

International Comparative Legal Guides



Investor-State Arbitration 2020

A practical cross-border insight into investor-State arbitration

Second Edition

Featuring contributions from:

3D Legal – DANDRIA Law Firm

Allen & Gledhill LLP

Arbitration Institute of the Stockholm Chamber of Commerce

AZB & Partners

Blake, Cassels & Graydon LLP

Boies Schiller Flexner LLP

Busse Disputes Rechtsanwalts-gesellschaft mbH

Cecil Abraham & Partners

Conway & Partners N.V.

Cornerstone Research

Corrs Chambers Westgarth

DLA Piper Posztl, Nemescsói, Györfi-Tóth and Partners Law Firm

European Federation for Investment Law and Arbitration

Eversheds Sutherland

Fangda Partners

Foley Hoag LLP

Hamdan Al Shamsi Lawyers and Legal Consultants

Hannes Snellman Attorneys Ltd.

Homburger AG

Huck, Otranto, Camargo

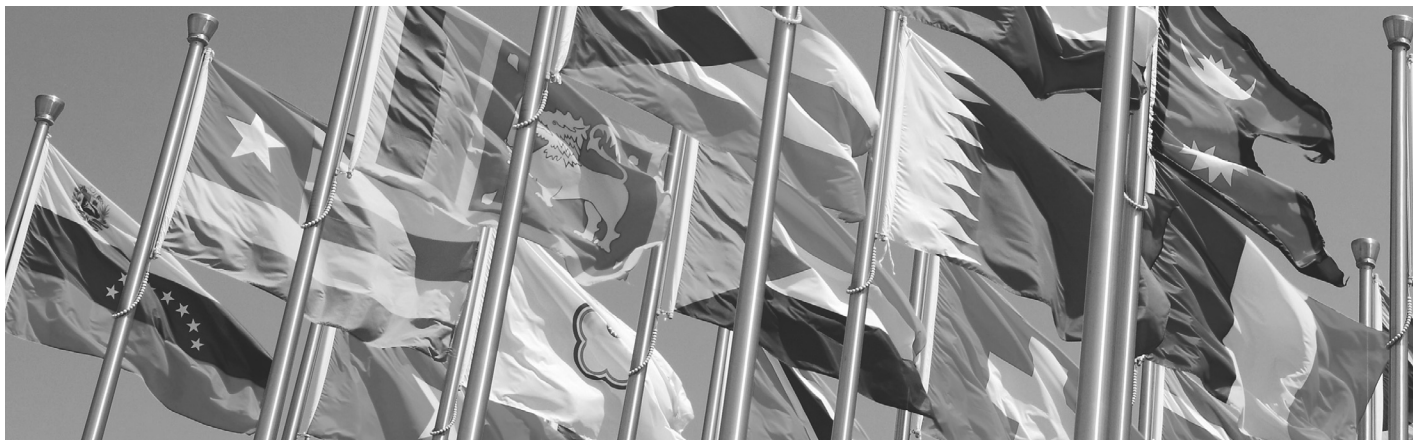
Morgan & Morgan

Mori Hamada & Matsumoto

Oblin Rechtsanwälte GmbH

Sorainen

Zhong Lun Law Firm



ISBN 978-1-83918-009-5
ISSN 2631-6307

Published by

glg global legal group

59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 367 0720
www.iclg.com

Group Publisher

Rory Smith

Publisher

Jon Martin

Senior Editors

Caroline Oakley
Rachel Williams

Sub-Editor

Iris Gioti

Creative Director

Fraser Allan

Printed by

Ashford Colour Press Ltd.

Cover Image

www.istockphoto.com

Strategic Partners



Investor-State Arbitration 2020

Second Edition

Contributing Editors:

Dominic Roughton and Kenneth Beale
Boies Schiller Flexner LLP

©2019 Global Legal Group Limited.

All rights reserved. Unauthorised reproduction by any means, digital or analogue, in whole or in part, is strictly forbidden.

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.

This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.

Expert Chapters

- 1** **Third-Party Funding and Investor-State Arbitration**
Dominic Roughton & Nathalie Allen Prince, Boies Schiller Flexner LLP
- 9** **Issues in Cross-Border Valuation and the Implications for Damages Assessments in Investor-State Disputes**
Ronnie Barnes, Cornerstone Research
- 14** **Investor-State Arbitration Before the SCC**
James Hope, Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
- 19** **The Impact of EU Law on ISDS**
Prof. Dr. Nikos Lavranos, European Federation for Investment Law and Arbitration (EFILA)

Q&A Chapters

- 23** **Australia**
Corrs Chambers Westgarth: Lee Carroll & Frances Williams
- 29** **Austria**
Oblin Rechtsanwälte GmbH: Miloš Ivković
- 35** **Belarus**
Sorainen: Alexey Anischenko & Valeria Dubeshka
- 39** **Brazil**
Huck, Otranto, Camargo: Fábio Peixinho Gomes Corrêa & Mônica Naomi Murayama
- 44** **Canada**
Blake, Cassels & Graydon LLP: Iris Antonios & Paul Blyschak
- 50** **China**
Zhong Lun Law Firm: Huawei Sun
- 57** **Estonia**
Sorainen: Maria Pihlak & Dr. Carri Ginter
- 62** **France**
Eversheds Sutherland: Julien Fouret
- 68** **Germany**
Busse Disputes Rechtsanwalts-gesellschaft mbH: Dr. Daniel Busse & Dr. Sven Lange
- 74** **Hong Kong**
Fangda Partners: Olga Boltenko & John Zhou
- 80** **Hungary**
DLA Piper Posztl, Nemescsói, Györfi-Tóth and Partners Law Firm: András Nemescsói & David Kohegyi
- 85** **India**
AZB & Partners: Rajendra Barot & Sonali Mathur
- 91** **Italy**
3D Legal – DANDRIA Law Firm: Roberto Pirozzi & Rocco Iola
- 97** **Japan**
Mori Hamada & Matsumoto: Yuko Kanamaru & Daniel Allen
- 102** **Malaysia**
Cecil Abraham & Partners: Sunil Abraham & Syukran Syafiq
- 106** **Netherlands**
Conway & Partners N.V.: Thabiso van den Bosch & Lilian Meinen
- 111** **Panama**
Morgan & Morgan: José D. Carrizo D.
- 115** **Singapore**
Allen & Gledhill LLP: Chua Kee Loon & Nicholas Tan
- 121** **Sweden**
Hannes Snellman Attorneys Ltd.: Pontus Ewerlöf & Andreas Johard
- 126** **Switzerland**
Homburger AG: Mariella Orelli & Dilber Devitre
- 131** **United Arab Emirates**
Hamdan Al Shamsi Lawyers and Legal Consultants: Hamdan Al Shamsi, Omar Kamel & Nandini Tiwari
- 138** **United Kingdom**
Boies Schiller Flexner LLP: Dominic Roughton & Rosalind Axbey
- 144** **USA**
Foley Hoag LLP: Tafadzwa Pasipanodya & Darío Maestro

Australia

Corrs Chambers Westgarth



Lee Carroll



Frances Williams

1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your jurisdiction ratified?

Australia has entered into free trade agreements with the following individual countries: Chile; China; Japan; Korea; Malaysia; New Zealand; Singapore; Thailand; and the USA.

It is also party to the AANZFTA (with: Brunei; Burma; Cambodia; Indonesia; Laos; Malaysia; New Zealand; the Philippines; Singapore; Thailand; and Vietnam) and the CPTPP (with: Brunei Darussalam; Canada; Chile; Japan; Malaysia; Mexico; Peru; New Zealand; Singapore; and Vietnam).

Australia is party to 18 bilateral investment treaties (BITs) with: Argentina; China; Czech Republic; Egypt; Hong Kong; Hungary; Indonesia; Laos; Lithuania; Pakistan; Papua New Guinea; Peru; the Philippines; Poland; Romania; Sri Lanka; Turkey; and Uruguay.

With the introduction of the CPTPP, Australia's BITs were terminated with Mexico (30 December 2018) and Vietnam (14 January 2019). In addition, Australia's BIT with Peru will be terminated upon entry into force of the Peru-Australia FTA.

The provisions of a terminated BIT with India remain applicable to pre-termination investments.

1.2 What bilateral and multilateral treaties and trade agreements has your jurisdiction signed and not yet ratified? Why have they not yet been ratified?

Australia has signed, but not yet ratified, the Pacific Agreement on Closer Economic Relations Plus (PACER Plus) and the Peru-Australia Free Trade Agreement. Generally, there is a delay between signature and ratification because a process of inquiry must be undertaken by the Joint Standing Committee on Treaties (JSCOT).

The PACER Plus was signed in Tonga on 14 June 2017 by Australia, New Zealand and eight Pacific Island countries. The most recent report issued by the JSCOT (9 May 2018) recommended the PACER Plus be ratified. Some implementing legislation has been passed which will commence on the treaty's entry into force.

The Peru-Australia FTA was signed by representatives from Australia and Peru on 12 February 2018. The most recent reports issued by JSCOT (August and November 2018) recommended the Peru-Australian FTA be ratified.

The Australia-Hong Kong Free Trade Agreement (A-HKFTA) concluded negotiations on 15 November 2018. Both the A-HKFTA and the associated Investment Agreement were signed on 26 March 2019.

The Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA) was signed on 4 March 2019.

The next step for both A-HKFTA and IA-CEPA is ratification by each country. For Australia, this includes tabling the text of the agreements in Parliament and an inquiry to be undertaken by JSCOT.

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

There is an Australian model Investment Promotion and Protection Agreement (IPPA) text. It provides a clear set of obligations relating to the promotion and protection of investments and takes full account of each party's laws and investment policies. The model IPPA text can be seen, for example, in the Australia-Egypt IPPA, the Australia-Uruguay IPPA and the Australia-Lithuania IPPA.

1.4 Does your jurisdiction publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

We are not aware of diplomatic notes with other States being published.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

We are not aware of official commentaries concerning the intended meaning of treaty clauses being published.

2 Legal Frameworks

2.1 Is your jurisdiction a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Australia is party to both the New York Convention and the Washington Convention.

Australia signed the Mauritius Convention on Transparency on 18 July 2017. In October 2018, the *International Arbitration Act 1974* (Cth) was amended by the *Civil Law and Justice Legislation Amendment Act 2018* (Cth) to implement aspects of the Mauritius Convention. Specifically, section 22(3) of the Act carves out prohibitions on the disclosure of confidential information where the *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration* (Transparency Rules) apply to an arbitration. The parties

to arbitral proceedings and the arbitral tribunal itself are no longer precluded from disclosing confidential information in relation to an arbitration subject to the Transparency Rules. We note that although Australia implemented these changes, Australia is not party to any investment treaty which incorporates the Transparency Rules.

2.2 Does your jurisdiction also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The foreign investment legislative framework in Australia is comprised of the *Foreign Acquisitions and Takeovers Act 1975 (FATA)*, the *Foreign Acquisitions Takeovers Fees Impositions Act 2015* and their regulations. This legislative framework is supplemented by Australia's Foreign Investment Policy (**Policy**) and guidance notes. The substantive provisions of FATA and the Policy address the formal admission of foreign investment (discussed in question 2.3 below).

Like the rest of the market in Australia, foreign investors are regulated by the Australian Securities and Investments Commission (**ASIC**). ASIC is an independent Commonwealth Government body responsible for (among other things) registering and ensuring companies, schemes and various individuals and entities meet their obligations under the *Corporations Act 2001*. Additionally, all dealings must be conducted in accordance with the Corporations Act with regard to: insider trading; market manipulation; disclosure of shareholdings; takeovers; acquisitions; and capital raisings.

FATA (and its associated regulations) does not contain dispute resolution provisions.

2.3 Does your jurisdiction require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Under FATA, foreign investment must receive approval from the Commonwealth Government's Treasurer in certain circumstances which involve a "foreign person" as defined by s 4 of FATA.

A foreign person includes:

- a natural person who is not ordinarily a resident in Australia;
- a corporation in which one foreign person (or two or more foreign persons together) holds a controlling interest; or
- the trustee of a trust estate in which one foreign person or corporation (or two or more foreign persons or corporations together) holds a substantial interest.

Whether a proposed foreign investment requires approval will depend upon the type of investor, the type of investment, the industry sector and also the value of the proposed investment. For example, there is greater scrutiny on investments by "foreign government investors" (as compared to foreign individuals or entities). Typical types of transactions requiring approval include real estate, agricultural or business investment.

In deciding whether to approve a proposed foreign investment, the Treasurer is advised by the Foreign Investment Review Board (**FIRB**). FATA itself does not prescribe criteria for approving foreign investment proposals. Rather, FATA empowers the Treasurer to veto foreign investment proposals which are contrary to the national interest (FATA, s 67). The Policy is instructive of what is relevant to the national interest. The Treasurer and FIRB start from the general presumption that foreign investment is beneficial (Policy, p 8). Matters that are relevant to the national interest include, for example, competition, impact on the economy, the investor's character and national security.

FATA also requires compulsory notification of certain business activities which are considered to be significant (or notifiable) actions. One of the tests used is a monetary screening threshold test (indexed annually). The threshold is met when either:

- the amount paid for an interest; or
- the value of the entity or the asset, exceeds the threshold amount (depending on the type of transaction).

Other business activities are considered voluntary notice activities (i.e. the foreign person can choose to notify but does not have to). The benefit of giving voluntary notice is that if the Treasurer issues a notice of "no objection", the Treasurer can no longer make orders in relation to the proposal.

Certain persons and proposals are exempt from the notification requirements, however, as strict penalties apply for breaches of FATA, foreign investors in doubt should seek legal advice.

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

In *SZOQQ v. Minister for Immigration and Citizenship* [2012] FCAFC 40, the Full Federal Court considered, among other issues, the connection between Australia's domestic law and the *Convention Relating to the Status of Refugees*. *SZOQQ* demonstrates that the Australian courts' approach to treaty interpretation is, subject to contrary legislation, consistent with the approach in international law reflected by arts 31 and 32 of the *Vienna Convention on the Law of Treaties (VCLT)*. The VCLT provides that a treaty shall be interpreted in good faith and according to the ordinary meaning of its words in their context and in the light of the treaty's object and purpose. Recourse to explanatory materials (i.e., *travaux préparatoires*) is permitted (*Great China Metal Industries Co Ltd* (1998) 196 CLR 161 at 186).

In *Minister for Home Affairs v Zentai* [2012] 246 CLR 213, the High Court of Australia considered Hungary's request for the extradition of the respondent to face questioning for an alleged war crime in 1944. The issue before the High Court was the interpretation of the *Australia-Hungary Extradition Treaty (Treaty)*, which had been incorporated into domestic law. Having ascertained the Treaty's object and purpose, the majority of the Court found in favour of a strict textual interpretation. The Chief Justice remarked that the VCLT rules of interpretation were "generally consistent" with Australian common law principles on treaty interpretation (paragraph [19]). Ultimately, as the crime with which the respondent was charged did not exist at the time of the alleged offence, the Court denied the request for extradition.

The Full Federal Court case of *Tejb Mahindra Limited v. Commissioner of Taxation* [2015] FCA 1082 provides a comprehensive analysis on the interpretation of treaties in Australia. The case concerned the *Indian Double Taxation Agreement (Agreement)*. The Court noted that India was not a party to the VCLT. However, as the VCLT is reflective of customary international law, the Court held that the rules of interpretation codified by arts 31 and 32 of the VCLT applied to the construction of the Agreement (paragraph [53]). Further, the Court emphasised that where Parliament had adopted the exact text of a treaty into domestic legislation, it can be assumed Parliament intended to fulfil its international obligations. Accordingly, it is appropriate to interpret such legislation in accordance with the VCLT (paragraph [51]).

3.2 Has your jurisdiction indicated its policy with regard to investor-state arbitration?

The current Australian Commonwealth Government's policy is to consider investor-State dispute settlement (**ISDS**) provisions on a case-by-case basis, and there is ministerial support for ISDS provisions. ISDS provisions were agreed to in the Korea-Australia FTA (2014), the China-Australia FTA (2015), as well as the recent CPTPP.

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your jurisdiction's treaties?

None of Australia's current treaties contain anti-corruption provisions save for the CPTPP which contains provisions which permit a State taking measures necessary to eliminate bribery and corruption in international trade.

Australia's more recent FTAs:

- recognise a State's right to adopt measures necessary to protect the environment or conserve natural resources (e.g., with Japan and China);
- expressly exclude procedures for the resolution of disputes provided for in other investment agreements from the ambit of the MFN clause (e.g., with Malaysia, Japan and China); and
- protect assets owned or controlled "directly or indirectly" by an investor of a party (e.g., with China, Japan, Korea and Malaysia).

3.4 Has your jurisdiction given notice to terminate any BITs or similar agreements? Which? Why?

No, however, India unilaterally terminated its BIT with Australia on 23 March 2017.

4 Case Trends

4.1 What investor-state cases, if any, has your jurisdiction been involved in?

Australia has only been a party to one reported investor-State case. A second case against Australia was not pursued.

In 2012, Philip Morris commenced UNCITRAL arbitral proceedings against Australia under the Hong Kong-Australia Bilateral Investment Treaty. The dispute arose out of Australia's implementation of tobacco plain-packaging laws. Philip Morris alleged, among other things, that Australia had not afforded Philip Morris fair and equitable treatment and that Australia had indirectly expropriated its assets. Ultimately, the Tribunal dismissed Philip Morris' claims for jurisdictional reasons.

In November 2016, an American power generation company, APR Energy, commenced UNCITRAL arbitral proceedings against Australia under the Australia-United States FTA (AUSFTA). Broadly, the dispute related to the seizure of the claimant investor's power turbines by one of Australia's major private banks. Australia responded to the Notice of Dispute stating that APR Energy cannot bring a dispute under AUSFTA because, *inter alia*, the treaty does not provide for investor-State arbitration. It is understood that APR Energy has not progressed the claim.

In 2018, three arbitrations were registered by investors whose home state is Australia. These arbitrations are brought against Egypt, the Republic of Gambia and Mongolia. Further, in July 2019, an award was rendered in an arbitration brought by an Australian company (Tethyan Copper Company Pty Limited) against Pakistan under the Pakistan-Australia 1998 BIT.

4.2 What attitude has your jurisdiction taken towards enforcement of awards made against it?

There have been no awards made against Australia.

4.3 In relation to ICSID cases, has your jurisdiction sought annulment proceedings? If so, on what grounds?

Australia has not had cause to bring any annulment proceedings.

4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

There has been no relevant satellite litigation.

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

There is a lack of case law on which to make any relevant observations.

5 Funding

5.1 Does your jurisdiction allow for the funding of investor-state claims?

In Victoria, New South Wales, South Australia and the Australian Capital Territory, third party funding has been legalised. The High Court of Australia in *Campbells Cash and Carry Pty Ltd v. Postif Pty Ltd* (2006) 229 CLR 386 held that litigation funding was not contrary to public policy or an abuse of process (at least in the circumstances being considered in that case, namely where maintenance and champerty had been abolished by statute). This decision is applicable to third party funding of other dispute resolution proceedings, including arbitral proceedings.

The position in Queensland, Western Australia, Northern Territory and Tasmania is not as clear as, in these states, maintenance and champerty have not been abolished. The issue is currently being considered by the Queensland Supreme Court in *Murphy Operator Pty Ltd & Ors v. Gladstone Ports Corporation Limited & Anor* (see for example [2019] QSC 118). Until the law is clarified in these states, there is a risk that third party funding agreements could be void and unenforceable and could possibly found a stay of proceedings.

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

In Australia, there is no case law directly relating to the funding of investor-State claims. This fact is unsurprising given Australia has been party to only one investor-State dispute (the Philip Morris plain-packaging laws dispute mentioned above).

5.3 Is there much litigation/arbitration funding within your jurisdiction?

It has been reported that third-party litigation funders operating in Australia capture approximately 15% of Australia's \$21 billion litigation market (Jason Geisker and Jenny Tallis, *The Third Party Litigation Funding Law Review*, The Law Reviews, 1st edition, 2018). A significant proportion of litigation funding relates to insolvency disputes and class actions for tort claims, investor claims, product liability claims and environmental claims.

By contrast, it is understood that few arbitral matters in Australia are funded.

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

In other countries, claims have been initiated against host States for allegedly targeting officers and directors of foreign investors through unlawful criminal proceedings. In these instances, claimants have relied on standard treaty provisions such as “National Treatment” and “Minimum Standard of Treatment” which exist in many of Australia’s Free Trade Agreements. For example, in the Singapore-Australia FTA, the minimum standard of treatment includes an express “*obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings*”. Therefore, although the provisions have not been tested in the context of Australian treaties in this way, it is conceivable that similar provisions could be invoked to call into question a criminal investigation or domestic judgment.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

In contrast with the Model Law, arbitrations under the Washington Convention are “self-contained”; that is, all procedural issues are to be resolved by ICSID and the arbitral tribunal themselves. For example:

- the Chairman of ICSID’s Administrative Council is responsible for appointing arbitrators where the parties cannot agree (Washington Convention, art 38; Rules of Procedure, art 4);
- the tribunal can make provisional measures if necessary (Washington Convention, art 47, Rules of Procedure, art 39); and
- ICSID, the tribunal, and *ad hoc* committees can (upon a party’s application) interpret, revise, stay or annul awards (Washington Convention, arts 50–52, Rules of Procedure, arts 50–55).

The self-contained nature of ICSID arbitrations is consistent with the IAA, which is silent on the Australian courts’ role (or lack thereof) concerning procedural issues. Accordingly, the Australian courts’ role in relation to ICSID arbitrations is limited to recognising and enforcing awards (Washington Convention, art 54; IAA, s 35).

6.3 What legislation governs the enforcement of arbitration proceedings?

The IAA governs the recognition and enforcement of arbitral awards. It gives the Washington Convention the force of law in Australia (s 32). Part IV of the IAA provides for the recognition and enforcement of ICSID awards. Arbitral awards made under the UNCITRAL Model Law are enforced under Part II of the IAA.

6.4 To what extent are there laws providing for arbitrator immunity?

Section 28 of the IAA provides arbitrators with immunity for anything done or omitted to be done in good faith in his or her capacity as arbitrator.

6.5 Are there any limits to the parties’ autonomy to select arbitrators?

A party should not appoint an arbitrator which is a national of the contracting State party to the dispute or the contracting State whose national is a party to the dispute unless the sole arbitrator or each

individual member of the tribunal is appointed by party agreement (Washington Convention, art 39).

Further, if a party appoints an arbitrator from outside the Panel of Arbitrators, the arbitrator must be: “*of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment*” (Washington Convention, arts 14(1) and 40(2)).

These articles above have the force of law in Australia under section 32 of the IAA.

Parties should also be aware of any contractually imposed limits.

6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?

Yes, the default procedure in the Washington Convention has the force of law in Australia.

If the parties fail to agree on the number of arbitrators, the default number is three (Washington Convention, art 37(2)(b)).

If the parties fail to agree upon a procedure for the appointment of arbitrators in a three-member tribunal, each party shall appoint one arbitrator and the two arbitrators appointed shall appoint the third, who shall be the president of the Tribunal (Washington Convention, art 37(2)(b)).

6.7 Can a domestic court intervene in the selection of arbitrators?

Generally, a domestic court will only intervene where the parties are unable to agree on the arbitrator or the method of appointment fails. However, arbitrations conducted under the Washington Convention are effectively insulated from the interference of domestic courts. The Washington Convention provides a mechanism for tribunal constitution where the parties are unable to agree on the number of arbitrators or the method of appointment (see art 37(2)(b)) or where the tribunal has not been constituted within time (see art 38). Similarly, the Washington Convention provides a mechanism in respect of the proposed disqualification of an arbitrator.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

Article 48 of the Washington Convention requires the award to be in writing and signed by the arbitrators. The award shall also state the reasons upon which it is based.

7.2 On what bases may a party resist recognition and enforcement of an award?

An ICSID award is binding and not subject to any appeal or any other remedy otherwise than in accordance with the Washington Convention.

Under art 54 of the Washington Convention, a State must enforce an ICSID award as if it were the final judgment of a court in that State. The Federal Court of Australia and the Supreme Courts of the States and Territories are designated for the purposes of art 54. A party cannot resist, and a court cannot deny, enforcement on grounds of public policy.

The grounds for resisting enforcement of an award under the New York Convention do not apply to an ICSID award (IAA, s 34).

There are limited grounds on which a party may request annulment of an award in art 52 of the Washington Convention.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Sovereign immunity from jurisdiction and execution is provided for under the *Foreign States Immunities Act 1985* (Cth). It provides for limited State immunity. A foreign State is generally immune from the jurisdiction of Australian courts unless it has submitted to the jurisdiction (s 10) or the proceedings concern the State's commercial activities (s 11). In *Laboud v. The Democratic Republic of Congo* [2017] FCA 982 (which concerned the enforcement of an ICSID award), the Federal Court of Australia held that the Democratic Republic of Congo was not immune because it had submitted to the jurisdiction of the ICSID tribunal.

The property of a foreign State will generally not be subject to any order of the Australian courts for the enforcement of an arbitration award unless the foreign State has waived immunity (s 31) or the property is commercial (s 32).

The case of *Firebird Global Master Fund II Ltd v. Republic of Nauru* [2015] ALR 228 considered these provisions. A private fund, Firebird, held bonds issued through the Nauru Finance Corporation (NFC) and guaranteed by the Republic of Nauru. NFC defaulted and Nauru refused to guarantee the debt owing. Firebird obtained judgment against Nauru in a Tokyo District Court. Firebird then sought to register that judgment in Australia, and to freeze Nauru's Australian bank accounts. The High Court of Australia held that Nauru was immune to any freezing order over its Australian bank accounts because Nauru used those accounts for non-commercial purposes. Although registered, the judgment against Nauru was practically toothless.

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The *Foreign States Immunities Act* expressly provides that separate entities (which are defined to include a body corporate that is an agency or instrumentality of the foreign State) are covered by the immunity from jurisdiction provided under s 9 and execution of an arbitration award against State property under s 30 (see ss 22 and 35, respectively).

The Full Court of the Federal Court of Australia considered the definition of separate entity in *PT Garuda Indonesia v. ACCC* [2011] FCAFC 52. It was held that an instrumentality is a body created by the State for the purpose of performing a function for the State.

Therefore, a separate entity will be covered by sovereign immunity unless one of the exceptions under the Act (discussed in question 7.3 above) applies.

Acknowledgment

The authors would like to thank their colleague Dominic Fawcett for his assistance in the writing of this chapter.



Lee Carroll is a Special Counsel in the Arbitration and Projects groups of Corrs Chambers Westgarth in Melbourne. She has experience in arbitrations conducted under many of the leading arbitral rules, advising clients and assisting arbitral tribunals. She advises clients on the drafting of arbitration agreements. She also advises on the potential enforcement of Bilateral Investment Treaties and corporate structuring with a view to optimising investment protection, and has published on the CPTPP. Lee has practised at leading international law firms in London and Paris, and is a former Associate to the Hon. Justice Hayne of the High Court of Australia. She holds a BCL from Oxford University, and a Bachelors of Laws (First Class Honours) and Arts from the University of Western Australia. She also has a Diploma in International Commercial Arbitration from the Chartered Institute of Arbitrators.

Corrs Chambers Westgarth

Level 25, 567 Collins Street
Melbourne, Victoria, 3000
Australia

Tel: +61 3 9672 3142
Email: lee.carroll@corrs.com.au
URL: www.corrs.com.au



Frances Williams is a Partner in the Projects and Regulatory groups of Corrs Chambers Westgarth in Brisbane. She is experienced in large-scale litigation in jurisdictions across Australia, including State and Federal Courts and tribunals. She is also experienced in arbitrations and alternative dispute resolution procedures, including dispute resolution boards and expert determinations. Frances is the former Associate to the late Hon. Justice RE Cooper of the Federal Court of Australia and the Hon. Justice SM Kiefel, then of the Federal Court of Australia (now the Chief Justice of the High Court of Australia). She was awarded the Sir Robert Menzies Memorial Scholarship in Law and obtained her Masters in Law (First Class Honours) from the University of Cambridge where she was awarded the Sir Clive Parry Prize in International Law. Frances also holds a Bachelor of Laws (First Class Honours) and a Bachelor of Arts from the University of Queensland.

Corrs Chambers Westgarth

Level 42, 111 Eagle Street
Brisbane, Queensland, 4000
Australia

Tel: +61 7 3228 9332
Email: frances.williams@corrs.com.au
URL: www.corrs.com.au

At Corrs, our internationally-recognised arbitration team has experience and expertise across a range of industry sectors and geographical locations. Our lawyers have conducted international arbitration proceedings under the rules of many of the world's leading arbitral institutions, acting as counsel and sitting as arbitrator. We are familiar with both *ad hoc* and institutional arbitration and with a range of alternative dispute resolution processes. We understand cultural nuances in the dispute context and can work with clients to take advantage of international conventions which reduce investment exposure in developing countries.

When a dispute arises, our experience enables us to provide insightful, pragmatic and innovative advice; our international network of independent firms offers prompt access to specialist lawyers around the world; and our technology helps us to provide innovative and seamless service across multiple jurisdictions and time zones. The strength of our practice is underpinned by our willingness to share our knowledge and experience to find the very best solution for our clients in any cross-border dispute.

www.corrs.com.au

**CORRS
CHAMBERS
WESTGARTH**
lawyers

ICLG.com

Other titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Recovery & Insolvency
Corporate Tax
Cybersecurity
Data Protection

Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law

Oil & Gas Regulation
Outsourcing
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.