

HOW THE JUDICIARY CAN SUPPORT DOMESTIC AND INTERNATIONAL ARBITRATION

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I INTRODUCTION

Commercial arbitration continues its global growth – with very significant increases in the number of disputes initiated, as well as in the monetary sums in dispute. This strong trend can be partially attributed to developing and rapidly industrialising economies, particularly those in Asia, and the consequent increase in business opportunities and ensuing disputes. No doubt the impact of long established arbitral jurisdictions, such as New York, London, Paris and other European centres, has also played a part. However, given that international arbitration generally relies on mutual consent, businesses and legal practitioners must have been satisfied at the time of contracting that dispute resolution by arbitration was fair, efficient, and enforceable. Contracting parties must first have had a favourable disposition towards arbitration, and also been able to understand the specific factors and decisions to be made which influence the particular ways in which an arbitration may be conducted. Surveys such as the *Queen Mary 2010 International Arbitration Survey: Choices in International Arbitration*¹ show that parties do consider various factors in choosing a favourable seat or law to govern the contract.²

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1 Queen Mary, University of London, School of International Arbitration, *2010 International Arbitration Survey: Choices in International Arbitration*, sponsored by White & Case LLP ('2010 QM Survey') at <www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf>

2 Please also note that there has been a further survey and study conducted and released, though it does not touch upon the issue of the choice of seat of arbitration: see Queen Mary, University of London, School of International Arbitration, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*.

Given the sophistication of the corporations that utilise international arbitration, there is a certain level of competition between arbitral jurisdictions. Potential seats take active measures to promote their approach to arbitration, otherwise they risk marginalisation in the competitive global marketplace. Failing to present attractively may have significantly adverse consequences, particularly in terms of the development of a jurisdiction's international legal expertise, and the involvement of its legal and other professionals in international trade and commerce.

Success in this respect is, of course, not only dependent on arbitrators and arbitration practitioners. The whole process must be well supported by arbitral institutions and, importantly, the courts. All concerned must play their part in maintaining the quality of arbitral processes and outcomes, and in reducing delay and expense. Legislatures must do all they can to facilitate laws that create a favourable arbitral environment. Courts, whether they be facilitating or enforcing, are also tasked with understanding and supporting arbitration in all these respects – and they must be impartial, efficient and knowledgeable, and experienced with respect to international and domestic arbitration law and practice. Arbitral institutions are also playing an increasing role, and must maintain a high level of expertise, impartiality and efficiency, to the extent they are involved in both administered disputes, and in exercising any statutory or other functions, such as appointment powers. These duties, shared amongst all actors in the field, are particularly important in an atmosphere of concern, internationally and domestically, at the incidence of delay and expense. Also of fundamental importance is the state of the arbitration law, the legislation regulating both domestic and international arbitration, and its interpretation and application by the courts.

There have, over many years now, been significant efforts made by individuals and organisations, public and private, to encourage and develop arbitration in New Zealand and in Australia. In New Zealand, these include very early adoption and enactment of the Model Law on International Commercial Arbitration (the Model Law), both as originally adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985 and then as amended by UNCITRAL on 7 July 2006. New Zealand was also very prompt in enacting the substance of the Model Law provisions, which were applied to both international and domestic arbitrations, in the *Arbitration Act* 1996 ('the AA'). In fact, with the introduction of the *Arbitration Amendment Act* 2007, which came into force on 18 October 2007, New Zealand became the first country to adopt the whole of the Model Law as amended, with only a few minor

modifications.³ Australia was a little slower in adopting a similar course, though the Model Law, as amended in 2006, now forms the basis of both the *International Arbitration Act 1974* (Commonwealth of Australia) ('the IAA'), as amended in 2010, and the State-based domestic commercial arbitration legislation – first enacted as uniform legislation on this basis by New South Wales in the *Commercial Arbitration Act 2010*, in Victoria in 2011 and now in all the other States and Territories (except the Australian Capital Territory) (the domestic legislation is, for convenience, referred to as 'the CAA').⁴

These efforts also include those by the courts in creating and utilising specialist arbitration lists and arbitration judges, and the development of new rules, services and education programs by arbitral institutions and centres.

The aim of the present arbitration reinvigoration process is to increase the use of both international and domestic commercial arbitration in both New Zealand and Australia. International experience indicates that countries that have been successful in establishing busy international arbitration centres and attracting significant international arbitration work also have significant and active domestic arbitration sectors. The two feed off each other. The vibrant domestic arbitration sector provides significant experience for its arbitrators – and also for its courts. It is all the more so where the domestic arbitration law is based on an international regime, such as the Model Law – as is the position in both New Zealand and Australia.

Reinvigoration of international or domestic arbitration in Australia cannot be achieved by governments or the courts acting alone. Governments have now made a crucial contribution to the process by procuring the enactment of

3 The legislation governs both domestic and international arbitration. The principal part of the legislation contains provisions that are applicable to domestic and international arbitration. The First Schedule adopts the Model Law with minor amendments and applies to both domestic and international arbitration. The Second Schedule contains optional rules applicable to domestic arbitration (unless the parties can opt out) and international arbitration (if the parties opt in). Though one should be wary of opting in as the Second Schedule has been designed for domestic arbitration by allowing appeals on questions of law arising out of an award. The Third Schedule contains reproduction of various treaties including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').

4 *Commercial Arbitration Act 2010* (NSW) came into force on 1 October 2010; *Commercial Arbitration Act 2011* (Vic) came into force on 17 November 2011; *Commercial Arbitration Act 2011* (SA) came into force 1 January 2012; *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) came into force on 1 August 2012. Both the *Commercial Arbitration Act 2011* (Tas) and *Commercial Arbitration Act 2012* (WA) have been assented to but are not yet in force. Queensland has the uniform legislation currently passing through its parliament, whilst the Australian Capital Territory is yet to act on the SCAG Model Bill.

substantially enhanced international arbitration legislation and groundbreaking domestic arbitration legislation. Rather, responsibility for this reinvigoration also falls on the various commercial arbitration stakeholders – commercial parties, lawyers (whether they be corporate, in-house lawyers, barristers or solicitors), arbitrators, and arbitral institutions (particularly as educators and the custodians of ethical standards).⁵ I will, however, concentrate on the role of the courts, but it should be observed that the role or roles of each of these stakeholders is or are, naturally, interconnected and so collective, coordinated, action is required.

At times, there has been a perception that the courts have hindered effective commercial arbitration, both by intervening too much in the arbitral process and by interpreting the arbitral law in an interventionist rather than a supportive way.⁶ This perception, as well as many other factors, was one of the reasons why Australian commercial arbitration legislation required attention; though the domestic legislation had also become very dated as a result of developments in legislation elsewhere.⁷

Prior to the enactment of the then new, uniform, domestic commercial arbitration legislation in the mid-1980s, Australian commercial arbitration had been constrained very significantly by the case stated procedure which could be used, in effect, to force a retrial of the issues in an arbitration in the reviewing court. Naturally, the cost, expense and delay involved, along with the loss of confidentiality of the dispute, had the effect of making commercial arbitration very unattractive.

In relation this latter aspect, reference should be made to the innovative arrangements developed by the Arbitrators' and Mediators' Institute of New Zealand ('AMINZ') in developing the Arbitration Appeals Tribunal, which is

5 Including the Arbitrators' and Mediators' Institute of New Zealand ('AMINZ'), the Australian Centre for International Commercial Arbitration ('ACICA'), the Chartered Institute of Arbitrators (Australian Branch) ('CIArb'), the Institute of Arbitrators and Mediators Australia ('IAMA') and the New Zealand Dispute Resolution Centre ('NZDRC').

6 For further discussions of these cases, see below Part V.

7 The domestic commercial arbitration legislation, prior to the enactment of the Commercial Arbitration Act 2010 in New South Wales was uniform (or substantially uniform) legislation which flowed from the work of SCAG in the late 1970s and early 1980s which was based on the then new and innovative legislative developments in England which resulted in the enactment of new legislation in the form of the Arbitration Act 1975 (Eng) and, principally, the Arbitration Act 1979 (Eng). Victoria was the first State to enact the legislation SCAG had developed, in the form of the Commercial Arbitration Act 1984. New South Wales followed shortly afterwards as, in due course, did the other States and the Territories. Apart from in New South Wales, as a result of its enactment of the Commercial Arbitration Act 2010 (NSW), this is the domestic commercial arbitration legislation still in force in Australia.

designed, broadly, to provide an expeditious and cost-effective arbitral appeal mechanism while at the same time maintaining arbitration confidentiality without the need to rely on judicial discretion being exercised in favour of maintaining confidentiality.⁸

Finally, in setting the scene, the importance of harmonising arbitration laws, both intra-nationally and internationally, and the needs of the international and domestic communities should be emphasised. In this respect, Mr Sundaresh Menon SC, Attorney-General of Singapore (as his Honour the Chief Justice then was),⁹ in the Opening Plenary Session of the ICCA Congress 2012 (Singapore) said:¹⁰

6. But, in the second half of the 20th century, as global trade grew, so did the pressure for the development of a workable system of international dispute resolution and with it we saw the growth of efforts to harmonise arbitration laws so as to construct an acceptable international framework. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which was adopted on 21 June 1985,¹¹ was ground breaking in its efforts to rationalise and propose a uniform legal framework for the conduct of arbitrations that would gradually displace the patchwork of hitherto disparate pieces of domestic legislation. And in providing a model text for States to adapt and adopt, the Model Law also paved the way for a new paradigm of minimal curial intervention by specifying very restrictive and defined circumstances in which the intervention of the courts could be sought

7. Recognising that what the business community desires is a fast and ultimately, a conclusive method for resolving commercial disputes, the courts have gradually eased their supervisory control over arbitration in line with the norms reflected in the Model Law and the ubiquitous New York Convention. The impressive statistics coupled with the prevailing attitude of judicial deference, that has been exhibited

8 See the AMINZ Arbitration Appeal Rules at <www.aminz.org.nz>, noting that rule 1.1 provides:

The purpose of the AMINZ Arbitration Appeal Rules is to encourage, through the use of the AMINZ Arbitration Appeal Panel, the efficient, confidential and high-quality resolution of appeals from arbitral awards on questions of law.' Section 14B of the *Arbitration Act* 1996 provides that every arbitration agreement the provision applies to 'is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.

9 The Hon Chief Justice Menon was appointed Chief Justice of Singapore on 6 November 2012.

10 Sundaresh Menon SC "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)" delivered at ICCA Congress 2012 Opening Plenary Session, at paras [6] and [7].

11 <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

across the globe are clear signs that arbitration has arrived as a vitally important partner in the business of international dispute resolution.

II THE ARBITRATION ENVIRONMENT AND ITS IMPORTANCE

The 2010 QM Survey provides a 'checklist' for assessing the attractiveness, or otherwise, of a jurisdiction as a seat for arbitrations. The 2010 QM Survey found that the most important factor influencing the choice of the seat for arbitration was the 'formal legal infrastructure' at the seat.¹² The passage of the Model Law based legislation in both New Zealand and Australia enhances their position in this respect. New Zealand and Australia, like other attractive international arbitration seats, have stable government institutions.

The governing law of the contract is also an important factor in selecting an arbitral seat – and this and the law of the seat may coincide. Whilst neither New Zealand nor Australian law is as frequently specified as the law applicable to international contracts as, for example, English or New York law, either may be seen as a useful option. Both are based on English common law and each country has developed its own jurisprudence which is regularly cited and applied in other jurisdictions. Of course, arbitrators in New Zealand and Australia can and do apply English law with relative ease; or, similarly, New York, Singapore or Hong Kong law if that is desired. The same applies with respect to civil law systems, such as Indonesia or the Philippines.

The effect of the choice of seat on enforceability of the arbitral award is also a serious matter – and one to be considered carefully. The choice of a jurisdiction where neutrality and impartiality is questionable may invite enforcement problems. Neither New Zealand nor Australia presents any such problem. Additionally, as emphasised in the 2010 QM Survey, a critical factor in choosing the seat is the neutrality and impartiality of the legal system – and New Zealand law (and New Zealand) and Australian law (and Australia) cannot be faulted on that score.

Arbitral institutions and their rules are another factor that may influence the choice of the seat. In particular, the NZDRC, ACICA and IAMA provide a choice of modern arbitration rules – a set of rules of general application to international arbitrations and an expedited set of rules tailored for smaller disputes.¹³ AMINZ, NZDRC, ACICA and IAMA have played a leading role in raising the profile of arbitration in New Zealand and Australia, supporting the arbitral process, educating arbitrators and providing general guidance.

¹² 2010 QM Survey, at p 17.

¹³ See <www.acica.org.au>; <www.nzdrcc.co.nz>; and <www.iama.org.au>. Note that AMINZ has an AMINZ Arbitration Protocol – but no designated set of arbitral rules.

In defence of the courts with respect to the perception that they have been too interventionist in, rather than supportive of, arbitration, it might be said that the legislatures could have included *The Nema* guidelines with respect to appeals in the 1980s uniform legislation if this had been the legislative intent. Nevertheless, given the provenance of the legislation and the English case law, I think it would have to be conceded that there were some 'unfortunate' decisions.¹⁴ There were also some problems with over intervention in the arbitration process by way of judicial review of awards and as a result of an increasing tendency for parties to challenge awards on the basis of, what is generally best described as, 'technical misconduct'. This should not, however, overshadow the very effective and useful work of the courts in expediting and supporting arbitration through very 'arbitration friendly' decisions on the operation of the arbitration legislation, and more generally. This is unsurprising and consistent with the approach of the common law over a long period of time. In this respect it is, in my view, worth noting that the common law courts were, as far back as the eighteenth century, extraordinarily supportive of commercial arbitration – as Professor James Oldham's account of the work of Lord Mansfield in the latter part of that century illustrates.¹⁵ More recently, the English, Singapore and Hong Kong courts, for example, have been very supportive, as many of the Australian courts have been, and continue to be. The New Zealand courts have also handed down decisions which reflect international arbitration trends and approaches.¹⁶

Also of concern has been the actual performance of arbitration itself. Although the education programs of arbitral institutions seek to develop and promote innovative techniques which save time and cost, all too often arbitration as practised in Australia has tended to replicate traditional litigation. I say 'traditional litigation' as for many years the commercial courts in Australia and other countries have embraced aggressive case management and time saving techniques which have made 'innovative litigation' far more attractive than domestic commercial arbitration in many instances. Certainly, New Zealand should be commended for its continual search for approaches to improve case

14 See below Part V.

15 J Oldham *English Common Law in the Age of Mansfield* (University of North Carolina Press, 2004) at pp 68–72.

16 See, for example, *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZCA 359 where the New Zealand Court of Appeal (referencing an earlier leading case with respect to art 34, *Amalta Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614) held that the public policy exception to refuse enforcement of an international award is to be narrowly interpreted.

management, as highlighted in a very recent regulatory impact statement prepared by the Ministry of Justice.¹⁷ A reason for the replication of traditional litigation can be explained by a number of factors, including the increase in the size and complexity of arbitral proceedings as well as the concerns of arbitrators in ensuring they provide the parties with a 'fair go' in reaching the right decision where there is a lack of avenues for appealing an award. In his paper at the ICCA Congress 2012, Mr Sundaresh Menon SC,¹⁸ noted that arbitration has transformed from its early days of being a 'faster, cheaper, less formal and more efficient' process than court proceedings to a 'highly sophisticated, complex and exhaustive process dominated by its own domain experts.' He went on to note that:

25 ...The lack of an avenue of appeal and minimal curial intervention were meant to simplify things. Instead, these factors have given rise to the realisation that there is little room for error in arbitration. The modern era of arbitration is characterised by insulated arbitral decision-making with minimal review. ...

26 Arbitrators, mindful of the principles of natural justice and the fact that there is no appeal against their decision, are sometimes compelled to endure protracted submissions and responses to submissions on every conceivable point.

27 Detailed frameworks and rules with an emphasis on legal accuracy, precision and certainty have overtaken the *ad hoc* compromise-orientated system. Just as arbitration has taken centre stage in the resolution of high value international commercial disputes, it has also become an increasingly complex and formal process burdened by formidable costs.

28 ...The golden age of arbitration bears a number of distinct hallmarks that may perhaps be surprising to those who shared our trade just a few decades ago. The worry is that these changes have occurred at breakneck pace and have far outstripped any central organising thought process on their potential consequences and pitfalls.'

A flow on effect of large and complex arbitration is the impact on costs and, naturally, the growing discontent of users of arbitration.¹⁹ Indeed, with respect to the important question of cost (arbitrators', experts' and lawyers' fees alike), steps

17 *Regulatory Impact Statement – Improvement Case Management for Civil Cases in the High Court* released 14 November 2012, available at <<http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-justice-icm-dec12.pdf>>.

18 Sundaresh Menon SC (as his Honour the Chief Justice then was), *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, presented at the ICCA Congress 2012 (Opening Plenary Session).

19 Sundaresh Menon SC (as his Honour then was), *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, presented at the ICCA Congress 2012 (Opening Plenary Session) at paras 35-37.

might be taken to limit or control fee structures which do not encourage efficiency, such as time costing, and which may cut across the objective of legislatures, courts and arbitrators to promote speedy and cost effective processes.²⁰

In this context, I observe that in more recent times arbitrators have been emboldened to be more robust in applying active case management and more innovative techniques. This process has also been assisted by cross fertilisation from international arbitration where innovation in arbitration processes has tended to be in advance of domestic arbitration, if only because of very significant time, cost and logistical constraints applying to the former. Interestingly the approach of international arbitrators has also assisted the courts and we now see the application of such techniques as 'chess clock' time management being used by the courts. Other positive influences include the very successful special reference procedures which were made available and applied extensively by the Supreme Court of New South Wales – which provide, in effect, an expedited, supervised, commercial arbitration process with minimal appeal potential and no enforcement problems. From my own experience, I can report that these procedures are now being applied more frequently in the Supreme Court of Victoria.

III GOVERNMENT AND LEGISLATIVE SUPPORT

There are two primary ways in which governments can assist arbitration: through direct financial assistance (for example, by trade promotion or public-private partnerships) and through the legislative provision of 'best-practice' in arbitral regimes, domestic and international.

In relation to the first point, governments across the globe have seen the need to support and encourage efforts to develop particular cities and jurisdictions in a manner favourable to arbitration.²¹ In the Asia-Pacific region, Singapore has led the field with Maxwell Chambers. In Australia, the Australian International Disputes Centre, based in Sydney, opened in August 2010. Funded by the Australian Commonwealth and New South Wales governments, it offers modern purpose-built hearing facilities and also houses leading ADR providers in Australia – including ACICA, CI Arb, the Australian Maritime and Transport Arbitration

20 And see, in the litigation context, Justice Clyde Croft, 'AON and its implications for the Commercial Court', a paper presented at the Commercial Court CPD and CLE – *Aon Risk Services Australia Ltd v ANU* [2009] HCA 27: What does this mean for litigation and how will it affect trial preparation?' seminar on 19 August 2010, available at <www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/supreme+court/home/library/supreme++aon+and+its+implications+for+the++commercial+court>.

21 See, for example, *Arbitration in Toronto: An Economic Study* (6 September 2012); referred to in (2012) 86 ALJ 723 at 726.

Commission ('AMTAC') and Australian Commercial Disputes Centre ('ACDC'). It is envisaged that other Australian States, including Victoria, will also follow suit, acting in conjunction through a 'grid' of coordinated centres throughout Australia to offer services to international and domestic parties alike.²² Likewise in Auckland, the Arbitration and Mediation Centre was recently opened. Modelled on arbitration centres in Australia, Hong Kong, Singapore, London and Toronto, the Auckland centre reflects the positive growing demand for dispute resolution services.

The other key to the rise of arbitration globally is the harmonisation of arbitration legislation across differing (nation) States. This is reflected by the work undertaken by UNCITRAL in developing, revising and promoting its Model Law and Arbitration Rules.²³ This highlights the desirability of harmonisation, internationally, in the way in which arbitrations are conducted and supervised. It ensures familiarity with arbitral processes which, in turn, leads to confidence in its role as a dispute resolution mechanism underpinning the global commercial and trading system. The use of the amended Model Law as the basis of both the international and domestic commercial arbitration legislation in New Zealand and Australia provides legislation which is based on current international consensus and accepted practice and which is well understood internationally. Consequently, the New Zealand and Australian legislation, at both levels, becomes immediately accessible and understood internationally – particularly as the New Zealand experience is that the legislation is interpreted and administered by the courts on the basis of accepted international jurisprudence. It is expected that the same approach will be adopted by the Australian courts. In terms of substance, the Model Law is an internationally drafted and accepted arbitration regime that is very supportive of commercial arbitration. It has been enacted in over sixty nation states. It allows parties the freedom to decide how they want their disputes resolved – with minimal court intervention, but with maximum court support. Consequently, the Model Law is the arbitration law against which all other arbitration laws tend to be judged.

The choice of the Model Law as the basis for the CAA in Australia will assist in achieving a great deal of uniformity between the international and domestic

22 The Hon Marilyn Warren AC, Chief Justice of Victoria 'Victoria's Commitment To Arbitration Including International Arbitration And Recent Developments', remarks at the Australian Centre for International Commercial Arbitration reception at the Melbourne Office of Mallesons Stephen Jacques on 13 May 2010.

23 See Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2010, Sweet & Maxwell); and Clyde Croft, Christopher Kee, and Jeff Waincymer, *A Guide to the UNCITRAL Arbitral Rules* (2013, Cambridge University Press).

regimes. As both the IAA and the CAA apply the Model Law provisions, with some additions and adaptations to accommodate their particular contexts, judgments under one regime can and will inform judgments under the other. State and Territory Supreme Court judges, when making decisions under the CAA, will need to be acutely aware of the impact of their judgments on the interpretation of the IAA, as they have jurisdiction under both regimes.²⁴ Additionally, international and domestic parties are likely, and entitled, to assume that a decision on similar or identical provisions under one regime will be found to apply with equal force under the other regime. Consequently, decisions under the CAA will also be considered in determining whether Australia is an attractive seat for international arbitrations. Given that, at least initially, it is likely that there will be more decisions under the CAA than the IAA, it would seem that Australia's Model Law jurisprudence will be developed, at first, by the State and Territory Supreme Courts – as the Federal Court of Australia, which has jurisdiction under the IAA, has no jurisdiction in the domestic regime. There was some controversy surrounding the question whether the Federal Court should be given exclusive jurisdiction under the IAA during the process of review which led to the amending legislation.²⁵ At the time this issue was being discussed the only context was the proposed amendments to the IAA and not also the effect of applying the Model Law domestically in terms of the CAA; which raises the variety of additional considerations to which reference has been made.

In New Zealand, the substantive provisions of the AA apply to both international and domestic arbitration. The First Schedule, which contains provisions reflecting the Model Law, applies to both international and domestic arbitration. The Second Schedule, which contains a set of optional rules designed for domestic arbitration, can also be 'opt-in' by parties to an international arbitration agreement. In that sense, whilst there remains, strictly speaking, a distinction between international and domestic arbitration, there is, by and large, uniformity between the two regimes.

Similarly, the Hong Kong Arbitration Ordinance provides for a unitary regime, removing the distinction between domestic and international arbitrations. Singapore, however, continues to maintain a distinction between domestic and international arbitrations, the former operating under the *Arbitration Act*

24 A position which is reinforced, and required, by s 2A of the CAA.

25 The issue was raised in the Commonwealth of Australia Attorney General's department *Review of the International Arbitration Act 1974, Discussion Paper*, November 2008 in section H.

(Chapter 10), and the latter under Singapore's *International Arbitration Act* (Chapter 143A). Nonetheless, Singapore's domestic *Arbitration Act* relies heavily on Model Law provisions, and thus the provisions of the domestic Act are substantially similar to those of the international regime.

IV KEY PROVISIONS IN THE AUSTRALIA AND NEW ZEALAND ARBITRATION LEGISLATION

Some of the important legislative changes introduced by the uniform CAAs and the amendment of the IAA (for Australia) and the AA (for New Zealand) will go a long way in both requiring and encouraging the courts to support both domestic and international arbitration.

A Court Assistance and Supervision Generally

Courts are given certain functions under the Model Law. The functions include the appointment of arbitrators (Articles 11(3) and (4)), the removal of arbitrators (Articles 13(3) and 14), decisions on arbitral jurisdiction (after the tribunal has already been appointed) (Articles 16(3)) and the setting aside of arbitral awards (Articles 34(2)). In New Zealand, this is generally reflected in Schedule 1 of the AA with the New Zealand High Court being the supervisory court. Under section 18 of the Australian IAA these functions can be performed by the relevant state or territory Supreme Court or by the Federal Court of Australia. This gives parties a choice of forum and thus encourages the courts to provide efficient court procedures. As discussed below, the Arbitration List in the Commercial Court, which is part of the Supreme Court of Victoria, is designed to provide an efficient and expeditious service in support of commercial arbitration; domestic and international.

It has been argued that giving jurisdiction to multiple courts will create inconsistency in interpretation of national legislation. In my view, this will be avoided by courts having regard to the interpretation provisions of the IAA in the context of the international character of the Model Law, by the establishment of specialist arbitration lists and with the assistance of the ACICA Judicial Liaison Committee.²⁶ In relation to domestic arbitrations, the Supreme Court of the

26 The ACICA Judicial Liaison Committee was established to provide consistency on Australian arbitration matters. The eight member Committee was formed as a response to legislative changes resulting from the International Arbitration Act 2010, which came into force in July, and the establishment of the Australian International Disputes Centre, which opened in August. The Committee was headed by former High Court Chief Justice, the Hon Murray Gleeson AC as Chairman. Other members included: The Hon Chief Justice Wayne Martin (Supreme Court of Western Australia); The Hon Justice James Allsop (then President of the New South Wales Court of Appeal; now Chief Justice of the Federal Court); The Hon Justice James Douglas (Supreme Court of Queensland); The Hon Justice John Middleton (Federal Court of Australia); The Hon Justice Judith Kelly (Supreme Court of the Northern Territory); The Hon

relevant state or territory is the court appointed to perform the various facilitative and supervisory functions under the CAA. Other courts can be given jurisdiction to perform these functions if the parties agree. In New South Wales both the District Court and the Local Court are available to the parties if they agree either before or after their dispute has arisen.

B Staying court proceedings

An obvious way for a court to support arbitration is to insist on the parties complying with their arbitration agreement. Quite frequently, a party to an arbitration agreement will issue court proceedings resulting in the other party making an application to the court for a stay of that proceeding. Article 8 of the Model Law provides that:

Article 8 Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

The IAA applies these Model Law provisions internationally,²⁷ as does the CAA domestically.²⁸ In New Zealand, the AA contains a similar provision.²⁹ If there is a valid arbitration agreement the court must grant a stay, unless the dispute subject to the court proceedings lies outside the ambit of the arbitration agreement. That said, it will be rare for a court to not stay court proceedings even if there is some doubt as to whether the matter is within the scope of that agreement. First, from a practical point of view, most arbitration agreements are drafted so widely these days that they will capture most of the parties' disputes. Secondly, the courts have reached the position that arbitration agreements should be construed liberally, in line with commercial realities and to give effect to the presumed intention of parties wishing to resolve their disputes by arbitration

Justice Clyde Croft (Supreme Court of Victoria); The Hon Justice Tim Anderson (Supreme Court of South Australia), The Hon Justice Richard Refshauge (Supreme Court of the Australian Capital Territory) and Doug Jones AM.

27 IAA, s 16.

28 CAA, s 8.

29 *Arbitration Act* 1996, art 8 of Schedule 1.

(though there is no legal presumption in favour of arbitration).³⁰ In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,³¹ Allsop J (as he then was) (with Finn and Finkelstein JJ agreeing) said:

164 ...The court should, however, construe the contract giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration.

165 This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places. This may be seen to be especially so in circumstances where disputes can be given different labels, or placed into different juridical categories, possibly by reference to the approaches of different legal systems. The benevolent and encouraging approach to consensual alternative non-curial dispute resolution assists in the conclusion that words capable of broad and flexible meaning will be given liberal construction and content. This approach conforms with a common-sense approach to commercial agreements, in particular when the parties are operating in a truly international market and come from different countries and legal systems and it provides appropriate respect for party autonomy.

The use of the court's powers to stay proceedings could be used quite strategically by the parties to establish whether or not the issues in dispute are in fact covered by the arbitration agreement. Indeed, there is a genuine concern that if the subject matter of the dispute is beyond the ambit of the arbitration agreement, then any resulting arbitral award could either be challenged³² or refused recognition (in relation to international arbitral awards only).³³ Although the arbitral tribunal has a power to determine its own jurisdiction under the principle of *kompetenz-kompetenz*,³⁴ parties may seek more certainty from the courts by requesting it to exercise its powers to stay the court proceedings.

30 See, for example, *Ferris v Plaister* (1994) 34 NSWLR 474; *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Walter Rau v Cross Pacific Trading Ltd* [2005] FCA 1102; and *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.

31 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 87.

32 Article 34(2)(iii) of the Model Law.

33 Article 36(1)(iii) of the Model Law and art V(1)(c) of the NY Convention.

34 Article 16 of the Model Law.

C Evidence

In relation to both international and domestic arbitration in Australia, the courts can assist the parties in the taking of evidence,³⁵ including the issuing of subpoenas for oral or documentary evidence.³⁶ It should be noted that the use of subpoenas for the purposes of arbitration may be a little different to the way in which it is utilised in court proceedings. In the matter of *Transfield Philippines Inc v Luzon Hydro Corp*,³⁷ the arbitral tribunal, of which I was a member, directed that subpoenas be issued before pleadings were delivered, before discovery was conducted and some time before the arbitral hearing. Byrne J of the Victorian Supreme Court described this approach as 'unusual in litigation' but did not question that the tribunal was acting within its competence.

In relation to arbitrations in New Zealand, Article 3 of Schedule 2 (opt-in for international arbitration and opt-out for domestic arbitration) expands on the powers of the New Zealand High Court or District Court with respect to assisting the arbitral tribunal in the exercise of its powers including, amongst other things, the power to order:

- the discovery and production of documents or materials within the possession or power of a party;
- the answering of interrogatories;
- that any evidence be given orally or by affidavit or otherwise; and
- that any evidence be given on oath or affirmation.

D Interim Measures

Prior to the 2010 amendments, the IAA adopted Article 17 of the 1985 Model Law, which states that the arbitral tribunal may '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 fundamental problem with this provision was that there is no procedure within the Model Law for a party to have an interim measure granted by an arbitral tribunal enforced by a court. Enforcement provisions under the 1985 Model Law only apply to 'awards', which, at the very least, must finally determine some of the issues in dispute.

In practice, interim measures ordered by an arbitral tribunal are often complied with as it is not prudent tactics to ignore the arbitral tribunal that is to

35 Article 27 of the Model Law and CAA s 27.

36 IAA s 23 and CAA s 27A.

37 *Transfield Philippines Inc v Luzon Hydro Corp* [2002] VSC 215.

decide the issues of substance, and also because the same interim measure can be applied for from a court under Article 9 of the Model Law. The latter option may raise *res judicata* issues if it puts the court in the position of having to determine something already dealt with by the arbitral tribunal. Parties may be better off avoiding this possible complication and applying directly to a court, rather than applying to the arbitral tribunal. This means, however, that parties would not be able to have the entire matter dealt with by an arbitral tribunal; which may have confidentiality implications and perhaps other implications of concern.

The 2006 amendments to the Model Law avoid some of these complications and issues by the creation of an enforceable interim measures regime. The IAA adopts all these amendments in relation to interim measures apart from Article 17B, which gives arbitral tribunals the power to grant *ex parte* interim measures. Article 17H(1) allows interim measures to be enforced by a court subject to the limited grounds for refusing enforcement set out in Article 17I. Section 18B of the IAA specifically prevents arbitral tribunals from making *ex parte* interim measure orders, known as preliminary orders, under Article 17B of the Model Law. The major criticism of *ex parte* orders in arbitration is that they run counter to the consensual nature of arbitration. This criticism may be overstated as Article 17B of the Model Law is an opt-out provision, which can be excluded by party agreement, so that if parties do not wish to have the option of *ex parte* preliminary orders available then, consistently with the principle of party autonomy, they can exclude them. Article 17J also provides that the court shall have the same power of issuing an interim measure in relation to arbitration proceedings, though it should exercise that power 'in accordance with its own procedures in consideration of the specific features of international arbitration.'

With respect to domestic arbitration in Australia, although parties to an arbitration agreement are not to make substantive claims in court, they can still apply to a court for an interim measure of protection. The types of interim measures sought are usually injunctions to preserve the status quo, freezing orders and the like. Arbitral tribunals, under section 17 of the CAA, also have the power to order interim measures. Under section 17H of the CAA interim measures made by an arbitral tribunal are enforceable by the court. Enforcement can only be refused on the limited grounds provided for in section 17I. Parties to arbitration are likely to comply with interim measures ordered by the arbitral tribunal as they risk costs consequences in court in the event that such recourse is made necessary by non-compliance. Similar to the Model Law, section 17J of the CAA also grants the court the same power of granting an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts.

The AA reflects the Model Law, as discussed above, but also contains provisions which allow arbitral tribunals to issue preliminary orders.³⁸ The conditions set out in Article 17D of Schedule 1 set a high bar before a preliminary order can be granted:

- (1) The arbitral tribunal may issue a preliminary order if it considers that prior disclosure of the request for the interim measure to the respondent risks frustrating the purpose of the measure.
- (2) An applicant for a preliminary order must satisfy the arbitral tribunal of the matters specified in article 17B. That article applies to a preliminary order subject to—
 - (a) the modification that the harm to be assessed under article 17B(1)(a) is the harm likely to result from the order being issued or not; and
 - (b) all other necessary modifications.'

E Determination of Preliminary Point of Law – Domestic Arbitrations Only

Section 27J of the CAA allows a party to apply to the court for a determination on a preliminary point of law. This can only occur with the consent of the arbitrator or all the other parties; so it is not a provision inherently likely to be abused. Delays may arise, however, if the determinations made by the court are sought on a regular basis; but this is unlikely under the new legislative regime. Nevertheless the safeguard adopted in New Zealand with respect to this type of application would be helpful.

Article 4 of Schedule 2 of the AA is similar to section 27J of the CAA but requires the New Zealand High Court, before embarking on the determination, to be satisfied that the determination:

- (a) might produce substantial savings in costs to the parties; and
- (b) might, having regard to all the circumstances, substantially affect the rights of one or more of the parties.

F Setting Aside and Appealing Awards – Domestic Arbitrations Only

Section 34 of the CAA, which is based on the Model Law, sets out the very limited grounds under which a party can apply to have an award set aside. The grounds do not include errors of law or fact by the arbitral tribunal, but rather deal

38 *Arbitration Act 1996*, arts 17C – 17G of Schedule 1.

mainly with situations where there was no power to issue the award in the first place. Among other things an award can be set aside because the dispute is not within the scope of the arbitration agreement; there is not a properly constituted tribunal; the arbitration agreement is void; or the award is in conflict with the public policy of the state. The grounds are very narrow, and are unlikely to be successfully relied upon frequently. Similar grounds apply under the enforcement provisions in section 36 of the CAA.

In the domestic context the grounds provided for in section 34 of the CAA (based on Article 34 of the Model Law) were thought, at least potentially, to be too narrow. Consequently there is a broader appeal right given under section 34A of the CAA. This section is an addition to the Model Law provisions, which are reflected in section 34 of the CAA, but section 34A only applies to domestic arbitrations. Section 34A of the CAA allows an appeal on a question of law if the parties agree that such an appeal may be made and the court grants leave.³⁹ This section is the high point of the court's supervisory role and goes further than the grounds set out in section 34. Although section 34A does go further than section 34, the appeal right is still restricted. Determinations of fact cannot be subject to appeal, but, of course, there is often difficulty in separating law from fact to the extent that a failure with respect to the determination of factual matters may amount to an error of law.⁴⁰ The decision of the arbitral tribunal must be 'obviously wrong' or the question must be one of 'general public importance' and the arbitral decision is open to 'serious doubt'. These tests are somewhat similar to those under the *Commercial Arbitration Act 1984* (Vic) ('CAA 1984'), but they appear to be more constrained and should be seen as at least incorporating the more restrictive approach to appeals contained in the *Nema guidelines*.⁴¹

39 Under s 34A(1)(a) of the CAA, the parties may agree, before the end of the appeal period referred to under subs 34A(6), which provides:

(6) An appeal may not be made under this section after 3 months have elapsed from the date on which the party making the appeal received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal (in this section referred to as the "appeal period").

Section 33 of the CAA contains provisions with respect to correction and interpretation of award; additional award (cf Model Law Act 33)

40 Cf Article 5 of Schedule 2 of the New Zealand AA; and s 34A of the Australian Uniform CCAs.

41 See *Pioneer Shipping Ltd v BTP Tioxide Ltd ('The Nema')* [1982] AC 724 at 742; and see JA Sharkey and JB Dorter, *Commercial Arbitration* (1986, LBC), 268–274.

It should be emphasised that in relation to international arbitrations there is no appeal right conferred under the IAA over and above any right with respect to court supervision provided for in the Model Law.

Article 5 of Schedule 1 of the AA, again, is largely reflected in its later Australian legislative counterpart. The article usefully clarifies that a 'question of law':

- (a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but
- (b) does not include any question as to whether—
 - (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and
 - (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

G Confidentiality

One of the key provisions of any piece of arbitration legislation now relates to confidentiality. One of the important developments for Australian arbitration was with respect to confidentiality. Although confidentiality had also been considered as an inherent feature of arbitration, the Australian High Court decision in *Esso Australia Resources Ltd v Plowman*⁴² was that confidentiality was an obligation only when it was expressly provided for in the arbitration agreement. To avoid any confusion, the IAA and the CAA now provide confidentiality regimes that apply unless the parties decide to opt out.⁴³ Taking the IAA as an example, section 23C prohibits parties and the arbitral tribunal from disclosing confidential information except as provided for by the Act. Section 23D specifies the situations when confidential information can be disclosed; such as with the consent of all the parties, for the purpose of obtaining professional advice or when required to be disclosed by a court. Section 23E gives the arbitral tribunal the power, on application of a party, to allow disclosure of confidential information in circumstances outside section 23D. Sections 23F and 23G give the court the power to prohibit disclosure or allow disclosure, respectively, after an application under section 23E has already been made.

42 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

43 See s 22(2) with respect to ss 23C to 23G of the IAA; and ss 27E to 27I of the uniform CCAs.

The confidentiality regime under AA contains similar, but more comprehensive, protections and prohibitions than its Australian counterparts.⁴⁴ Indeed, the New Zealand provisions go significantly further and make the distinction between privacy and confidentiality. Under section 14A arbitrations must be private. In sections 14F to 14I the AA sets up a regime which allows for the possibility of court proceedings relating to an arbitration being conducted in private and being confidential. A party seeking privacy and confidentiality must apply for the court proceedings to be so conducted (sub-section 14F(2)(a)) and state their reasons for doing so (section 14G). The court needs to balance the public interest aspects and must consider the factors set out in section 14H. These are:

- (a) the open justice principle;
- (b) the privacy and confidentiality of arbitral proceedings;
- (c) any other public interest considerations;
- (d) the terms of any arbitration agreement between the parties to the proceedings; and
- (e) the reasons stated by the applicant under section 14G(b).

In this context, it should be observed that the establishment of the AMINZ Arbitration Appeals Tribunal and the AMINZ Arbitration Appeal Rules ensures that privacy and confidentiality extends to arbitral awards on questions of law without the need to satisfy the court with respect to privacy and confidentiality.⁴⁵

V COURT SUPPORT FOR ARBITRATION?

It has been observed there are 'tentative signs suggesting a modest return to greater judicial oversight of arbitration'.⁴⁶ In recent years, arbitration has had to deal with some counterproductive decisions with respect to a number of issues. Australia, in particular, has been the source of a number of decisions which have caused anxiety within the arbitration community. Some related to the extent of reasoning required in arbitral awards. Dealing with the old commercial arbitration legislation and the requirement that an arbitrator 'include in the award a statement of the reasons for making the award', both the Victorian Supreme Court⁴⁷ and the

44 See ss 14A to 14I.

45 See above Part IV G.

46 Sundaresh Menon SC (as his Honour then was), *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, presented at the ICCA Congress 2012 (Opening Plenary Session) at paras 51-65.

47 *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402.

Victorian Court of Appeal⁴⁸ found that the arbitral proceedings in question required the arbitrators to provide reasoning at the same standard expected of the judiciary. This finding was met with some concern by the arbitration community; many taking the view that this requirement would undermine one of the strengths of arbitration, which was expedition and a quick turn around of decisions. The NSW Court of Appeal, however, took diametrically opposed view to its Victorian counterpart.⁴⁹

216 The underlying difference between arbitration and court litigation should be borne in mind at all times: see in particular the article by Lord Bingham "Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award" *op cit*. Though courts and arbitration panels both resolve disputes, they represent fundamentally different mechanisms of doing so. The court is an arm of the state; its judgment is an act of state authority, subject generally in a common law context to the right of appeal available to parties. The arbitration award is the result of a private consensual mechanism intended to be shorn of the costs, complexities and technicalities often cited (rightly or wrongly, it matters not) as the indicia and disadvantages of curial decision making.

217 That some difficult and complex arbitrations tend to mimic the procedures and complexities of court litigation may be a feature of some modern arbitration, but that can be seen perhaps more as a failing of procedure and approach rather than as reflecting any essential character of the arbitral process that would assist in a conclusion (erroneous in principle) that arbitrations should be equated with court process and so arbitrators should be held to the standard of reasons of judges.'

The matter ultimately found its way to the High Court⁵⁰ where the High Court held that the requirement that arbitral awards display a judicial standard of reasoning 'placed an unfortunate gloss upon the terms of s 29(1)(c)'⁵¹ and that what was required by way of reasons in a given case depended on the circumstances of the case.⁵² It was, naturally, important that the issue be clarified but some dicta, together with the Victorian decision, tended to reinforce the

48 *Oil Basins Limited v BHP Billiton Limited* [2007] 18 VR 346; see in particular paras [50]-[57].

49 *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74.

50 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239.

51 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239 at para [53].

52 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239 at paras [53]-[54] and [169]-[170]; cf *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor* [2010] VSC 139 ('*Thoroughvision*').

perception that the courts were not supportive of arbitration – particularly some comments by Heydon J in the High Court casting doubt of the merits of arbitration:⁵³

111 The arbitration proceedings began on 15 October 2004 when Gordian served points of claim. This appeal comes to a close seven years later. The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy... But it must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater relevant expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three.

There were also some other decisions which were the focus of the recent legislative reforms, including *Esso Australia Resources Ltd v Plowman*⁵⁴ (see above with respect to confidentiality), *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardts GmbH*⁵⁵ (relating to the proposition that the adoption of the ICC arbitral rules constituted an opt-out of the Model Law),⁵⁶ and *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies*⁵⁷ (in relation to the interpretation of an arbitration clause and staying of related court proceedings).

However, despite some less supportive or problematic decisions and comments, there are recent signs that the courts do, in reality, strongly support arbitration and the system that underpins it. In the decision of *Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd*⁵⁸ the NSW Supreme Court rejected a challenge to the constitutionality of the CAA 2010 (NSW). An arbitral award had been rendered against the plaintiff for its wrongful cancellation of wheat contracts. Under the CAA, an appeal to the court on a question of law required leave of the court as well the parties' agreement. The plaintiff failed to establish that there had been such an

53 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239 at 288.

54 (1995) 183 CLR 10.

55 [2001] 1 Qd R 461.

56 Noting that the amendments to the IAA now addresses this, which no longer permits the parties to opt out of the Model Law.

57 *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies* [2011] ACTSC 59.

58 *Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd* [2012] NSWSC 1306.

agreement. It was argued that the CAA: (a) was an impermissible attempt to remove the court's constitutionally entrenched jurisdiction to review arbitral awards for 'jurisdiction error'; and (b) impermissibly impaired the 'institutional integrity' of the court by requiring the court to enforce an award of an arbitral tribunal infected by 'jurisdiction error'. Stevenson J rejected both arguments:

53. The source of the arbitrator's power to decide the dispute between the parties in a "consensual arbitration" arises from the agreement of the parties...The authority of private arbitrators is "derived solely from agreement of parties to the determination"...

54. The parties in a consensual arbitration are not compelled to resolve their disputes by arbitration; they do so because that is their agreement. An award binds the parties because they have agreed to abide the arbitrator's decision.

55. Their position is quite different from that of a citizen subject to the exercise of state, judicial, governmental or executive power; that citizen has no choice.

56. The arbitrator, acting under contract, is not exercising state, judicial, governmental or executive power.

Even more recently, the High Court unanimously upheld the constitutional validity of the IAA in *TCL Air Conditioner v The Judges of the Federal Court of Australia*.⁵⁹

The decision related to an arbitration involving an Australian company (Castel Electronics Pty Ltd ('Castel')) and a Chinese company (TCL Air Conditioner (Zhongshan) Co Ltd ('TCL')). The parties' distribution agreement contained an arbitration clause. The arbitration was heard in Australia and an award was ultimately rendered in favour of Castel for \$3.5 million. Castel then sought to enforce the arbitral award, which TCL opposed; unsuccessfully arguing, amongst other things, that the Federal Court did not have jurisdiction to enforce the award.⁶⁰ The matter went before the High Court where TCL argued that enforcement of the arbitral award was at odds with the exercise of judicial power by the Federal Court of Australia.⁶¹

59 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.

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

61 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at para [4] (per French CJ and Gageler J).

4 The plaintiff's argument, as refined in oral submissions, reduces to the proposition that the inability of the Federal Court under Arts 35 and 36 of the Model Law to refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award either: undermines the institutional integrity of the Federal Court as a court exercising the judicial power of the Commonwealth, by requiring the Federal Court knowingly to perpetrate legal error; or impermissibly confers the judicial power of the Commonwealth on the arbitral tribunal that made the award, by giving the arbitral tribunal the last word on the law applied in deciding the dispute submitted to arbitration. The undermining of the institutional integrity of the Federal Court is compounded, the plaintiff argues, because the arbitral award that is to be enforced by the Federal Court, in spite of any legal error that may appear on its face, is one that Art 28 of the Model Law, or an implied term of the arbitration agreement, requires to be correct in law.

More specifically, the argument was that the IAA gave effect to articles in the Model Law which provide for the exercise of the judicial power of the Commonwealth contrary to Chapter III of the Constitution. TCL argued that: (a) the IAA required the court to act in a manner which impairs the institutional integrity of the court by prohibiting the court from refusing enforcement of an award on the basis of an error of law on the face of the award; and (b) the IAA vested judicial power of the Commonwealth in tribunals because the enforcement provisions of the IAA rendered the arbitral award final and determinative.

With respect to the first argument, French CJ and Gageler J said:

34 The inability of the Federal Court, as a competent court under Arts 35 and 36 of the Model Law, to refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award does nothing to undermine the institutional integrity of the Federal Court. Enforcement of an arbitral award is enforcement of the binding result of the agreement of the parties to submit their dispute to arbitration, not enforcement of any disputed right submitted to arbitration. The making of an appropriate order for enforcement of an arbitral award does not signify the Federal Court's endorsement of the legal content of the award any more than it signifies its endorsement of the factual content of the award.

Hayne, Crennan, Kiefel and Bell JJ found that a court hearing the enforcement application pursuant to the IAA could refuse enforcement or set aside an award for a number of reasons – and that these provisions provided protection for the

institutional integrity of the Australian courts.⁶² Their Honours also observed that:⁶³

[t]he Federal Court's determination of the enforceability of an award, upon criteria which do not include a specific power to review an award for error, serves the legitimate legislative policy of encouraging efficiency and impartiality in arbitration and finality in arbitral awards.

TCL also argued that article 28(1) of the Model Law should be read as requiring the arbitral tribunal to decide a dispute correctly if it is to be taken to be acting within the powers conferred by the arbitration agreement. This argument was rejected on the basis that it 'runs counter to the autonomy of the parties to an arbitration agreement and is opposed by the drafting history of Art 28'.⁶⁴ Hayne, Crennan, Kiefel and Bell JJ found that:⁶⁵

72 Even if any of these provisions can be understood as obliging arbitrators to decide a dispute according to law, senior counsel for TCL correctly accepted in argument that the Model Law makes it plain that recognition and enforcement of an arbitral award could only be denied in limited circumstances. Legal error is not one of those circumstances.

73 TCL's argument must be rejected: it depends on treating the language of part of Art 28(1) as forming part of the agreement between the parties, whilst simultaneously treating the provisions of the Model Law regulating the recognition and enforcement of awards as not forming part of that agreement.

74 The alternative argument advanced by TCL, that it is an implied term of every arbitration agreement that the authority of an arbitrator is limited to the *correct* application of the law, must also be rejected. No term of the kind asserted can be implied into an agreement to submit a dispute to arbitration. Implication of such a term (even if it could be said to be reasonable and equitable) is not necessary to give

62 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at para [103].

63 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at para [105].

64 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at para [15] (per French CJ and Gageler J).

65 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at paras [72]-[74] (per French CJ and Gageler J).

business efficacy to an arbitration agreement and is not so obvious that "it goes without saying"⁶⁶.

The High Court also unanimously rejected the argument that the judicial power of the Commonwealth had been delegated to arbitral tribunals:⁶⁷

'28 Underlying each of those dimensions of the judicial power of the Commonwealth is its fundamental character as a sovereign or governmental power exercisable, on application, independently of the consent of those whose legal rights or legal obligations are determined by its exercise. That fundamental character of the judicial power of the Commonwealth is implicit in the frequently cited description of judicial power as "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects", the exercise of which "does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action". Judicial power "is conferred and exercised by law and coercively", "its decisions are made against the will of at least one side, and are enforced upon that side in invitum", and it "is not invoked by mutual agreement, but exists to be resorted to by any party considering himself aggrieved".

29 Therein is the essential distinction between the judicial power of the Commonwealth and arbitral authority, of the kind governed by the Model Law, based on the voluntary agreement of the parties. The distinction has been articulated in the following terms⁶⁸:

"Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it."

The context of that articulation puts its reference to "private arbitration" in appropriate perspective. The context was that of a challenge to the capacity of a

66 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.

67 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at paras [28]-[29] (per French CJ and Gageler J).

68 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at 658 [31]; [2001] HCA 16. See also *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 at 14.

statutory body consistently with Ch III of the Constitution to exercise a statutory function to settle a dispute where so empowered by an agreement entered into as a result of statutory processes. The reference to "private arbitration" was not to a private function, as distinct from a public function, but rather to a function the existence and scope of which is founded on agreement as distinct from coercion.

It is safe to say the arbitration stakeholders in Australia breathed a collective sigh of relief when the High Court unanimously rejected the challenge. The decision now strongly re-affirms judicial support for arbitration in Australia, at the highest level - as a reliable and final method for determining disputes. I endorse the observations of Justice Allsop that:⁶⁹

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

VI THE ONGOING ROLE OF COURTS WITH RESPECT TO ARBITRATION

The judiciary will continue to play an essential role in supporting and facilitating the development of arbitration. The majority of courts in developed arbitral jurisdictions are vested with at least some degree of supervisory, supportive and enforcement jurisdiction over all forms of arbitration. Over the last few years, there has been a significant increase in the number of specialist arbitration lists of courts in the Asia-Pacific region.

In August 2010, Bombay's High Court announced the creation of a court dedicated to arbitration-related applications. In China, a lower court decision not to enforce an award is, in practice, referred automatically to a higher court for review. If the decision on review is not for enforcement, this decision must, in turn, be reviewed by the Supreme People's Court. Developments of this nature help to ensure specialisation in the resolution of arbitral matters, leading to consistent and predictable outcomes in line with global arbitration jurisprudence and international conventions and obligations. The High Court of Hong Kong and the High Court of Singapore are outstanding examples of courts in this region which achieve these

69 Justice James Allsop "International Arbitration and the Courts: the Australian Approach" in CIArb's Asia Pacific Conference 2011 – *Investment & Innovation: International Dispute Resolution in the Asia Pacific* (2011), 1 and 7, as referred to in Peter Megens and Andrew Vincent "Case Note: To Stay or Not to Stay? *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies* [2011] ACTSC 59" (2011) 30(2) *The Arbitrator and Mediator* 57, 63.

results; having done so for very many years. The Dubai International Financial Centre Court has similar goals and has a good relationship with the DIFC-LCIA Arbitration Centre.

A The Specialist Arbitration List of the Commercial Court of the Supreme Court of Victoria

The Supreme Court of Victoria is vested with broad jurisdiction to assist with all aspects of both domestic and international commercial arbitration. As noted previously, the Federal Court of Australia only has jurisdiction with respect to international arbitration, as defined in the Australian IAA, as amended in 2010. On 1 January 2010, the new Arbitration List of the Commercial Court in the Victorian Supreme Court began operation; which, together with the Commercial Arbitration List of the New South Wales Supreme Court,⁷⁰ are the only specialist arbitration lists in Australia.⁷¹

All arbitration matters brought in the Victorian Supreme Court are heard in the Arbitration List of the Commercial Court. Arbitration matters are exempt from the usual Commercial Court fee, which applies because of the managed list and expeditious processes which are available. The operation of the arbitration list is set out in *Practice Note 2 of 2010 – Arbitration Business*.⁷² The Practice Note sets out procedural information as well as useful guidelines for those considering an application. Parties are encouraged to communicate directly with my Associates before filing an application at the Registry. There are a number of advantages to this approach. First, the parties can seek to clarify any procedural or administrative issues. Secondly, enquiries are made with Associates who have experience in handling arbitration related enquiries. Thirdly, and most importantly, parties are given a very early opportunity to suggest when the application should be heard. This is essential given the expedition of matters that the Arbitration List aims to achieve. In fact, given the priority put on hearing arbitration related matters quickly, the parties have often asked for a more relaxed timetable than has been offered to them.

B Benefits of Specialist Lists

It is clear that there are substantial benefits that flow from providing a specialist list, with a specialist judge or judges. A court that has established an arbitration

70 See Practice Note No. SC Eq 9 at <www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/012e70809f4424c1ca2579a30079a2db?OpenDocument>.

71 The Federal Court of Australia has a panel of judges available to hear arbitration matters, but it has not established a separate list.

72 See Appendix I.

list is likely to be more aware of the specific issues that arise in the arbitration context. Also, a consistent body of arbitration related decisions can be developed by judges that have an interest and expertise in arbitration. Given that the legislation governing Australia's arbitral regime is relatively new, there will be great importance placed upon court decisions interpreting these provisions, which are largely based on the Model Law. It is essential that consistent interpretation and application is given to both the international and the domestic legislative provisions – contained in the IAA and the CAA, respectively – not only to conform with international thinking and arbitral practice (particularly having regard to the Model Law's international heritage), but also to assist in developing sound arbitration law expertise and to support Australia's reputation as an arbitration-friendly jurisdiction.

As part of so doing, courts need to ensure that any procedures to be applied with respect to the making of and dealing with applications under both the IAA and the CAA are clear and easily accessible. In this context, procedure must also include listing procedures and expedition.⁷³ Specialist courts with arbitration lists assist in this respect. The procedural approach to applications under the IAA and the CAA will have a major impact on the way that Australian arbitration law is viewed. For example, staying court proceedings in favour of an arbitration is a pro-arbitration step, but if it takes an excessive time for the stay application to be heard and determined, the arbitration process has probably been thwarted anyway. Procedural consistency and expediency is far more likely to be achieved when there are specialist arbitration lists and judges; as the experience in leading commercial arbitration centres such as London, Singapore and Hong Kong shows. Specific arbitration practice notes and rules are essential to this process.

C Liaison Between Courts and with Arbitration Users

If the objectives of the IAA and the CAA are to be fully realised, the courts need to communicate with and receive feedback from commercial arbitration stakeholders. Specialist courts with arbitration lists are particularly well placed to do this as they are in contact with the relevant parties and practitioners to the greatest extent possible. An Arbitration Users' Group for the Supreme Court of Victoria has been established and has provided valuable input with respect to the development of new court rules for the commencement and disposition of

73 Noting in this respect that the Victorian Supreme Court Arbitration List (List G) is available 24 hours per day, seven days per week and hearings can and do take place outside court hours as required.

applications under the IAA and the CAA. This ongoing consultation process through the Users' Group will also lead to further improvements to the Arbitration Business Practice Note.⁷⁴ I would expect that other courts will establish similar consultative mechanisms.

The courts in a federal state like Australia, where the jurisdiction is spread between a number of different courts, need to liaise with each other to develop and share their arbitration expertise and experience. The existence of specialist arbitration lists will help in this regard by directing arbitration business to particular judges within a court who can then share their knowledge and experience with the arbitration judges from other courts. This consultation between judges of the Federal Court and the judges of the State and Territory Supreme Courts will be essential if, as I expect, the majority of Model Law decisions are initially made under the CAA.⁷⁵ I have no doubt that such communication and consultation between arbitration judges in New Zealand is equally important. Additionally, having regard to the extent of international arbitration in this region of the world, it would also be beneficial to develop further the communication and consultation that already exists between the courts in our two countries – and, additionally, the courts in centres such as Singapore and Hong Kong.

D Raising the Expectations on Arbitrators and Practitioners

In order to achieve the general objectives discussed, courts need, and value, assistance from parties and their representatives. Solicitors and counsel are able to provide significant assistance to the courts in applying the Model Law provisions, as applied by the IAA or as adopted by the CAA, in a manner consistent with international and domestic jurisprudence. Assistance by reference to commentaries and case law in submissions informed by comprehensive research, including consideration of the broader policy considerations underlying the legislation – policy considerations which may have an international dimension, for the purposes of the AA, the IAA and the CAA – is essential. The existence of a specialist arbitration list with a specialist judge or judges can provide a focus for arbitrators and arbitration practitioners, both for the purpose of

74 Practice Note No 2 of 2010 – Arbitration Business.

75 This process is being assisted by the ACICA Judicial Liaison Committee which was established in late October 2010. This Committee is chaired by a former Chief Justice of the High Court of Australia, the Hon Murray Gleeson AC. The Committee includes the judges hearing arbitration-related cases from the Supreme Courts and the Federal Court, as well as representatives from ACICA. It aims to promote uniformity in the rules and procedures relating to arbitration in Australia – particularly concerning the enforcement of arbitration agreements and awards, as well as the appointment of arbitrators, and the provision of interim measures or other assistance in support of arbitration.

educating arbitrators and practitioners in this respect and providing an understood level of knowledge and expectation having regard to the expertise of the court.

E Decisions in the Victorian Supreme Court Arbitration List

The Arbitration List has attracted a significant amount of work since it began. During that time I have handed down judgments in a number of arbitration matters,⁷⁶ some quite significant, and dealt with a variety of other applications. Each case that has gone to judgment has raised a different issue regarding the extent to which the Court can intervene or assist in arbitration decisions or processes, including enforcement – both issues of procedure and substance. A few of the decisions were made under the CAA 1984, which is the old domestic commercial arbitration legislation. However, the principles in those cases are still very relevant in examining the relationship between the Court and arbitration more generally. *Arnwell Pty Ltd v Teilaboot Pty Ltd & Ors*⁷⁷ raised issues regarding court intervention in procedural decisions made by an arbitral tribunal. *Oakton Services Pty Ltd v Tenix Solutions*⁷⁸ was a successful application to stay court proceedings in favour of arbitration as there was an arbitration agreement in place. *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor*⁷⁹ involved an application for leave to appeal an arbitral award under section 38 of the CAA 1984 and an application to set aside an award for misconduct under section 42 of that Act on the basis of insufficient reasons provided in the award. I found that there was no manifest error of law on the face of the award for the purposes of sub-section 38(5)(b)(i) and that there was no misconduct on the part of the arbitrator for the purposes of section 42 on the basis asserted. This required examination of the quality of reasons required of an arbitrator under sub-section 29(1)(c) of the CAA 1984 in the context of a decision of the Victorian

76 *Arnwell Pty Ltd v Teilaboot Pty Ltd & Ors* [2010] VSC 123; *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor* [2010] VSC 139; *Oakton Services Pty Ltd v Tenix Solutions IMES Pty Ltd* [2010] VSC 176; *Winter v Equuscorp Pty Ltd* [2010] VSC 419; *Altain Khuder LLC v IMC Mining Inc & Anor* [2011] VSC 1; *Altain Khuder LLC v IMC Mining Inc & Anor (No 2)* [2011] VSC 12 (referred to with approval by the Hong Kong Ultimate Court of Appeal in *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* CACV 136/2011); *Yesodei Hatorah College Inc v Trustees of the Elwood Talmud Torah Congregation* [2011] VSC 622; and *Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249 (noting that both *Altain Khuder* decisions were reversed on appeal [2011] VSCA 248; cf *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 and *Traxys Europe SA v Balaji Coke Industry pvt Ltd [No 2]* (2012) 201 FCR 535.

77 [2010] VSC 123.

78 [2010] VSC 176.

79 [2010] VSC 139.

Court of Appeal⁸⁰ and NSW Court of Appeal⁸¹ in that area (as discussed above). More recently *Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd*⁸² involved consideration, in the context of a stay application under section 53(1) of the 1984 Act, of the nature and operation of an arbitration agreement in the context of a variety of other agreed dispute resolution mechanisms.

*Yesodei Hatorah College Inc v Trustees of the Elwood Talmud Torah Congregation*⁸³ was a significant decision for a number of reasons. In that proceeding, I found that an arbitrator had failed to discharge his mandate under section 22(2) of the CAA 1984 to determine issues by reference to 'considerations of general justice and fairness', which is a conflation or amalgam of the concepts 'amiables compositeur' and 'ex aequo et bono', both of which are found in UNCITRAL's Model Law and Arbitration Rules. The parties were in dispute over a lease and entered into an arbitration agreement, appointing a sole arbitrator, who was a distinguished former judge and empowered by the agreement to 'determine any question that arises for determination in the course of the arbitration by reference to considerations of general justice and fairness.' The parties submitted three issues for determination: (i) whether the parties had entered into an agreement for lease of land; (ii) whether the landowner (the 'Congregation') was estopped from denying the parties had entered into a lease agreement; and (iii) if the first two questions were in the negative, the period of notice required for the College to vacate the land. The sole arbitrator dismissed the first two claims. The College then sought to appeal the award under section 42 of the CAA 1984 on the basis that the arbitrator had failed to: (i) determine all matters before him and that the Congregation had acted unconscionably and was thereby estopped; and (ii) failed to exercise his jurisdiction by applying strict law and not determining the matters in accordance with section 22(2) of the CAA 1984. I concluded that the arbitrator had failed to exercise the powers granted to him and that there were 'equitable' factors which should have been considered by him. This is a departure from the usual position which requires an arbitrator to apply the law strictly. The judgment in this case is one of the very few instances where a common law court (in any jurisdiction) has considered the nature and operation of a mandate of this kind. I should note though that I was concerned to emphasize that the court's power was only to set aside the arbitrator's findings if it was found that

80 *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346.

81 *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.

82 *Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249.

83 *Yesodei Hatorah College Inc v Trustees of the Elwood Talmud Torah Congregation* [2011] VSC 622.

he had failed to exercise his powers. On the other hand, had the arbitrator exercised that power, the court would not have been in a position to review that exercise of his power in circumstances where he was not required to decide according to law.

VII CONCLUSION

The importance of judicial support for the development and growth of arbitration on both the domestic and international level cannot be overestimated. With the continuing progress of globalisation arbitration now plays a crucial role in international trade and investment and in the commercial life of industrialised economics – especially those in the Asia-Pacific region. Although governments can support international arbitration through legislative reforms and other direct assistance, the judiciary must be actively involved and demonstrate a willingness to support arbitration, facilitating its processes and enforcing its results.

The changes introduced by the arbitration legislation in New Zealand and Australia reaffirm the role of courts in providing critical assistance and guidance in the arbitration process, and with respect to arbitration generally. Crucially, recent decisions in both New Zealand and Australia also indicate that despite some problematic decisions – especially in Australia – the courts are now strongly supportive and will ensure that arbitration, international and domestic, will continue to develop in both countries. Indeed it must flourish for the benefit of our trading nations!

