the Model Law will apply instead.

Section 7(2)(b) of the *IAA* implements Australia's obligations under article II(3) of the New York Convention. It provides that the court must stay proceedings if there is a valid arbitration agreement and the dispute 'involves the determination of a matter that, in pursuance of the arbitration agreement, is capable of settlement by arbitration.' Courts will refuse a stay only if they find the arbitration agreement is null and void, inoperative or incapable of being performed (section 7(5) of the *IAA*).

If section 7(2)(b) does not apply, Article 8 of the Model Law may apply as long as the stay is requested no later than the date the applicant submits its first statement on the substance of the dispute.

In domestic arbitrations, different criteria under the State or Territory *CAAs* will apply. Using these criteria the courts have discretion to refuse to order a stay.

6. May an arbitral tribunal rule on a party's challenge to its own jurisdiction ('competence-competence'). Need a tribunal suspend its proceedings if a party seeks to test jurisdiction in the courts?

For international arbitrations, Article 16 of the Model Law enacts the competence-competence principle, pursuant to which an arbitrator is empowered to rule on his or her own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement.

The *CAAs* do not contain an equivalent provision. However, the common law accepts the jurisdiction of an arbitrator to rule on his or her own jurisdiction; at least if the parties have *prima facie* concluded an agreement to arbitrate (see *Ferris v. Plaister* [1994] 34 NSWLR 475). The position at common law is not so clear if there is a dispute concerning the initial existence or validity of a contract containing an arbitration clause or a dispute concerning the actual existence of the arbitration clause. In practice, arbitral proceedings will generally continue notwithstanding a court challenge to the arbitrators' jurisdiction. However, if there is a dispute concerning the initial existence of a contract, arbitrators will usually adjourn arbitral proceedings while those issues are resolved by a court.

USEFUL REFERENCES

7. Provide a selected bibliography of the most influential publications in or relied upon in the jurisdiction – books, journals, newsletters and pamphlets.

Books

P E Nygh & M Davies, *Conflict of Laws in Australia* (7th ed., Butterworths, Sydney, 2002)

M Mustill & S Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed., Butterworths, London,1989)

M Pryles, *Dispute Resolution in Asia* (2nd ed., Kluwer Law International, The Hague, 2002)

W L Craig, W W Park & J Paulsson, *International Chamber of Commerce Arbitration* (Oceana Publications Inc., New York, 1998)

A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (3rd ed., Sweet & Maxwell, London, 1999)

F Russell, D St John Sutton & J Gill, *Russell on Arbitration* (22nd ed., Sweet & Maxwell, London, 2003)

M J Moser (ed.), *Arbitration in Asia* (Butterworths Asia, Singapore, 2001)

J J A Sharkey & J B Dorter, *Commercial Arbitration Law Book*, Sydney, 1986.

Articles

M Pryles, *International Arbitration in Australia*, (1990) 1 American Review of International Arbitration 37

S Greenberg, *Latest Developments in International Arbitration Down Under* (2003) 7 Vindobona Journal of Int Commercial Law and Arbitration 287

R Garnett, *The Current Status of International Arbitration Agreements in Australia* (1999) 15(1) JCL 29

S Greenberg & M Secomb, *Terms of Reference and Negative Jurisdictional Decisions: A Lesson from Australia*, 18(2) Arbitration International (2002), 125.

AGREEMENT TO ARBITRATE

8. Are there form and/or content requirements for an enforceable agreement to arbitrate? How may they be satisfied?

For international arbitrations the Model Law and the New York Convention each contain form requirements for arbitration agreements. For the purposes of enforcement of foreign arbitral awards and where the *IAA* applies without the Model Law (see question 2) Article II(2) of the New York Convention sets out the form requirements. Although an agreement in writing is required by both the New York Convention and the Model Law, the latter definition is more expansive. Article 7(2) of the Model Law allows the arbitration agreement to be communicated in any form that provides a record of the agreement.

For arbitrations conducted under one of the *CAAs*, section 4(1) simply requires the arbitration agreement to be in writing. There is no express requirement for the agreement to be signed and the requirement of writing is not further specified. In general no distinction is drawn between the submission of an existing dispute to arbitration and an arbitration clause providing for the reference of future disputes to arbitration. However section 43 of the *Insurance Contracts Act 1984* (Cth) renders void an arbitration clause in a contract of insurance unless the agreement to arbitrate was

made after the dispute or difference arose. A similar provision can be found in section 7C of the *Home Building Act 1989* (New South Wales) and section 14 of the *Domestic Building Contracts Act 1995* (Victoria) (see *Age Old Builders Pty Ltd. v. Swintons Pty Ltd.* [2003] VSC 307).

ARBITRABILITY

9. Is arbitration mandated for certain types of dispute?

There are certain domestic disputes for which arbitration is the mandated dispute resolution procedure. Mandatory arbitration applies to disputes between pipeline service providers and prospective users about terms and conditions of access under the *Gas Pipeline Access Act 1997* (South Australia) and the *Gas Pipeline Access Act 1998* (Queensland). Also for certain disputes under the *Industrial Relations Act 1996* (New South Wales) and the *Industrial Relations Act 1999* (Queensland) arbitration is mandated after conciliation has failed.

Further, in some States and Territories the Supreme Court has the power to refer certain disputes to arbitration. In New South Wales, for example, section 76B of the *Supreme Court Act 1970* allows a court to refer to arbitration claims or ancillary remedies for the recovery of damages or other money.

10. Is arbitration prohibited for certain types of dispute (restraints of fundamental public policy)?

The Australian courts have taken a positive attitude towards the arbitrability of international disputes and consequently there are few types of commercial disputes where arbitration is prohibited. Questions about whether a dispute is arbitrable usually arise in the context of applications to stay court proceedings.

Section 7(2)(b) of the *IAA* provides that the court must stay its proceedings if there is a valid arbitration agreement and the dispute 'involves the determination of a matter that, in pursuance of the arbitration agreement, is capable of settlement by arbitration.' Matter capable of settlement by arbitration has been interpreted as 'any claim for relief of a kind proper for determination in a court' (*Elders CED Ltd. v. Dravo Corporation* [1984] 59 ALR 206).

However, there are exceptions. For example, the *IAA* is expressly subject to section 11 of the *Carriage of Goods by Sea Act 1991* (Cth). This declares void an arbitration agreement in a bill of lading or similar document relating to the international carriage of goods to or from Australia, unless the arbitration agreement provides that the place of arbitration is in Australia. Further, section 8 of the *Insurance Contracts Act 1984* (Cth) may affect the arbitrability of insurance-related disputes.

Courts have also refused stay applications where the dispute involves antitrust, bankruptcy or insolvency. However, the courts have not stated that these matters are inherently not capable of settlement by arbitration. Rather, the courts have focused on whether the scope of the arbitration agreement is broad enough to cover such disputes. These situations often arise in relation to the *Trade Practices Act 1974* (Cth), Australia's antitrust and consumer protection legislation. In *IBM Australia Ltd. v. National Distribution Services Ltd.* [1991] 22 NSWLR 466, the New South Wales Court of Appeal held that some issues relating to consumer protection under the *Trade Practices Act* are capable of settlement by arbitration. More recently the NSW Supreme Court in *Francis Travel Marketing Pty Ltd. v. Virgin Atlantic Airways Ltd.* [1996] 39 NSWLR 160 and the Federal Court in *Hi-*

Fert Pty Ltd. v. Kiukiang Maritime Carriers [1998] 159 ALR 142 confirmed that disputes based on section 52 of the *Trade Practices Act* (relating to misleading and deceptive conduct) are arbitrable. Concerning the arbitrability of insolvency matters, please see *Tanning Research Laboratories Inc. v. O'Brien* [1990] 64 ALJR 211, reported in Yearbook Comm. Arb'n XV (1991) pp. 521-529.

SEPARABILITY OF ARBITRATION CLAUSES

11. May an arbitral clause be considered valid even if the rest of the contract in which it is embedded is invalid?

Article 16(1) of the Model Law provides that an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Further, a decision by the arbitral tribunal that the contract is null and void does not *ipso jure* mean the arbitration clause is invalid. This expressly recognises the doctrine of severability and autonomy of the arbitration clause.

The principle of severability of an arbitration clause is also firmly established at common law. An arbitration agreement will remain effective in the presence of an allegation that the substantive contract is void or has been discharged by frustration (*Heymann v. Darwins Limited* [1942] A.C. 356; *Multiplex Constructions Pty Ltd. v. Trans Australian Constructions Pty Ltd.* (unreported, Supreme Court of the Northern Territory, 03/02/1995)). The same applies when there is an allegation that the contract is void *ab initio* for example as a result of fraud (*Ferris v. Plaister* [1994] 34 NSWLR 475). However, the position would be different if there is a dispute about the initial existence of the contract or the arbitration agreement.

QUALIFICATION/APPOINTMENT/LIABILITY OF ARBITRATORS

12. Are there specific provisions regulating the qualifications of arbitrators? Are there requirements (including disclosure) for 'impartiality' and 'independence', and do such requirements differ as between domestic and international arbitrations?

Australian laws do not impose any restrictions as to the arbitrator's professional qualifications, nationality or residency. However, all arbitrators must be independent and impartial. The same standards of impartiality and independence apply for party-nominated and neutrally-appointed arbitrators.

Article 12(1) of the Model Law applies the reasonable doubts test. It requires the arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence from the time of his or her appointment and throughout the arbitral proceedings.

The requirements of independence and impartiality are also indirectly recognised under the *CAAs* by sections 44 and 45(1).

At common law Australian courts apply the reasonable suspicion or reasonable apprehension test. The Supreme Court of Victoria in *Gas and Fuel Corporation of Victoria v. Woodhall and Leonard Pipeline Contractors Ltd.* [1978] VR 385 held that reasonable suspicion is established if a party or the public would reasonably consider that the arbitrator did not or would not decide the dispute in a fair and unprejudiced manner. This test was reworded to the 'reasonable apprehension' test in *Livesey v. New South Wales Bar Association* [1983] 151 CLR 294.

13. Are there provisions governing the challenge or removal of arbitrators? Do the courts or other jurisdictions play/have a role in any such challenge?

According to Article 12(2) of the Model Law an arbitrator may be challenged if circumstances exist which give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed upon by the parties. The provisions in the Model Law have been accepted as a standard for domestic arbitrations (*Gascor v. Ellicott* [1997] 1 VR 332).

Concerning the procedure for challenges, Article 13 of the Model Law states that the parties are free to agree on a procedure and, failing such an agreement, the challenge shall proceed in accordance with Article 13(2). Article 13(2) provides for the challenge to be submitted to the arbitral tribunal at first instance. If the arbitral tribunal rejects the challenge, the challenging party may request the court to decide.

For arbitrations proceeding under the *CAAs*, section 44 empowers the court, on application of a party to the arbitration agreement, to remove the arbitrator or umpire where it is satisfied that (a) there has been misconduct on the part of an arbitrator, (b) undue influence has been exercised in relation to an arbitrator or (c) an arbitrator is incompetent or unsuitable to deal with the particular dispute.

The *CAAs* expressly provide that an arbitrator can be challenged even by the party who appointed him or her (section 45(1)).

14. Does legislation govern, or have the courts developed rules regarding the liability of arbitrators for acts related to their decision-making function?

In Australia, arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrator. However, they will be liable for fraud in respect of anything done or omitted to be done in that respect (see section 28 of the *IAA* and section 51 of the *CAAs*). So far the question of liability of an arbitrator to the parties has not come before the courts. It is likely though that these provisions will not excuse an arbitrator for breaches of the contract between him or her and the parties. But the implication is that the arbitrator has a certain degree of immunity unless guilty of gross misconduct amounting to fraud.

PARTY REPRESENTATION

15. Are there particular qualification requirements for representatives ('counsel') appearing in the jurisdictions?

The *IAA* prescribes a very liberal rule in relation to representation. Section 29(2) of the *IAA* provides that a party may be represented by himself or herself, by a duly qualified legal practitioner from any legal jurisdiction of that party's choice, or by any other person of that party's choice. Thus a party may choose any person, either legally qualified or not, as a representative. Further, the selection of a representative is not subject to approval by the arbitrator.

If parties have excluded the Model Law by virtue of section 21 of the *IAA*, it is not clear whether the representation provisions in the *IAA*, or those in the *CAA*, will apply. This question has not been resolved. However, the better view is that the parties only exclude the Model Law and the remainder of the *IAA's* provisions

are still applicable. Thus section 29 of the *IAA* should apply to all international arbitrations even if the Model Law has been excluded.
For domestic arbitrations under the *CAAs*, the rule regarding representation is less liberal than under the *IAA*. Section 20(1) of the *CAAs* provides that a party to the arbitration may be represented by a legal practitioner only where:
a) a party to the proceedings is, or is represented by, a legally qualified person;
b) all the parties agree to it;
c) the amount or value of the claim subject to the proceedings exceeds AU$20,000 or such other amount as is prescribed instead by regulation; or
d) the arbitrator or umpire grants leave for such representation.

Thus legal representation is as of right if one of conditions (a) to (c) are met. Otherwise, it is in the discretion of the arbitrators. The wording of section 20(1) is broad enough to allow foreign legal practitioners to appear.

Section 20(2) of the *CAAs* permits representation by a non-legal practitioner only in limited circumstances.

PLACE OF ARBITRATION/PROCEDURES

16. Are there provisions governing the place (seat) of arbitration, or any requirement for arbitral proceedings to be held at the seat?

For international arbitrations, Article 20(1) of the Model Law provides that parties are free to agree on the place of arbitration. Failing such agreement, the place is decided by the arbitral tribunal. There is no requirement that hearings be held at the seat. The arbitral tribunal may decide to hold hearings or meetings in places other than the seat (Article 20(2)).

For arbitrations conducted under the *CAAs*, there is common law authority suggesting that arbitrators are authorised to determine the place of arbitration on the basis that this is a procedural matter which is entrusted to them (see *Re Whitwhan Trustees* [1895] 39 Sol. Jo. 692).

17. Are specific procedures mandated in particular cases, or in general?

Most provisions which govern the procedural aspects of domestic and international arbitrations may be modified by agreement of the parties. However, there are some mandatory provisions from which parties cannot derogate.

For example, arbitrators must ensure that parties are treated equally and that each party is given a proper opportunity to present its case (Article 18 of the Model Law). Further, Article 24(2) of the Model Law is also mandatory. This requires an arbitrator to give the parties proper notice of any hearing or meeting of the arbitral tribunal for the purposes of inspecting goods, properties or documents.

Section 14 of the *CAAs* states that subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit. The limitation of 'subject to this Act' means that mandatory provisions must be followed. However, in practice there are few mandatory provisions concerning the arbitral procedure set out in the *CAAs*.

Further, at common law there is a requirement that judicial proceedings conform to the principles of due process and natural justice. This would apply to

all aspects of the arbitral procedure. The principles of natural justice require that parties receive proper notice of hearings and are given a proper opportunity to present their cases. An arbitrator is also bound by the usual obligation to treat the parties equally. Otherwise, as provided by section 14 of the *CAAs*, the arbitrator may conduct the hearings as he or she thinks fit.

EVIDENCE GATHERING

18. What is the general approach to the gathering and tendering of evidence at the pleading stage and at the hearing stage (please deal with production, discovery, privilege, use of witness statements, etc.). Are there differences between domestic and international arbitrations?

Arbitrators who conduct proceedings under the Model Law are not bound by local rules of evidence. They have considerable freedom to determine the facts. Article 19(2) of the Model Law provides that the tribunal may determine the admissibility, relevance, materiality and weight of the evidence. The tribunal, or the parties with the tribunal's approval, may also request assistance in the taking of evidence from a competent court. In that case, the court would apply its own rules regarding the taking of evidence.

The *CAAs* also provide a liberal rule (section 19(3)). Arbitrators may inform themselves in such manner as they think fit. However, the parties can, by agreement, require the arbitrator to apply certain rules of evidence. Further, section 19(1) of the *CAAs* provides that, subject to a contrary intention in the arbitration agreement, evidence before an arbitrator or umpire may be given orally or in writing and shall, if the arbitrator so requires, be given on oath or affirmation or by affidavit. In practice, written evidence is common.

Arbitrators may order parties to produce documents (see Articles 17 and 19(2) of the Model Law and section 14 of the *CAAs*). However, arbitrators may only make orders with respect to the parties to the proceedings. If a discovery order is required over a non-party, court assistance may be necessary. As with evidentiary procedures generally, the discovery process in Australian arbitrations is influenced by the common law system. However, limited discovery has become the common practice used in commercial courts as well as in domestic arbitration.

Subject to a contrary agreement by the parties, arbitral tribunals are authorised to appoint one or more expert witnesses to assist them (Article 26 of the Model Law and section 19(3) of the *CAAs*). In practice, an arbitrator will generally seek the consent of the parties before deciding to appoint an expert.

Upon request, a court can issue subpoenas ordering a witness to appear (see Article 27 of the Model Law and section 17 of the *CAAs*).

19. What powers of compulsion or court assistance are there for arbitrators to require attendance of witnesses or production of documents, either prior to or at the substantive hearing? Is there a difference between domestic and international tribunals or as between parties and non-parties? Do special provisions exist for arbitrators appointed pursuant to international treaties (i.e. bilateral or multilateral investment treaties)?

This question has been dealt with in question 18 above.

INTERIM MEASURES/ROLE OF THE TRIBUNAL

20. Are there special provisions relating to the granting of interim and preliminary relief? Have the courts recognised and/or limited any such authority? Do the courts themselves play a role in interim relief in arbitration proceedings?

Subject to a contrary agreement of the parties, Article 17 of the Model Law empowers the arbitral tribunal to order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with such measure. Measures ordered under Article 17 must be in respect of the subject matter of the dispute. It is therefore unlikely that arbitrators are empowered to order security for the costs of the proceedings.

Parties may also adopt the optional provisions in section 23 of the *IAA* (see question 3), which provide for the enforcement of interim measures under Chapter VIII of the Model Law.

Intervention by a court is not excluded under the Model Law. Article 9 of the Model Law provides that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for the court to grant such measure.

For arbitrations under the *CAAs*, there are a number of relevant provisions. Section 14 provides the arbitrator with the freedom to conduct the proceedings as he or she thinks fit. Section 37 provides that the parties shall at all times do all things which the arbitrator requires to enable a just award to be made, and no party shall wilfully do or cause to be done any act to delay or prevent any award being made. Finally, section 23 confers on an arbitrator the power to make an interim award, unless a contrary intention is expressed in the arbitration agreement.

In general, the *CAAs* allow for a higher level of intervention by the courts than does the Model Law. Section 47 of the *CAAs* confers on the court the same power to make interlocutory orders for the purposes of, and in relation to, arbitration proceedings than it does for proceedings in the courts. However, in *Nauru Phosphate Royalties Trust v. Matthew Hall Mechanical and Electrical Engineers Pty Ltd.* [1994] 2 VR 386, Smith J emphasised that the purpose of section 47 is not to allow courts a greater interference in the arbitral proceedings, but rather to facilitate and support arbitral proceedings.

TAXATION OF ARBITRATORS' FEES

21. Does the state, or any of its sub-divisions purport to tax domestically the fees of foreign arbitrators conducting hearings in the state? Is there a difference if the arbitration is 'seated' in the state or elsewhere?

Foreign arbitrators conducting hearings in Australia will need to be aware of Australian income tax and goods and services tax (GST) implications on fees earned.

Australia taxes income earned by non-residents from Australian sources. Arbitrators' fees are likely to have an Australian source if the agreement between the parties and arbitrators is made in Australia, payment is made in Australia and the services are to be performed in Australia. However, Australia has entered into double taxation agreements with many of its major trading partners and these agreements generally allocate primary taxing rights to the country of residence.

Australian GST is a value-added tax (currently ten per cent) charged on supplies of goods and services. Arbitrators' fees will only be subject to GST if their annual Australian turnover exceeds AU$50,000. In this case the arbitrator will have to register for GST purposes. If the arbitration hearing does not physically take place in Australia, the arbitrators might not have to register and pay GST in respect of their fees notwithstanding that the seat of the arbitration is in Australia.

Further, the fact that payment of fees may be made through another body (for instance, the International Court of Arbitration of the ICC) will not necessarily remove arbitrators from the Australian GST obligations if all the other requirements are fulfilled. Further, in some circumstances, the arbitration services may be GST free – for instance, where the parties to the dispute are not Australian residents and do not have a permanent presence in Australia during the arbitration.

DEFAULT PROCEEDINGS

22. Are there provisions governing a tribunal's ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at or seek adjournment of the arbitral proceedings?

Both the *CAAs* and the Model Law contain default provisions so that the arbitration may continue if a party fails to participate.

Article 25 of the Model Law provides that, subject to a contrary agreement of the parties, if the claimant fails to communicate its statement of claim, the arbitral tribunal shall terminate the proceedings. However, if the respondent fails to communicate its statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations. Further, if a party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and issue the award on the evidence before it.

Section 18(3) of the *CAAs* provides that if a party to an arbitration agreement refuses or fails to attend before the arbitrator for examination, or fails within the time specified by the arbitrator to comply with a requirement of the arbitrator, the arbitrator may continue with the arbitration proceedings in default of appearance if, in similar proceedings before the Supreme Court, the latter could in the event of such default continue with the proceedings. (The *CAA* of Western Australia is slightly different).

THE ARBITRAL AWARD

23. Must an award take any particular form, e.g. in writing, signed, dated, place, the need for reasons, delivery, etc.?

Form requirements under the *CAAs* and the Model Law differ slightly. Article 31 of the Model Law for example requires the award to be in writing and signed by the arbitrators (signature of the majority of the tribunal is sufficient). The award must also contain reasons, state the date and place of arbitration, and be delivered to each party in original form.

The form requirements under section 29 of the *CAAs* are similar. However, if the parties agree that an award shall not be made in writing, section 29(2) of the *CAAs* provides that the arbitrator shall upon request by a party within seven days after the making of the award, give that party a statement in writing signed by the arbitrator containing the terms and reasons for making the award. The *CAAs*, in contrast to the Model Law, do not require that the award mention the date and place it was made.

Neither the Model Law nor the *CAAs* state a time limit for delivering the award.

24. Are there limits on arbitrators' powers to fashion appropriate remedies, e.g. punitive or exemplary damages, rectification, injunctions, interest and costs?

Subject to any contrary agreement between the parties there are presently no limits to the remedies an arbitrator can award. However, the question whether punitive or exemplary damages can be awarded by an arbitrator has not come before the courts.

RECOURSE FROM AN AWARD

25. Are there provisions governing modification, clarification or correction of an award?

Article 33 of the Model Law provides for correction and interpretation of arbitral awards. Within 30 days of receipt of the award, a party may request the arbitral tribunal to correct any computation, clerical or typographical errors in the award. The arbitral tribunal may also correct such errors on its own initiative. However, interpretations of awards may only be given if there is an agreement by the parties for the tribunal to do so.

The *CAAs* do not contain any provisions for an arbitrator to interpret an award. However, section 30 empowers the arbitrator or the courts, on application of a party to the agreement, to make an order correcting the award if the award contains:

- a clerical mistake;
- an error arising from an accidental slip or omission;
- a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the award; or
- a defect of form.

26. May an award be appealed to or set aside by the courts? If so, on what grounds and by what procedures?

Under the Model Law the exclusive recourse against an award is an application

for setting the award aside. The grounds upon which an award may be set aside (Article 34(2) of the Model Law) mirror the grounds for refusing recognition and enforcement of a foreign award under Article V of the New York Convention.

Under the *CAAs*, recourse against an award is dealt with very differently. Section 38(2) allows for an appeal to the Supreme Court on any question of law arising out of an award. However, an appeal may only be brought either:

- with the consent of all the parties to the arbitration agreement; or
- with the leave of the Supreme Court (section 38(4) of the *CAAs*).

The Supreme Court will not grant leave unless it considers that the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement and there is either:

- a manifest error of law on the face of the award; or
- strong evidence that the arbitrator made an error of law and that the determination of the question may add substantially to the certainty of commercial law (section 38(5)).

On hearing an appeal the court may either confirm, vary or set aside the award, or remit the award together with the Supreme Court's opinion on the question of law to the arbitrator for reconsideration (section 38(3)).

Section 40 of the *CAAs* permits parties to conclude an exclusion agreement, excluding or limiting the rights of appeal under section 38(2). For international arbitrations under the *CAAs*, such exclusion agreement may be entered into before the dispute arises; for example it may appear in the parties' contract. However, for domestic arbitrations the exclusion agreement must be entered into after the commencement of the arbitration. For certain types of contracts, such as insurance, admiralty and commodity contracts, some restrictions on exclusion agreements apply (section 41 of the *CAAs*).

The provisions relating to appeals from awards are slightly different in the Tasmanian and Northern Territory *CAAs*. Recourse against an arbitral award under the *CAAs* may also be sought under section 42, which allows the setting aside of an arbitral award in whole or in part where the arbitrator has misconducted the proceedings, or the award has been improperly procured.

ENFORCEMENT OF AWARD

27. What are the procedures and standards for enforcing an award? Is there a difference between 'domestic' and 'non-domestic' awards?

Australia is a signatory to the New York Convention. Section 8 of the *IAA* is based on Article V of the New York Convention and provides that a foreign award may be enforced in the courts of a State or Territory as if the award had been made in that State or Territory in accordance with the laws of that State or Territory.

However, Article 8 of the Model Law only extends to awards made in a Convention Country outside Australia. Where the New York Convention does not apply, enforcement may be possible under Article 35 of the Model Law.

Where enforcement of awards is neither covered by the New York Convention (i.e. foreign awards) nor the Model Law (e.g. domestic awards), section 33 of the *CAAs* will apply. Section 33 operates similarly to section 8 of the *IAA*.

Australian courts have an excellent record for enforcing foreign arbitral awards. They rarely refuse enforcement. However, parties should be aware that

interlocutory or procedural orders made by arbitrators may not be characterised as an award for the purposes of enforcement (see *Resort Condominiums International Inc. v. Bolwell* [1995] 1 QDR 406).

CONFIDENTIALITY OF PROCEEDINGS

28. What are the confidentiality requirements of the arbitral process; i.e. existence of the arbitration, pleadings, documents produced, hearing, award?

The question of confidentiality was addressed by the High Court of Australia in *Esso Australia Resources Ltd. v. Plowman* [1995] 183 CLR 10. The Court confirmed that arbitral proceedings and hearings are private in the sense that they are not open to the general public.

The Court, however, took a different position with respect to documents and information concerning the arbitration. It held that documents voluntarily produced by a party to arbitration proceedings are not automatically confidential. Parties may agree in their arbitration agreement that documents are to be kept confidential, but such an agreement is not implied by the mere fact that the parties have agreed to arbitrate.

A different rule was set down by the Court with respect to documents produced under compulsion, such as documents subject to a discovery order. Those documents are confidential and may only be produced with the consent of the party to whom they belong or when a person is compelled by law to produce them.

UNIQUE JURISDICTIONAL ATTRIBUTES

29. Is there any particular aspect of the approach to arbitration in the jurisdiction which bears special mention?

Besides the particularity of providing for an opting out of the Model Law, division 3 of the *IAA* further contains optional provisions that parties can adopt. These include provisions for the consolidation of arbitral proceedings and the awarding of interest.

As a consequence of Australia being a federation, there is arbitration legislation at both federal and State levels. Care must therefore be taken when drafting arbitration clauses to ensure that the desired arbitral procedural law will apply.

Finally, please note that the *CAAs* are currently being reviewed for possible amendment.