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# Arbitration in Australia

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Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. While on a domestic level this is reflected by court-annexed and compulsory arbitration prescribed for certain disputes, arbitration has become equally common in international disputes. Traditionally arbitration was largely confined to areas such as building and construction. However, the strong and steady growth of the Australian economy over the past decade and the opening of the Asian markets in the mid-1990s has further advanced the use of arbitration in other areas, in particular in the energy and trade sectors. From an Australian perspective, the opening of foreign markets, particularly in Asia, is dramatically increasing the significance of foreign investment protection under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID). While the number of investment arbitrations with Australian participation is expected to increase significantly over the next few years, the level of awareness about the different options of investment protection that is available under investment treaties still needs to be raised.

Australia is a party to 22 bilateral investment treaties (BITs), 19 of which have been in force as of 1 November 2008. Most of the BITs designate ICSID arbitration for the resolution of disputes arising under those treaties. Australia has further entered into free trade agreements (FTAs) with New Zealand, Singapore, Thailand, the US and most recently with Chile, and further FTAs are currently under negotiation with China, Malaysia, Japan, the Gulf Cooperation Council (GCC) and ASEAN-New Zealand.

On 30 July 2008, Australia and Chile entered into the Australia-Chile FTA. The agreement is expected to enter into force in January 2009 and will replace the existing BIT between the two countries. Section B of chapter 10 of the Australia-Chile FTA contains detailed provisions on investor-state dispute settlement. Where a dispute between a party and an investor is not resolved by negotiations and consultations, the investor may refer the investment dispute to either arbitration under the ICSID Convention, proceedings under the ICSID Additional Facilitations Rules, arbitration under the UNCITRAL Arbitration Rules, or arbitration under any other arbitration rules. The procedures and remedies available are significantly broader than those included in the existing BIT between Australia and Chile.

The Australia-Chile FTA is the most comprehensive outcome in trade negotiations since the Closer Economic Relations Trade Agreement with New Zealand in 1983, and will liberalise trade and investment between Australia and Chile.

The use of arbitration clauses in international contracts has grown steadily and the majority of Australian companies prefer arbitration over litigation when it comes to cross-border agreements. While this might be slightly different in a purely domestic context, largely due to the bad reputation of domestic arbitration in the 1990s, there is a trend towards adopting more efficient and flexible procedures based on what is good and common practice in international arbitrations (eg, the Anaconda arbitration in 2002).

### Institutional arbitration in Australia: ACICA

Following the successful launch of the new arbitration rules of the Australian Centre for International Commercial Arbitration (ACICA) in 2005, ACICA has recently published its 'Expedited Arbitration Rules'. The ACICA Expedited Arbitration Rules have been drafted along ACICA's general arbitration rules, but provide special provisions to facilitate expedited proceedings. The objective of these rules is to provide arbitration that is quick, cost effective and fair, considering especially the amount in dispute and complexity of issues or facts involved.

In April 2007, the Australian Maritime and Transport Arbitration Commission (AMTAC) was officially launched by ACICA. With approximately 12 per cent of world trade by volume either coming into Australia or out of Australia by sea, this will pave the way for Australia taking a leading role in domestic and international maritime law arbitration. AMTAC is committed to using the ACICA Expedited Arbitration Rules for maritime proceedings conducted under its auspices.

### Primary sources of arbitration law

Legislative powers in Australia are divided between the Commonwealth of Australia, as the federal entity, and six states. Furthermore, there are two federal territories with their own legislatures.

Matters of international arbitration are governed by the International Arbitration Act 1974 (Cth) (IAA), which in section 16 adopts the UNCITRAL Model Law. It is possible for the parties to opt out of the application of the Model Law by express choice in writing (IAA, section 22). The Model Law provides for a flexible and arbitration-friendly legislative environment, granting the parties ample freedom to tailor the procedure to their individual needs. The adoption of the Model Law does of course also provide users with a high degree of familiarity and certainty as to the operation of those provisions, which makes it an attractive choice.

The IAA supplements the Model Law in several respects. Division 3, for example, contains optional provisions such as for the enforcement of interim measures or the consolidation of arbitral proceedings. Another helpful provision is section 19, which clarifies the meaning of the otherwise debatable term 'public policy' for the purpose of articles 34 and 36 of the Model Law.

Part II contains the implementation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Australia has acceded to the New York Convention without reservations and it extends to all external territories except for Papua New Guinea.

Australia is also a signatory to ICSID, the implementation of which is contained in part IV of the IAA.

Domestic arbitration has traditionally been a matter of state law and is governed by the relevant Commercial Arbitration Act (CAA) of each state or territory where the arbitration takes place. Following amendments made in 1984 and 1993, the CAAs of the states and territories are largely uniform. While the CAA primarily deals with domestic arbitration proceedings, parts of it may also apply in international arbitrations where the parties have chosen to opt out of the Model Law.

**Arbitration agreements**

Form requirements

For international arbitrations in Australia, both the Model Law and the New York Convention require the arbitration agreement to be in writing. While article II(2) of the New York Convention qualifies writing as either signed by both parties or contained in an exchange of letters or telegrams, the Model Law is more expansive in its definition of writing and includes any means of telecommunication that provides a permanent record of the agreement. Under the IAA, the term 'agreement in writing' has the same meaning as under the New York Convention.

In the landmark decision of *Comandate Marine Corp v Pan Australia Shipping* [2006] FCAFC 192, the Federal Court confirmed its position that an arbitration clause contained in an exchange of signed letters is sufficient to fulfil the written requirement. Furthermore, the court found that a liberal and flexible approach should be taken in interpreting the scope of an arbitration agreement. In this case, the words 'all disputes arising out of this contract' were held to be wide enough to encompass claims under the Trade Practices Act for misleading and deceptive conduct that arose in relation to the formation of the contract. The judgment preceeded the decision by the UK House of Lords in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, which confirmed the more liberal approval with regard to interpreting the scope of an arbitration agreement.

However, as the Federal Court of Australia recently pointed out in its decision in *Seeley International Pty Ltd v Electra Air Conditioning BV* [2008] FCA 29, ambiguous drafting may still lead to unwanted results. In that case, the arbitration clause included a paragraph that provided that nothing in the arbitration clause would prevent a party from 'seeking injunctive or declaratory relief in the case of a material breach or threatened breach' of the agreement. The Federal Court interpreted that paragraph to mean that the parties intended to preserve their right to seek injunctive or declaratory relief before a court. The court was assisted in its interpretation by the fact that the agreement also included a jurisdiction clause.

For domestic arbitrations, the CAA also requires an arbitration agreement to be in writing. However, there is no requirement for the agreement to be signed.

There is generally no distinction between submission of an existing dispute to arbitration and an arbitration clause referring future disputes to arbitration. However, the distinction is important in the context of statutory provisions, such as those relating to insurance contracts. These will be discussed further below.

Under Australian law, arbitration agreements are not required to be mutual. They may confer a right to commence arbitration to one party only (see *PMT Partners v Australian National Parks & Wildlife Service* [1995] HCA 36). Some standard form contracts, particularly in the construction industry and the banking and finance sector, still make use of this.

Severability of the arbitration agreement

Australian courts acknowledge the notion of severability of the arbitration agreement from the rest of contract. There is authority from the High Court of Australia in relation to domestic arbitrations that suggests that the notion of severability does not apply in circumstances where there is a dispute concerning the initial existence of the underlying contract or the arbitration agreement itself (see *Codelfa Construction v State Rail Authority* (NSW) (1982) 149 CLR 337). However, this issue has been resolved at least in New South Wales. In *Ferris v Plaister* (1994) 34 NSWLR 474, it was held that the arbitrator has jurisdiction to determine that the relevant contract was void ab initio as long as there was a general consensus. However, an arbitrator may not possess jurisdiction to determine a claim that no arbitration agreement has in fact been concluded. In those circumstances, the arbitrator will usually adjourn the arbitration proceedings pending the court's determination of the issue.

In contrast, for international arbitrations, article 16(1) of the Model Law expressly provides that the tribunal may also consider objections as to the existence of the arbitration agreement.

Stay of proceedings

Provided the arbitration agreement is drafted widely enough, Australian courts will stay proceedings in face of a valid arbitration agreement. For domestic arbitrations, section 53(2) of the CAA provides that a stay application has to be made before the party has delivered pleadings or has taken any other steps in the proceedings other than filing of an appearance, unless with the leave of the court. For international arbitrations, section 7(2) of the IAA incorporates Australia's obligations under the New York Convention and provides for a stay of court proceedings if the proceedings involve the determination of a matter that is capable of settlement by arbitration. Applications for stay are limited to those types of arbitration agreements listed in section 7(1) of the IAA. The primary purpose of this section is to ensure that a stay of proceedings is not granted under the New York Convention for purely domestic arbitrations.

For international arbitrations under the Model Law, article 8 provides for a stay of proceedings where there is a valid arbitration agreement. A party must request the stay before it makes its first substantive submissions. Although the issue of the relationship between article 8 of the Model Law and section 7 of the IAA has not been finally settled by the courts, the prevailing opinion among arbitration practitioners is that a party can make a stay application under either of the two provisions (this also seems to be the position of the Federal Court in *Shanghai Foreign Trade Corporation v Sigma Metallurgical Company* (1996) 133 FLR 417).

The IAA is expressly subject to section 11 of the Carriage of Goods By Sea Act 1991 (Cth), which renders void an

arbitration agreement contained in a bill of lading or similar document relating to the international carriage of goods to and from Australia, unless the designated seat of the arbitration is in Australia. Furthermore, there are statutory provisions in Australia's insurance legislation (section 43 of the Insurance Contracts Act 1984 (Cth) and section 19 of the Insurance Act 1902 (NSW)) that render void an arbitration agreement unless it has been concluded after the dispute has arisen. A recent decision by the New South Wales Supreme Court clarified that this limitation applies to both insurance and reinsurance contracts (*HIH Casualty & General Insurance Limited (in liquidation) v Wallace* (2006) NSWSC 1150). A similar provision is also contained in section 7C of the Home Building Act 1989 (NSW).

### Arbitrability

The issue of which disputes are arbitrable and which are not has not yet been finally resolved. Especially in relation to competition, bankruptcy and insolvency matters (with regard to insolvency matters, see *Tanning Research Laboratories v O'Brien* (1990) 64 ALJR 211, reported in *Yearbook of Commercial Arbitration XV* (1991), pp521-529), courts have occasionally refused to stay proceedings though without expressly holding that these matters are inherently not arbitrable. Instead, most court decisions have considered whether the scope of the arbitration agreement is broad enough to cover such dispute (see, for example, *ACD Tridon Inc v Tridon Australia* [2002] NSWSC 896) in respect of claims arising under the Corporations Act 2001.

Considerations such as these commonly arise in relation to the Trade Practices Act 1974 (Cth), Australia's competition and consumer protection legislation. In *IBM Australia v National Distribution Services* (1991) 22 NSWLR 466, the New South Wales Court of Appeal held that certain matters of consumer protection under the Trade Practices Act are capable of settlement by arbitration. More recently, the New South Wales Supreme Court in *Francis Travel Marketing v Virgin Atlantic Airways* (1996) 39 NSWLR 160 and the Federal Court in *Hi-Fert v Kiukiang Maritime Carriers* (1998) 159 ALR 142 confirmed that disputes based on misleading and deceptive conduct under section 52 of the Trade Practices Act are arbitrable.

However, in *Petersville v Peters* (WA) (1997) ATPR 41-566 and *Alstom Power v Eraring Energy* (2004) ATPR 42-009, the Federal Court took a slightly different position and held that disputes under part IV of the Trade Practices Act (anti-competitive behaviour) are more appropriately dealt with by the court, irrespective of the scope of the arbitration agreement. These decisions show that courts may be reluctant to allow the arbitrability of competition matters and seek to preserve the courts' jurisdiction to hear matters that have a public dimension.

An issue that courts have had to deal with more regularly in recent times is when multiple claims are brought by one party, including some which are capable of settlement and others which are not. So far the courts have approached this issue by staying court proceedings for only those claims it considers to be capable of settlement by arbitration (see *Hi-Fert* and *Tanning Research Laboratories*).

### Third parties

There are very limited circumstances in which a third party who is not privy to the arbitration agreement may be a party in the arbitral proceedings. One situation in which this can possibly occur is in relation to a parent company where a subsidiary is bound by an arbitration agreement, though this exception is yet to be finally settled by Australian courts. There is, however, authority suggesting that a third party can be bound by an arbitration agreement in the case of fraud or where a company structure is used to mask the real purpose of a parent company.

## The arbitral tribunal

### Appointment and qualification of arbitrators

Australian laws do not impose any special requirements with regard to the arbitrator's professional qualification, nationality or residence. However, arbitrators will need to be impartial and independent. Article 12 of the Model Law requires an arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts as to his impartiality or independence. This duty continues during the course of the arbitration.

Where the parties fail to agree on the number of arbitrators to be appointed, section 6 of the CAA provides for a single arbitrator and article 10 of the Model Law for a three-member tribunal to be appointed. The appointment process for arbitrators will generally be provided in the institutional arbitration rules or within the arbitration agreement itself. For all other circumstances, article 11 of the Model Law and section 8 of the CAA prescribe a procedure for the appointment of arbitrators.

It should be noted that the arbitration law in Australia does not prescribe a special procedure for the appointment of arbitrators in multiparty disputes. If multiparty disputes are likely to arise under a contract it is advisable to agree on a set of arbitration rules that contain particular provisions for the appointment of arbitrators under those circumstances, such as the ACICA arbitration rules (article 11).

### Challenge of arbitrators

For arbitrations under the Model Law a party can challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. This standard has also been applied in domestic arbitrations (*Gascor v Ellicott* [1997] 1 VR 332).

The parties are free to agree on a procedure for challenging arbitrators. Failing such agreement, article 13(2) of the Model Law prescribes the procedure. Initially the party is required to submit a challenge to the tribunal, but may then apply to a competent court if the challenge has been rejected (article 13(3) of the Model Law).

For domestic arbitrations the courts have exclusive jurisdiction to remove arbitrators. Pursuant to section 44 of the CAA, any party can make an application to the court to remove an arbitrator or umpire where it is satisfied that there has been misconduct by the arbitrator, undue influence has been exercised in relation to the arbitrator or an arbitrator is unsuitable or incompetent to deal with the particular dispute. Also, its involvement in the appointment of an arbitrator does not bar a party from later on alleging the arbitrator's lack of impartiality, incompetence or unsuitability for the position (CAA, section 45).

### Liability of arbitrators

Both the CAA (section 51) and the IAA (section 28) provide that arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrators. But they remain liable for fraud. This is also

reflected in article 44 of the ACICA arbitration rules. There are no known cases where an arbitrator has been sued in Australia.

## Procedure

Under Australian law, parties are generally free to tailor the procedure for the arbitration to their particular needs, as long as they comply with fundamental principles of due process and natural justice such as equal treatment of the parties, the right of a party to present its case and the giving of proper notice of hearings.

This applies to domestic arbitrations as well as to international arbitrations.

### Court involvement

Australian courts have a good history of supporting the autonomy of arbitral proceedings. Courts will generally interfere only if specifically requested to do so by a party or the tribunal and only where the applicable law allows them to do so.

The courts' powers under the Model Law are very restricted. However, courts may:

- grant interim measures of protection (article 9);
- appoint arbitrators where the parties or the two party-appointed arbitrators fail to agree on an arbitrator (articles 11(3) and 11(4));
- decide on a challenge of an arbitrator if so requested by the challenging party (article 13(3));
- decide, upon request by a party, on the termination of a mandate of an arbitrator (article 14);
- decide on the jurisdiction of the tribunal, where the tribunal has ruled on a plea as a preliminary question and a party has requested the court to make a final determination on its jurisdiction (article 16(3));
- assist in the taking of evidence (article 27); and
- set aside an arbitral award (article 34(2)).

With regard to domestic arbitration, courts have some additional powers. In particular, courts have discretion to stay proceedings (CAA, section 53), as well as power to review an award for errors of law (CAA, section 38) and to issue subpoenas (CAA, section 17) upon application by a party.

### Party representation

There are much greater flexibilities with regard to legal representation in international arbitration than there are in domestic arbitrations. Under section 29(2) of the IAA, a party may represent itself or may choose to be represented by a duly qualified legal practitioner from any legal jurisdiction or, in fact, by any other person of its choice. This applies to all international arbitrations irrespective of whether the Model Law applies or not (in case the parties chose to opt out). For domestic arbitrations, the requirements are more restrictive. Section 20(1) of the CAA sets out a comprehensive list of circumstances and requirements under which a party may be represented in arbitral proceedings. While the provision is broad enough to also allow representation by a foreign legal practitioner in certain circumstances, representation by a non-legal practitioner is very limited.

### Confidentiality of proceedings

Australian courts have taken a somewhat controversial approach to confidentiality of arbitral proceedings. In the well-known decision of *Esso Australia Resources v Plowman* (1995) 183 CLR 10, the High Court of Australia held that while arbitral proceedings and hearings are private in the sense that they are not open to the general public, that does not mean that all documents voluntarily produced by a party during the proceedings are confidential. In other words, confidentiality is not inherent in the fact that the parties agreed to arbitrate. However, the court noted that it is open to the parties to agree that documents are to be kept confidential. From an Australian perspective, it is therefore advisable to provide in the arbitration agreement, either expressly or by reference to a set of arbitration rules containing confidentiality provisions, that the arbitration and all documents produced during the proceedings are to be confidential.

### Evidence

Evidentiary procedure in Australian arbitrations is largely influenced by the common law system. Arbitrators in international and domestic arbitration proceedings are not bound by the rules of evidence and may determine the admissibility, relevance, materiality and weight of the evidence with considerable freedom (article 19(2) of the Model Law and section 19(3) of the CAA).

Although arbitrators enjoy great freedom in the taking of evidence, in practice arbitrators in international proceedings will often refer to the IBA Rules on the Taking of Evidence. The ACICA arbitration rules also suggest the adoption of the IBA Rules absent any express agreement between the parties and the arbitrator.

The situation is slightly different with regard to domestic arbitrations. Despite the liberties conferred by section 19(3) of the CAA, many arbitrators still conduct arbitrations in a way not dissimilar to court proceedings, namely, witnesses are sworn in, examined and cross-examined. Nevertheless, there has been some development lately and more arbitrators are adopting procedures that suit the particular circumstances of the case and allow for more efficient proceedings.

For arbitrations under the Model Law, article 27 allows an arbitrator to seek the court's assistance in the taking of evidence. In such case, a court will usually apply its own rules for the taking of evidence.

### Interim measures

With regard to arbitrations under the Model Law, the arbitral tribunal is generally free to make any interim orders or grant interim relief as it deems necessary in respect of the subject matter of the dispute. Article 9 states that it is not incompatible with the arbitration agreement for a party to request, before or during arbitral proceedings, interim measures from a court and for a court to grant such measures. There is currently debate about whether an Australian court is entitled to grant interim measures of protection in support of foreign arbitrations, as article 1(2) of the Model Law expressly allows for the application of article 9 in arbitrations with a foreign seat. While the position in Australia is yet to be tested, it is possible that Australian courts will follow the decision of the High Court of Singapore in *Front Carriers v Atlantic Shipping Corp* [2006] SGHC 127, granting such interim measure of protection (in that case, an asset preservation order) in support of foreign arbitration proceedings in England, as Singapore's arbitration laws are very similar to those in Australia.

Parties may also choose to opt in to section 23 of the

IAA (additional provisions), which allows a court to enforce interim measures of protection under article 17 of the Model Law in the same way as awards under chapter VIII of the Model Law. Although of great benefit, this provisions is hardly ever noticed at the time the arbitration agreement is drafted.

Under the CAA, the arbitrator has freedom to conduct the arbitration as he or she thinks fit. In particular, section 23 allows the arbitrator to make interim awards unless the parties' intention to the contrary is expressed in the arbitration agreement. Furthermore, section 47 confers on the court the same powers of making interlocutory orders for arbitral proceedings as it has with regard to court proceedings.

### Form of the award

The proceedings are formally ended with the issuing of a final award. Neither the Model Law nor the CAA prescribes time limits for the delivery of the award. However, there are certain form requirements that awards have to meet. According to article 31 of the Model Law, an award must be in writing and signed by at least a majority of the arbitrators. It must contain reasons, state the date and place of the arbitration and must be delivered to all parties to the proceedings. This date will be relevant for determining the period in which a party make seek recourse against the award.

The form requirements for domestic awards are similar. The award needs to be in writing, signed and contain reasons (CAA, section 29). Although there is no express requirement for the award to state the date and place of the arbitration, it is recommended to do so. The parties may also choose for the award to be delivered orally, with a subsequent written statement of reasons and terms by the arbitrator (CAA, section 29(2)). With regard to the content of the award, there are currently no restrictions as to the remedies available to an arbitrator. Whether the award of exemplary or punitive damages is admissible, however, is yet to be tested in Australia.

There are no statutory time limits, either in domestic or international proceedings, for the making of an award. Where the arbitration agreement itself contains a time limit to this effect, a court would have the power to extend the time limit with regards to domestic proceedings (CAA, section 48(1)). The effect of such time limit in Model Law proceedings is unsettled. Under article 32 of the Model Law, delays in rendering an award do not result in the termination of the arbitral proceedings. Instead, one option is for a party to apply to a court to determine that the arbitrator loses his mandate under article 14(1) of the Model Law on the basis that he is 'unable to perform his function or for any other reason fails to act without undue delay'.

Under article 29 of the Model Law any decision of the arbitral tribunal shall be made by a majority of its members. In contrast, the CAA provides that the decision of a presiding arbitrator shall prevail if no majority can be reached (CAA, section 15). The Model Law allows a similar power of the presiding arbitrator, though only with regard to procedural matters (article 29 of the Model Law).

## Recourse against the award and enforcement

### Appeal and setting-aside proceedings

Most important to a party that is unhappy with the outcome of the arbitration is whether it is possible to appeal or set aside the award. The only available avenue for recourse against international awards is to set aside the award (article 34(2) of the Model Law). The grounds for setting aside an award mirror those for refusal of enforcement under the New York Convention and basically require a violation of due process or breach of public policy. The term 'public policy' in article 34 of the Model Law is qualified in section 19 of the IAA and requires some kind of fraud, corruption or breach of natural justice in the making of the award. The Model Law does not contemplate any right to appeal for errors of law.

The CAA allows for broader means to attack an award. An appeal to the Supreme Court is possible on any question of law (section 38(2)) with either the consent of all parties or where the court grants special leave (section 38(4)). (Section 38 is worded slightly differently in the Northern Territory and Tasmania.) However, the Supreme Court will not grant leave unless it considers the determination of the question of law concerned to substantially affect the rights of one or more parties to the arbitration agreement. Furthermore, the court will have to be satisfied that there is either a manifest error of law on the face of the award or strong evidence exists that the arbitrator made an error of law and that the determination of that question may add substantially to the certainty of commercial law (CAA, section 38(5)). Guidance as to how a court might interpret these provisions can be taken from *Giles v GRS Constructions* (2002) 81 SASR 575 and *Pioneer Shipping v BTP Tioxide* [1982] AC 724, though the latter case has been criticised in some regard in more recent decisions.

In the recent decision in *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255, the Victorian Court of Appeal set aside an arbitral award on the basis that the arbitrators provided inadequate reasons in the award which did not meet the judicial standard. The decision represented a significant departure from previous authority in respect of domestic arbitration and led to a rival of the discussion about a uniform legislation under the UNCITRAL Model Law for both domestic and international arbitration.

All the aforementioned rights to appeal may be excluded by the parties by way of an exclusion agreement (CAA, section 40, subject to the limitations set out in CAA, section 41). Further recourse is available under CAA, section 42 in the form of setting aside the award on the grounds that the arbitrator misconducted the proceedings or the award has been improperly procured.

### Enforcement

The most crucial moment for a party that has obtained an award is often the enforcement stage. Australia has acceded to the New York Convention without reservation, though it should be noted that the IAA creates a quasi-reservation in that it requires a party seeking enforcement of an award made in a non-convention country to be domiciled or to be an ordinary resident of a convention country. So far no cases have been reported where this requirement was tested against the somewhat broader obligation under the New York Convention, and given the ever-increasing number of convention countries, the likelihood that this requirement will become of practical relevance is decreasing.

Section 8 of the IAA implements Australia's obligations under article V of the New York Convention and provides for foreign awards to 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, section 8 of the IAA only applies to awards made outside of Australia. For awards made within Australia, either article 25 of the Model Law for international arbitration awards, or section 33 of the CAA for domestic awards, applies.

Australian courts have an excellent record for enforcing foreign arbitral awards. They rarely refuse enforcement. However, it should be noted that interlocutory or procedural orders made by an arbitral tribunal may not fulfil the requirements for an award and therefore courts may refuse enforcement of such interim measures (see *Resort Condominiums International v Bolwell* (1993) 118 ALR 655). For this purpose, parties may wish to apply section 23 of the IAA (optional provisions), which allows for the enforcement of interim measures under part VIII of the Model Law.

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Clayton Utz is one of Australia's leading national law firms and a leading practice in the Asia-Pacific region. Established in 1833, the firm has over 210 partners and more than 1,600 legal and support staff nationally. We have offices in Sydney, Brisbane, Melbourne, Perth, Canberra and Darwin, and maintain strong links with legal firms across the globe through membership of the Lex Mundi and Pacific Rim Advisory Council (PRAC) networks.

Clayton Utz is a full-service firm organised under four core departments: corporate; banking and financial services; property, environment and construction; and litigation and dispute resolution. Within these departments, the firm has specific industry practice groups which focus on the needs of individual sectors of commerce and industry, as well as specific areas of legal practice. These practice groups include construction; property, planning and environment; competition (antitrust) law; corporate law; equity finance; corporate advisory and mergers and acquisitions; privatisation and corporatisation; taxation; project finance; retail banking and e-commerce; structured capital markets; structured and property finance; superannuation and funds management; insurance; intellectual property; information technology; workplace relations and employment law; product liability; insolvency; government services; and commercial litigation and arbitration.

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The international arbitration group at Clayton Utz is one of the leading practices in the Asia-Pacific region. The team is known for its world-class international arbitration and alternative dispute resolution practitioners, Doug Jones, Michael Pryles and Andrew Rogers, who are well known throughout the international arbitration community. We have advised and represented clients in major international transactions, projects and disputes throughout the world under all of the major arbitration rules and regimes.

Clayton Utz is committed to the development and study of international arbitration and international dispute resolution in Australia and the Asia-Pacific region. In association with the University of Sydney, Clayton Utz holds an annual International Arbitration Lecture, with previous presenters including Lord Mustill, Fali Nariman, Rusty Park, Arthur Marriott QC, Karl-Heinz Boeckstiegel and Gabrielle Kaufmann-Kohler.

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Björn Gehle is a special counsel and consultant in our international arbitration group. Prior to joining Clayton Utz in 2002, Björn worked for major international law firms in Frankfurt, Munich and London.

Björn has advised and represented clients in disputes throughout Asia, Europe, Africa, the Middle East and Australia. He has considerable experience in conducting arbitrations under various arbitration rules, including those of the ICC, LCIA, ACICA, DIS, SIAC and UNCITRAL. Björn regularly advises governments and private-sector clients in relation to disputes involving major infrastructure projects, including ports, railways, tunnels, hospitals, power plants, oil and gas pipelines, and other commercial construction projects. His other areas of specialisation include international trade and protection of foreign investment.

Björn has represented NGOs as a delegate to the United Nations Commission on International Trade Law (UNCITRAL) working group on international arbitration. He is a founding member and co-chair of the Australasian Forum for International Arbitration (AFIA) and has been appointed special associate to the Australian Centre for International Commercial Arbitration (ACICA) where he is a member of the drafting committee for ACICA's international arbitration rules.

In 2007 he was appointed a board member of the global advisory board of the International Centre for Dispute Resolution (ICDR) Y&I in New York.

Björn has published widely in the field of international arbitration and is regularly invited as speaker and guest lecturer to conferences and universities.

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Doug Jones is an international infrastructure and dispute resolution lawyer. He is a Sydney-based partner in the Australian law firm of Clayton Utz where he heads the international arbitration and major projects groups.

Doug has extensive experience as arbitrator and counsel in international and domestic arbitrations under the ICC, LCIA, AAA, KLRCA, SIAC, and ACICA Rules. He has also been regularly involved in the use of ADR, including mediation in construction industry disputes.

He is currently chairman of the board of trustees of the Chartered Institute of Arbitrators (London) and will become president of the Chartered Institute of Arbitrators in 2011, president of the Australian Centre for International Commercial Arbitration, a Foundation Fellow and graded arbitrator of the Institute of Arbitrators & Mediators Australia, an arbitrator member of the Society of Construction Arbitrators (London) and a member of the Australian executive committee of the Dispute Review Board Foundation. He is co-editor-in-chief of the *International Construction Law Review*, editorial board member of the *International Trade and Business Law Review*, editorial board member of *Global Arbitration Review,* and a member of the Melbourne Juris Doctor Advisory Board of the University of Melbourne.

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