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Chapter 4

AUSTRALIA

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I INTRODUCTION

Australia has a federal system of government with separate arbitral laws in force in the Commonwealth (as the federal entity) and in every state and territory. International arbitration is regulated at the federal level by the International Arbitration Act 1974 (Cth) (IAA), while domestic arbitration is regulated by the various state and territory commercial arbitration acts.

All of the relevant Australian legislation is based on the Model Law on International Commercial Arbitration (Model Law) adopted by the United Nations Commission on International Trade Law (UNCITRAL). The IAA also incorporates the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Convention on the Settlement of International Disputes between States and Nationals of Other States.

Recent amendments to the IAA and commercial arbitration acts, developments in case law and efforts on the ground have all sought to promote Australia as an attractive regional seat for international arbitration.

i Reform of the IAA

In July 2010, the federal parliament enacted a number of important amendments to the IAA to incorporate changes made to the Model Law in 2006. Section 16(1) of the IAA gives the Model Law 'the force of law in Australia'. This provision was challenged in the *TCL* case (discussed below), but the constitutional validity of Australia's international arbitration regime was unanimously upheld.

Also of significance was the amendment of Section 21 of the IAA in 2010, which clarified that the 'Model Law covers the field' for international arbitrations seated in Australia, to the exclusion of state and territory arbitral laws.

However, the 2010 amendments did not expressly address the temporal operation of Section 21 – the provision clearly applied to prevent parties from excluding the Model Law in any agreement entered into on or after 6 July 2010, the date the amendments came into force, but it was not clear whether this provision applied to agreements entered into before that date. This uncertainty was exacerbated by conflicting judicial reasoning on the point.[2]

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2 As observed by Albert Monichino QC and Alex Fawke, since the 2010 amendments, four different judges have expressed three different views, *in obiter*, as to the temporal operation of Section 21 introduced by the

Further, determining the temporal operation of Section 21 was complicated by Section 30 of the IAA, which provided that Part III of the IAA (which includes Section 21) does not apply in relation to an international commercial arbitration between parties to an arbitration agreement that was concluded before 12 June 1989, unless the parties have otherwise agreed.[3]

However, in 2015, the federal parliament enacted amendments to the IAA that squarely addressed these uncertainties: the amendments inserted a new Section 21(2), which makes clear that Section 21 has retrospective effect, and repealed Section 30.

The new Subsection 21(2), which came into effect on 18 August 2015,[4] provides that the Model Law 'covers the field' in arbitrations arising from arbitral proceedings that commence on or after the commencement of Subsection 21(2), regardless of whether the arbitration agreement giving rise to the arbitration was made before, on or after 6 July 2010. This amendment makes clear that Section 21 has retrospective operation, such that the Model Law applies even if the parties to an arbitration agreement entered into before 6 July 2010 chose to opt out of the Model Law. This amendment is intended to provide certainty to parties who entered into arbitration agreements before the IAA was last amended in 2010.[5] In October 2015, the federal parliament enacted additional amendments to the IAA.[6] These amendments were enacted to simplify the provisions governing the enforcement of foreign arbitral awards in Australia, improve compliance with the New York Convention, change the application of the existing confidentiality provisions to arbitral proceedings seated in Australia and make minor amendments in the interests of clearer laws.[7] Section 30 was repealed as part of these amendments.[8]

Significantly, the confidentiality provisions in the IAA, which formerly operated on an opt-in basis, have been amended to operate on an opt-out basis. Sections 23C to 23G of the IAA require that parties to arbitral proceedings commenced in reliance on an arbitral agreement not disclose confidential information in relation to the proceedings (subject to certain public interest exceptions).[9] Parties are now required to agree (in the arbitration agreement or otherwise in writing) that Sections 23C to 23G will not apply in order to oust their operation.[10] This amendment applies to arbitral proceedings commenced in reliance on an arbitration agreement made on or after the day the amendments commenced on

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2010 amendments: *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209 (Murphy J); *Rizhao Steel Holding Group Co Ltd v. Koolan Iron Ore Pty Ltd* (2012) 43 WAR 50 (Martin CJ, with whom Buss JA agreed; Murphy JA); Monichino QC and Fawke, 'International Arbitration in Australia: 2014/2015 in review' (2015) 26 *ADJR* 192, 192–193.

3 See Richard Garnett and Luke Nottage, 'What law (if any) now applies to international commercial arbitration in Australia?' (2012) 35(3) *UNSW Law Journal* 953, 957.

4 Section 21(2) was inserted into the IAA by Schedule 2 of the Civil Law and Justice Legislation Amendment Act 2015 (Cth), which was assented to on 17 August 2015.

5 Commonwealth, Second Reading Speech – Civil Law and Justice Legislation Amendment Bill 2014, Senate, 8160 (Senator George Brandis, Attorney-General – 29 October 2014).

6 Civil law and Justice (Omnibus Amendments) Act 2015 (Cth).

7 Commonwealth, Second Reading Speech – Civil Law and Justice (Omnibus Amendments) Bill 2015, Senate, 4610 (Senator Mitch Fifield, 25 June 2015).

8 The Explanatory Memorandum to the Civil Law and Justice (Omnibus Amendments) Bill acknowledged that the Federal Court of Australia had found Section 30 to be redundant and a source of confusion (at [215]).

9 Explanatory Memorandum to the Civil Law and Justice (Omnibus Amendments) Bill at [213]–[214].

10 Section 22(2)(ca)–(ce) of the IAA.

14 October 2015.[11] Since privacy and confidentiality are among the attractive aspects of arbitral proceedings, this aspect of the amendments has been particularly well received, as it aligns with market expectations.[12]

The October 2015 amendments also made some minor changes that are intended to improve compliance and consistency with the New York Convention.

Prior to these amendments, a foreign arbitral award could not be enforced in Australia if the award was made in a country that is not party to the New York Convention[13] unless the party seeking enforcement is at that time domiciled or ordinarily resident in Australia or another Convention state party. This restriction has now been removed to allow enforcement of foreign awards in Australia regardless of the country in which they are made.[14] In addition, the IAA, as amended, now allows a party to an arbitration agreement to apply to a court to resist enforcement of an award on the legal incapacity of any party to the arbitration, whereas previously only the incapacity of the award debtor could be used to resist enforcement.[15]

Although arbitration agreements designating a non-Convention state party as the seat of arbitration are uncommon, and legal incapacity is rarely a basis upon which enforcement is resisted, both of these amendments are regarded as improving compliance with the New York Convention by broadening the scope of application of the enforcement provisions and improving fairness of enforcement proceedings, respectively.[16]

Further proposed amendments to the IAA have been introduced in federal parliament in the form of the Civil Law and Justice Legislation Amendment Bill 2017, which at the time of writing has not yet been passed. The proposed changes include clarifying that a foreign award is binding between the parties to the award, rather than between the parties to the arbitration agreement,[17] bringing Australia into line with international best practice by removing the need for an award creditor to establish that an award debtor was a party to the relevant arbitration agreement.[18] The Bill also adds a new Subsection 18(4) and (5) to the IAA, which has the effect of defining 'competent court' to mean the Federal Court of Australia and the supreme courts of the states and territories for the purposes of Articles 17H, 27, 35 and 36 of the Model Law.[19] The Bill also proposes that the confidentiality provisions

11 Civil Law and Justice (Omnibus Amendments) Act (Cth), Schedule 1, Item 63.

12 See Aleks Sladojevic 'The International Arbitration Act 1974 – summarising recent legislative amendments' (December 2015) *The ACICA Review* 39, 39; see also Albert Monichino QC and Alex Fawke, 'International arbitration in Australia: 2014/2015 in review' (2015) 26 *ADJR* 192, 194, who note that this amendment is especially welcome in light of the decision of the High Court in *Esso Australia Resources Ltd v. Plowman* (1995) 183 CLR 10, which held that documents and information disclosed to an opposing party in an arbitration that is to be heard in private are not confidential merely because the hearing is being held in private.

13 There are 156 states party to the New York Convention. Non-states party include Taiwan, Timor-Leste and various African nations.

14 This restriction has been removed by the repeal of former Section 8(4).

15 This change is effected by the amendment to Section 8(5)(a).

16 Explanatory Memorandum to the Civil Law and Justice (Omnibus Amendments) Bill at [209]–[212].

17 Civil Law and Justice Legislation Amendment Bill 2017, Sch 7, cl 2.

18 See *Altain Khuder LLC v. IMC Mining Inc & Anor* (2011) 282 ALR 717.

19 Civil Law and Justice Legislation Amendment Bill 2017, Sch 7, cl 7. While the IAA specifically vests jurisdiction in the Federal Court and in state and territory courts to enforce 'foreign awards' (Sections 8(2) and (3)), both the IAA and Articles 35 and 36 of the Model Law are silent as to the 'competent court' responsible for the enforcement of 'non-foreign awards'. This had previously been a source of controversy: see *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209.

of the IAA would not apply to investor–state arbitral proceedings to which the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration apply.[20] Finally, the Bill would add a Subsection 27(2AA), which would give arbitrators greater flexibility in making costs awards by providing that arbitral tribunals are not required to use any scales or other rules used by a court when making costs orders.[21]

The purpose of the amendments is to ensure that Australian arbitral law and practice stay on the 'global cutting edge' so that Australia continues to gain ground as a competitive arbitration-friendly jurisdiction.[22]

ii New state and territory arbitral laws

In conjunction with the recent amendments to the IAA, the domestic arbitral laws (regulating domestic commercial arbitrations) have undergone a complete overhaul over the past few years. The most significant change is that the new laws are now based on the Model Law. The revised commercial arbitration acts have now commenced in all states and territories,[23] and Australia has a uniformly harmonious domestic and international arbitration scheme of legislation based on the Model Law.

iii Australia as an arbitration venue

Despite the implementation of a raft of legislative amendments designed to increase Australia's attractiveness as a regional hub for arbitration, Australia has not traditionally been perceived as a favourable destination for international commercial arbitration. The 2015 Queen Mary International Arbitration Survey indicated that preference for certain seats is based on intrinsic features of the local legal system, such as neutrality and impartiality, rather than factors of personal convenience, such as the location of the arbitration venue.[24] However, given that the same survey also showed that costs are regarded as arbitration's worst feature,[25] the competitive disadvantages facing Australia, not least its geographical distance

20 Civil Law and Justice Legislation Amendment Bill 2017 (the Bill), Sch 7, cl 11.

21 Civil Law and Justice Legislation Amendment Bill 2017 (the Bill), Sch 7, cl 15.

22 Commonwealth, Second Reading – Civil Law and Justice Legislation Amendment Bill 2017, Senate, 12790 (George Brandis, Attorney-General).

23 Commercial Arbitration Act 2010 (NSW) (commenced on 1 October 2010); Commercial Arbitration Act 2011 (Vic) (commenced on 17 November 2011); Commercial Arbitration Act 2011 (SA) (commenced on 1 January 2012); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT) (commenced on 1 August 2012); Commercial Arbitration Act 2011 (Tas) (commenced on 1 October 2012); Commercial Arbitration Act 2013 (Qld) (commenced on 17 May 2013); Commercial Arbitration Act 2012 (WA) (commenced on 7 August 2013); and Commercial Arbitration Act 2017 (ACT) (commenced on 4 April 2017).

24 Queen Mary, University of London, School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, at 15.

25 Ibid, at 7. In relation to the award of indemnity costs in arbitration, three recent decisions considered the application of the presumption in *A v. B* [2007] EWHC 54 (Comm); [2007] 1 Lloyd's Rep 358, namely, that indemnity costs are generally appropriate where proceedings were commenced in breach of an arbitration agreement. In all three cases, the courts rejected that presumption, finding that there was no reason justifying the departure from the accepted starting point that costs are payable on the ordinary basis unless there are exceptional circumstances warranting an award of costs on an indemnity basis: see *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd* (No. 2) [2015] FCA 1046 (costs of proceedings

from other countries,[26] are considerable. The 2016 Queen Mary International Arbitration Survey, focused on technology, media and telecommunications disputes, recorded that only 1 per cent of such disputes were arbitrated in Australia.[27]

Despite some scepticism,[28] the outlook for growth of international arbitration in Australia is positive. Since the Australian International Disputes Centre (Australia's first international dispute resolution centre) opened in August 2010, more than 45 new arbitrations have been filed with Australia's leading body for international commercial arbitration, the Australian Centre for International Commercial Arbitration (ACICA). ACICA's caseload during 2013 to 2015 was more than double that of the two prior years.[29] Australia was also chosen by the International Council for Commercial Arbitration to be a joint host for its 2018 conference, with the successful bid overcoming the strong alternative contenders of Hong Kong, Moscow and Kuala Lumpur.

In October 2016, the Federal Court of Australia replaced the former practice note governing matters concerning the IAA with a new practice note.[30] Relevant changes include a clarification that the Federal Court's jurisdiction extends to the enforcement of international arbitral awards made in Australia,[31] and the creation of a national allocations system with a dedicated group of judges with special expertise in international arbitration to be allocated for such matters. A national coordinating judge, along with four other registry coordinating judges, oversees and manages international commercial arbitration matters so that the cases are dealt with expeditiously and consistently by the court under a harmonised procedure.[32]

The recent amendments to Australia's international arbitration regime, coupled with the recent emergence of Asia as the world's economic powerhouse, have caused commentators to be more hopeful than ever that Australia will present itself as a prime seat for international

challenging the appointment of arbitrators and making other procedural challenges); *Roy Hill Holdings Pty Ltd v. Samsung C&T Corporation* [2016] WASC 458(S); and *John Holland Pty Limited v. Kellogg Brown & Root Pty Ltd* [No 2] [2015] NSWSC 564 (both cases concerned costs of stay applications).

26 AA de Fina, in 'Swings and Roundabouts – Developments in Arbitration in Australia' (2012) 28 *Building and Construction Law Journal* 169, also explains some of the difficulties that Australia faces in relation to the 'serious decline for years' of the use of arbitration for the resolution of domestic disputes, 'not because of an inadequate or flawed domestic law, but variously because of government bias against arbitration, the increase in the use of non-determinative processes, particularly mediation and expert determination, and legal fraternity bias generally against arbitration'.

27 Queen Mary, University of London, School of International Arbitration, 2016 International Dispute Resolution Survey: Pre-empting and Resolving Technology, Media and Telecoms Disputes, at 34.

28 See, for example, de Fina (footnote 26), at p. 169: 'True it is that Australia is in the region, but it is not seen by Asian disputants as being Asian, and is geographically at a significant disadvantage to the well-established centres of Singapore and Hong Kong. A newly established hearing facility in Sydney pales beside the extravagant Maxwell Chambers facility in Singapore funded by the Singapore government and, while beneficial for domestic dispute resolution, is unlikely to be an attraction for international arbitrations which worldwide are predominantly held in other than dedicated hearing rooms.'

29 ACICA's caseload indicates an increasing number of foreign parties choosing Australia as a seat, with 90 per cent of ACICA cases from 2013 to 2015 involving at least one foreign party, and more than one-third of cases involving two foreign parties, with no other connection to Australia other than it being the choice of seat (Deborah Tomkinson and Margaux Barhoum, 'Australian Centre for International Commercial Arbitration (ACICA)' in Karyl Nairn QC and Patrick Heneghan (eds), *Arbitration World* (Thomson Reuters, 2015) 28).

30 C&C-1: Commercial & Corporations Practice Note.

31 See comment at footnote 19.

32 See C&C-1: Commercial & Corporations Practice Note at Schedule 3, s 6.

arbitration in the Asia-Pacific region.[33] Recent domestic decisions outlined in this chapter reinforce this positivity, as Australian state courts have sought to facilitate the objectives of arbitration by providing quick and efficient resolutions to disputes.[34]

II THE YEAR IN REVIEW

i Developments affecting international arbitration

In addition to the recent amendments to the IAA, in January 2016 the newly revised ACICA Arbitration Rules and Expedited Arbitration Rules came into effect, bringing the ACICA Rules in line with international best practice.

Notable amendments include provisions that stipulate:

a that the law of the seat is the governing law of the arbitration agreement, unless the parties have expressly agreed otherwise and that agreement is not prohibited by an applicable law;[35]

b that prior to the constitution of the arbitral tribunal, a party may make submissions to ACICA for the arbitration to be conducted in accordance with the ACICA Expedited Rules where the amount in dispute is less than A$5 million or in cases of exceptional urgency;[36]

c that in certain circumstances ACICA may consolidate two or more pending arbitrations into a single arbitration;[37] and

d that the arbitral tribunal may allow an additional party be joined to an arbitration provided that the additional party is bound by the same arbitration agreement between the existing parties to the arbitration.[38]

33 See, for example, Garnett and Nottage (footnote 3); Albert Monichino SC, 'International Arbitration in Australia – 2010/2011 in Review' (2011) 22 *Australasian Dispute Resolution Journal* 215. In contrast, de Fina (footnote 26), at 169, again offers a less enthusiastic view: '[T]his misconception [that the legislative amendments will result in an influx of international arbitrations to Australia] ignor[es] [...] that Australia has long subscribed to the New York Convention and applied the previous version of the UNCITRAL Model Law as a fundamental part of the International Arbitration Act and has been unsuccessfully promoting Australia as a situs of international arbitrations for over 20 years through the [ACICA].'

34 For example, the Supreme Court of Victoria in 2015 heard and determined an application for enforcement of a foreign arbitral award, and the subsequent appeal against that decision (and related contempt proceedings), in little more than a week (see *Sauber Motorsport AG v. Giedo Van Der Garde BV* [2015] VSCA 37). The Federal Court also introduced international commercial arbitration as a national practice area in the Federal Court, assigning specialist judges to oversee disputes involving international arbitration, reflecting at an institutional level the Court's support for the role of arbitration (the Honourable Steven Rares, Justice of the Federal Court of Australia, 'The Modern Place of Arbitration', April 2015, Celebration of the Centenary of the Chartered Institute of Arbitrators).

35 ACICA Arbitration Rules 2016, r 23.5.

36 ACICA Arbitration Rules 2016, r 7.

37 ACICA Arbitration Rules 2016, r 14.

38 ACICA Arbitration Rules 2016, r 15. As to the related question of when a party claims 'through or under a party' for the purposes of Section 7(4) of the IAA, see *KNM Process Systems SDN BHD v. Mission Energy Ltd* [2014] WASC 437.

The ACICA Expedited Arbitration Rules have an overriding objective to provide arbitration that is quick, cost-effective and fair considering the amounts in dispute and the complexity of the issues or facts involved.[39] For example, they provide that there will only be one arbitrator, who will be appointed by ACICA within 14 days from the commencement of arbitration.[40]

The ACICA Arbitration Rules 2016 also incorporate emergency arbitrator provisions, which allow a party to apply to ACICA for emergency interim measures of protection prior to the constitution of an arbitral tribunal.[41] An emergency arbitrator is to be appointed within one business day from receipt of the application, and any decision on emergency interim measures is to be made within five business days from when the application was referred to the emergency arbitrator.[42]

ii Arbitration developments in local courts

The past couple of years have been an important period for international arbitration in Australia as cases concerning the IAA amendments filter through the judicial system. While the practical operation of the IAA will continually be tested in court, it appears that Australian courts are moving to a significantly more positive, pro-arbitration position.[43]

A comparative analysis, the research of which was presented in 2016, of the approaches taken in more than 350 cases over the course of the past two decades by Australian, Singaporean and Hong Kong courts with regard to the adoption and interpretation the Model Law, found that recent judgments of Australian courts in recent years have exhibited 'highly sophisticated internationalist' judgments, and the judiciary has accordingly been exceptionally strong in their display of internationalism when interpreting the Model Law'.[44]

The law of the forum is to be used in determining whether a party is a 'party to an arbitration agreement' under Section 7(2) of the IAA

Trina Solar (US), Inc v. Jasmin Solar Pty Ltd[45]

In *Trina Solar*, the Full Federal Court addressed an appeal relating to whether the primary judge had erred in his discretion to grant leave to Jasmin to serve an originating process on Trina Solar in the US to commence proceedings in Australia. Among the reasons why Trina Solar claimed the discretion had miscarried was that there was no utility to granting leave to

39 ACICA Expedited Arbitration Rules 2016, r 3.1.

40 ACICA Expedited Arbitration Rules 2016, rr 8.1, 8.2.

41 ACICA Arbitration Rules 2016, sch 1.

42 ACICA Arbitration Rules 2016, sch 1, cls 2.1 and 3.1.

43 The Honourable James Allsop, Chief Justice of the Federal Court of Australia and the Honourable Clyde Croft, Justice of the Supreme Court of Victoria, 'Judicial Support of Arbitration', March 2014, APRAG Tenth Anniversary Conference at 4. See also the Honourable Tom Bathurst AC, Chief Justice of New South Wales, 'Judicial Support for Arbitration, a reprise', November 2014, International Arbitration Conference at 11. However, see the Honourable Robert French AC, Chief Justice of the High Court, 'Arbitration and Public Policy', 18 April 2016, Arbitration and Public Policy, Hong Kong at 21.

44 Dr Dean Lewis, Lecture, The Australian Disputes Centre, 19 April 2016. For further reading, see D. Lewis, The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Focusing on Australia, Hong Kong and Singapore (2016, Wolters Kluwer). See also Media Release, 'Australian Court Decisions On Arbitration Reflect Leadership In Internationalist Approach', ACICA, 29 April 2016.

45 [2017] FCAFC 6 (*Trina Solar*).

serve, because any proceedings would be stayed upon an application by Trina Solar to refer the dispute to arbitration under Section 7(2) of the IAA pursuant to a supply agreement between the parties.

Jasmin had previously filed a motion seeking orders that it be removed from the arbitration on the basis that it was not a party to the supply agreement . The New York-based arbitrator, applying the law of the supply agreement (being the law of New York) found that Jasmin was a party to the supply agreement, and denied the motion. However, at the first instance, Justice Edelman of the Federal Court[46] found that, applying the law of the forum (*lex fori*), being that of Queensland, Jasmin was not a party to the arbitration agreement and therefore it was unlikely that the proceeding would be stayed.[47] Accordingly, the Court granted leave to serve the originating process.

The question on appeal was whether, in determining whether a party is party to an arbitration agreement, the relevant law to apply is the law of the contract or the law of the forum. Trina argued that the relevant law to determine whether Jasmin was a party to the agreement was the law of the contract, as Sections 7 and 8 of the IAA have the combined effect that the definition of an 'arbitration agreement' under Section 7(2) has an expansive meaning. In addition, Trina Solar argued that the choice of law requirement in Section 8(5)(b) of the IAA, which provides that the validity of an arbitration agreement is to be determined by the law expressed in the agreement, should be incorporated into determinations under Section 7(2).

The majority of the Full Federal Court upheld the primary judge's finding that the appropriate law to be applied was the law of the forum. In particular, the Court found that while the definition of 'arbitration agreement' in the IAA might be more expansive than the domestic law allowed, that question is different to determining how mutual consensus is to be determined and the choice of law relevant to that determination. The Court found that merely because Section 8(5)(b) prescribed the law of the contract, it did not follow that the same choice of law is to be made for Section 7(2), and uniformity on choice of law is not enshrined in the IAA or the New York Convention. Accordingly, the Court was not satisfied that the primary judge made an error in the exercise of discretion and dismissed the appeal.

Adoption of the 'full merits' approach to determining applications under Section 7(2) of the IAA

Samsung C&T Corporation v. Duro Felguera Australia Pty Ltd[48]

Samsung considered what test a court should use in determining whether there is a valid arbitration agreement for the purposes of section 7(2) of the IAA. Samsung and Duro had entered into a subcontract that contained an arbitration clause. Samsung terminated that subcontract, but the parties entered into a new interim subcontract, which did not contain an arbitration clause. Disputes arose under both subcontracts, and Samsung sought declaratory relief to the effect that there was no binding arbitration agreement governing Duro's claims brought under the interim subcontract, while Duro sought to stay the proceedings that it said fell under the purported arbitration agreement.

46 Edelman J has since been elevated to the High Court of Australia.

47 *Jasmin Solar Pty Ltd v. Trina Solar Australia Pty Ltd* (2015) 331 ALR 108.

48 [2016] WASC 193 (*Samsung*).

The central issue was whether the interim subcontract included an arbitration agreement in the terms of the agreement under the subcontract. The Supreme Court of Western Australia found, applying ordinary principles of construction and taking into account considerations of commercial convenience, that the interim subcontract should be read in a way that was compatible with the arbitration agreement, and therefore the proceeding should be stayed and referred to arbitration.

However, the Court made significant findings regarding the principle of *Kompetenz-Kompetenz*, being the principle that an arbitral tribunal may independently rule on the question of its jurisdiction, including any objections with respect to the existence of an arbitration agreement, without having resort to a court. The Court noted that there is friction between the operation of Section 7(2) of the IAA and *Kompetenz-Kompetenz*, in that a court hearing a stay application will necessarily have to take a view on the existence and scope of the arbitration agreement in question before it can decide whether a stay must be granted, possibly intruding into the tribunal's *Kompetenz-Kompetenz*. Therefore in an application for a stay under Section 7(2) of the IAA, there is a threshold question: what standard of review should the court adopt in determining the existence and scope of the arbitration agreement?

The Court noted that there were two competing views: the first is the '*prima facie*' view, which is that if the court is satisfied on a *prima facie* standard that the conditions for the grant of a stay have been met, it should grant the stay and defer to the arbitral tribunal the proper determination of whether those conditions have been satisfied. The second view is the 'full merits' approach: that the court should determine on the balance of probabilities the existence and scope of the arbitration agreement when it hears a stay application.[49] On this view, the court grants a stay if, and only if, it is satisfied that the requirements for a grant of a stay have in fact been met.

The Court ultimately decided to follow the 'full merits' approach adopted by the English courts[50] and discussed in previous Australian cases,[51] concluding that the correct approach was to decide on the balance of probabilities whether, on the proper interpretation of the interim subcontract, the arbitration agreement was a term of the interim subcontract. The Court found that if the party seeking a stay cannot prove the existence of an arbitration agreement that covers the disputes, then the conditions for staying the proceedings under Section 7(2) of the IAA have not been met. The Court's decision to take the full merits approach, rather than deferring to the authority of the arbitral tribunal, involved taking a narrower view of *Kompetenz-Kompetenz*.

49 The Court noted that one benefit of this approach is that it allows the court to pronounce with finality on an arbitral tribunal's jurisdiction in the first instance, instead of deferring the question to the arbitral tribunal and face the prospect of the same question coming back to the court in the event of an appeal against the arbitral tribunal's jurisdictional ruling: *Samsung* [2016] WASC 193 at [37].

50 *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi Tpk Ltd* [2013] EWHC 1240 and *Joint Stock Co 'Aeroflot Russian Airlines' v. Berezovsky* [2013] EWCA CIV 784. The Court also considered the decision of the Singapore Court of Appeal in *Tomolugen Holdings Ltd v. Silica Investors Ltd* [2015] SGCA 57, which adopted the *prima facie* approach.

51 *Rinehart v. Rinehart* (No 3) [2016] FCA 539, noting that this decision concerned Section 8 of the Commercial Arbitration Act 2010 (NSW).

Narrow scope for resisting enforcement of awards

TCL Air Conditioner (Zhongshan) Co Ltd v. Castel Electronics[52]

In *TCL Air*, the Full Federal Court dealt with an appeal relating to TCL's attempt to set aside and resist enforcement of arbitral awards awarded in favour of Castel. TCL argued that the awards were made in breach of procedural fairness (and thus in breach of the rules of natural justice); therefore, it was asserted, the awards were in conflict with, or contrary to, the public policy of Australia, and the Court should refuse to enforce the awards pursuant to Section 8(7) of the IAA.

The issue arose out of the 2010 amendments to the IAA, whereby a new Section 8(7A) was inserted that provided that the circumstances in which enforcement of an award would be contrary to public policy included (but are not limited to) where 'the making of the award was induced or affected by fraud or corruption' or where 'a breach of the rules of natural justice occurred in connection with the making of the award'.

At first instance, the Federal Court rejected TCL's claims and held that the awards should be enforced,[53] and elucidated some guiding principles in relation to 'public policy'.[54] On appeal, the Full Federal Court upheld the trial judge's decision, unanimously finding that an international commercial arbitration award will not be set aside or denied recognition or enforcement under Articles 34 or 36 of the Model Law for breach of the rules of natural justice unless there is 'demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness'.[55]

The basis of TCL's complaint was an asserted lack of evidence for three critical findings made by the arbitral panel, in which TCL was said to have been denied an opportunity to present evidence and argument. The Court's view was that, if the rules of natural justice require probative evidence for findings of facts or the need for logical reasoning to support factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by a judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice in circumstances where the hearing or reference has been conducted regularly and fairly.[56] The Court also remarked that in most (if not all) cases, a party that says that it has suffered such unfairness or practical injustice should be able to establish this without a detailed re-examination of the facts.[57]

52 [2014] FCAFC 83 (*TCL Air*).

53 [2012] FCA 1214 (*Castel* (No. 2)).

54 On appeal, the Full Federal Court generally agreed with these principles.

55 TCL Air [2014] FCAFC 83 at [55].

56 Nonetheless, the Court accepted, without the slightest hesitation, that the making of a factual finding by a tribunal without probative evidence may reveal a breach of the rules of natural justice in the context of an international commercial arbitration; for example, where the fact was critical or was never the subject of attention by the parties to the dispute, or where the making of the finding occurred without the parties having an opportunity to deal with it (*TCL Air* [2014] FCAFC 83 at [83]). See also *Emerald Grain Australia Pty Ltd v. Agrocorp International Pte Ltd* [2014] FCA 414, in which the Court found that for a party to succeed on a 'no evidence' claim, such party must show that there was a complete absence of probative evidence available to the tribunal for it to come to a finding of fact, which was to be distinguished from a claim of an incorrect or flawed finding based on facts before the tribunal (at [15]–[16]).

57 This appears to be consistent with the Court's criticism of TCL 'dressing up' its complaints about the factual findings of the arbitrator into a claim concerning asserted breaches of the rules of natural justice: *TCL Air* [2014] FCAFC 83 at [53]–[54].

The Court emphasised that the essence of natural justice is fairness. Unless there is unfairness or true practical injustice, there can be no breach of any rule of natural justice. The required content of both natural justice and fairness in any particular case will depend on the context. Here, the context was international commercial arbitration, in which the object of the IAA and the Model Law is to facilitate the use and efficacy of arbitration as a means of settling international disputes.

In reaching its decision, the Court emphasised that in interpreting the IAA it was important to establish, to the degree that the language of the IAA permits, international harmony and concordance of approach to international commercial arbitration, particularly by reference to the decisions of other common law countries.[58] More recently, however, a rare counter example of a successful attempt to set aside an arbitration award pursuant to Article 34 was *Hui v. Esposito Holdings Pty Ltd*,[59] where the Federal Court set aside two partial arbitration awards and made orders removing the arbitrator. This was due to the 'exceptional circumstances' of the matter involving alleged unfairness and practical injustice as a result of the arbitrator purportedly failing to give certain parties a reasonable opportunity to be heard on material issues in the arbitration, and allegations that the arbitrator had prejudged the matter. The Court ultimately found that the flaws in the arbitral process in that case were so significant as to override the usual considerable caution of supervisory courts in determining whether to set aside an international commercial arbitration award.

TCL Air Conditioner (Zhongshan) Co Ltd v. Judges of the Federal Court of Australia[60]

TCL also challenged the constitutional validity of the IAA in the original jurisdiction of the High Court of Australia. TCL argued that, in circumstances where the Federal Court, under Articles 35 and 36 of the Model Law, has no power to refuse enforcement of an award on the ground of error of law appearing on the face of the award, then Section 16(1) of the IAA (which gives the Model Law the force of law in Australia) either:

a substantially impairs the institutional integrity of the Federal Court by enlisting it in an arrangement to facilitate arbitration and then enforcing the resulting awards, thereby requiring the Court to knowingly perpetrate legal error; or

b impermissibly vests the judicial power of the Commonwealth on the arbitral tribunal that made the award by reason of the IAA's enforcement provisions that render an award binding and conclusive, thereby giving the arbitral tribunal the last word on the law applied.

The High Court unanimously rejected TCL's arguments. The Court emphasised the consensual foundation of private arbitration and explained that enforcement of an arbitral award is enforcement of the binding result of the parties' agreement to submit their dispute to arbitration, not enforcement of any disputed right submitted to arbitration. There is

58 In doing so, the Court noted that the reference to 'public policy' in the Model Law and New York Convention was meant to be limited to fundamental principles and was not intended to be interpreted broadly in a manner that might encompass idiosyncratic national conceptions of public policy (see *TCL Air* [2014] FCAFC 83 at [73] and *Traxys Europe SA v. Balaji Coke Industry Pvt Ltd* (No. 2) (2012 201 FCR 535 at [105]).

59 *Hui v. Esposito Holdings Pty Ltd* [2017] FCA 648.

60 (2013) 295 ALR 596 (TCL).

accordingly no impairment of the Federal Court's institutional integrity where the making of an appropriate order for enforcement in no way signifies the Court's endorsement of the legal content of the award.

Furthermore, that an arbitrator is the final judge on questions of facts and law does not mean that an arbitrator purports to exercise the judicial power of the Commonwealth; rather, this again reflects the consequences of the parties having agreed to submit a dispute to arbitration voluntarily.

Aircraft Support Industries Pty Ltd v. William Hare UAE LLC[61]

The central issue in ASI was whether, in circumstances where there was a breach of the rules of natural justice in the making of part of an arbitral award, severance of that part of the award was appropriate to enforce the remainder of the award. The dispute arose in relation to a foreign arbitral award made in favour of William Hare, which it sought to enforce in Australia. This was resisted by ASI on the basis that it would be contrary to public policy under Section 8(7)(b) of the IAA, as a breach of natural justice occurred in connection with the making of the award. ASI contended that part of the arbitral award, a payment of A$50,000, had not been included in the statement of claim or responded to in the defence (despite being raised in the request for arbitration), and the arbitral tribunal failed to give reasons why William Hare was entitled to this payment.

At first instance,[62] the Supreme Court of NSW referred to T*CL Air* and found that the principles of fairness required the tribunal to give notice to the parties of its view that it considered the claim for A$50,000 was being maintained (despite its absence from the statement of claim) and give the parties an opportunity to address the claim.[63] In light of this, the Court found that real unfairness and real practical injustice was shown to have been suffered by ASI.[64]

The Court then considered whether the impugned portion of the arbitral award could be severed from the remainder of the award. ASI argued that by virtue of Section 8(7A) of the IAA, the Court should refuse to enforce the award *in toto* despite only part of the award being affected by a breach of the rules of natural justice. The Court disagreed with this contention, finding that Section 8 of the IAA should be construed so as to allow the enforcement of parts of awards not affected by fraud, corruption or breaches of the rules of natural justice. The Court found that this was not only the correct construction of the language of Section 8, it was consistent with the objectives of the IAA and would promote rather than hinder the efficient and fair enforcement of arbitral awards.[65] The Court therefore ordered that the award be enforced to the extent that it related to the retention monies of A$797,500.

On appeal, ASI argued that there had been a denial of natural justice in awarding the retention monies of A$797,500 so that, even if severance of the award was possible, the award

61 (2015) 324 ALR 372 (*ASI*).

62 *William Hare UAE LLC v. Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403.

63 Ibid [62]–[63].

64 This can be contrasted with *Emerald Grain Australia Pty Ltd v. Agrocorp International Pte Ltd* [2014] FCA 414, in which the Court stated that in determining whether a party had been given adequate notice of an arbitral tribunal considering an issue, the relevant test was twofold: first, that the party would not have foreseen the possibility of the tribunal's reasoning, and second, that the party could have possibly persuaded the tribunal otherwise if the tribunal had given adequate notice.

65 *William Hare UAE LLC v. Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403 at [124]–[125] and [130].

should not have been enforced, and that the award was incapable of severance. The NSW Court of Appeal unanimously dismissed the appeal, finding that ASI had failed to show real practical unfairness or injustice that could amount to a denial of natural justice in the making of the award in respect of the retentions monies of A$797,500. In relation to severability, the Court referred to the 'centuries-old power' of the court to partially enforce awards where no injustice is caused and the award is clearly separate and divisible, and found that the award was severable in this instance.[66]

No 'special rule' that indemnity costs are payable following a failed application to set aside an arbitral award

Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd (No 2) [67]

In *Sino Dragon*, the Court considered whether there was a 'special rule' that indemnity costs should be ordered against parties that have unsuccessfully sought to set aside an arbitral award under Article 34(2) of the Model Law, the effect of which would be to reverse the usual position and provide for a rebuttable presumption in favour of indemnity costs.

In a previous decision, the Federal Court had dismissed an application by Sino Dragon to set aside an arbitral award pursuant to Article 34(2) of the Model Law.[68] As the successful party, Noble Resources sought for its costs to be paid on an indemnity basis, arguing that there should be a default rule providing that indemnity costs be awarded in proceedings where a party has unsuccessfully sought to set aside an arbitral award based on the character and context of international commercial arbitration, the 'exceptional nature' of an Article 34 challenge, public policy and international precedent.[69]

However, the Court did not accept those submissions, finding that as the Model Law and the IAA are silent on how costs are to be dealt with in an Article 34 challenge, it is the law of the forum that would determine the principles to be applied to the indemnity costs question.

While the Court noted the approach of the English and Hong Kong courts in *A v. B (No. 2)*[70] and *A v. R*,[71] which supported Noble Resources' position, it found that those cases were applying their respective laws of the forum, supported by the public policy of each such forum, rather than speaking generally about a uniform international approach. In that context, the Court found that there was no legislative intent in the IAA to create a special category for awards of indemnity costs,[72] no reason why failed Article 34 challenges should have a special rule and no reason why existing principles for determining indemnity costs were inadequate. For these reasons, *inter alia*,[73] the Court found that there was no special rule

66 *AIS* (2015) 324 ALR 372, [57]–[60]. In this respect, the Court noted that it was essential to 'pay due regard' (citing *TCL Air* [2014] FCAFC 83 at 75) to decisions taken in other New York Convention jurisdictions in relation to similar legislation, including *JJ Agro Industries (P) Ltd v. Texuna International Ltd* [1992] 2 HKLR 391.

67 [2016] FCA 1169 (*Sino Dragon*).

68 *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd* [2016] FCA 1131.

69 *Sino Dragon* [2016] FCA 1169 at [5].

70 [2007] 1 Lloyd's Rep 358.

71 [2009] 3 HKLRD 389.

72 *Sino Dragon* [2016] FCA 1169 at [12].

73 Including partial reliance on the Victorian Court of Appeal in *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC* (2011) 38 VR 303 at [55] to [58] and [335] to [337].

as contended. In any case, based on the application of existing principles, the Court made orders that Sino Dragon should pay two-thirds of Noble Resources' costs on an indemnity basis, as the Article 34 challenge was found not to have reasonable prospects of success.

On this question of the existence of a 'special rule', it is worth noting remarks made by other judges of the Federal Court, including in *Ye v. Zeng (No. 5)*,[74] a similar case where the Court awarded indemnity costs applying 'entirely conventional and unremarkable authority'.[75] Although the Court found that in that case it was unnecessary to decide the question of whether a special rule should be adopted in Australia, it did note that 'powerful considerations to that effect' can be seen.[76] The question of the 'special rule' is likely to be raised in future cases.[77]

Two other important decisions

MOL Bulk Carriers Pte Ltd v. Sin-Tang Development Pte Ltd[78]

Sin-Tang applied for proceedings initiated by MOL to be stayed on the grounds that either it was not a party to the relevant contract or, alternatively, there was an arbitration clause in that contract.

However, problematically for Sin-Tang, it had not made an application under the relevant Federal Court Rules for an application seeking a stay under Section 7(2) of the IAA. MOL argued that, without filing an application, any party seeking the exercise of the Court's power to stay must accept that it is a party to the arbitration agreement, which Sin-Tang denied, before it can enforce its terms by seeking the stay. While the Court did not agree with the characterisation of Sin-Tang's approach as inconsistent, it was disinclined, in the absence of an application and full submissions, to stay the proceedings on the basis of the arbitration claim, even though the Court recognised there was power in a clear case to do so. It was not sufficient that an application to stay proceedings might be brought under the arbitration clause: an actual application needed to be brought to enforce the clause. That is, Sin-Tang could not refuse to bring an application to avoid relying on the clause, but at the same time point to the existence of the arbitration clause that might apply as a reason to stay the proceedings under Section 7(2).

Robotunits Pty Ltd v. Mennel[79]

In *Robotunits*, the Supreme Court of Victoria examined whether Section 7(2)(b) of the IAA requires that a matter be determined to be 'sustainable', meaning that it has reasonable prospects of success, before it is referred to arbitration. Robotunits had commenced proceedings seeking the return of payments made to its former managing director, Mennel,

74 [2016] FCA 850, per Allsop CJ.

75 *Ye v. Zeng* (No 5) [2016] FCA 8501 at [1].

76 *Ye v. Zeng* (No 5) [2016] FCA 8501 at [23], citing 'Public Policy in the New York Convention and the Model Law', Enforcement of International Arbitration Awards and Public Policy: Part III (Paper presented to the AMTAC and Holding Redlich Seminar, Sydney, 10 November 2014) at [56]-[77].

77 See Leon Chung and Phoebe Winch, 'Indemnity costs and the enforcement of arbitral awards in Australia', *The ACICA Review* (December 2016) at 17.

78 [2016] FCA 619 (MOL *Bulk Carriers*).

79 [2015] VSC 268 (*Robotunits*).

on the basis that the payment had been made without a legal or equitable basis. Mennel sought a stay of proceedings under Section 7(2)(b) of the IAA, relying on an arbitration clause contained in a shareholders' agreement signed by both parties.

Neither party disputed that, on its face, the arbitration agreement was pathological, as it referred to a set of arbitration rules that did not exist. Nonetheless, the Court held that the arbitration agreement was operable. However, Robotunits resisted the stay of proceedings on two grounds. First, Robotunits submitted that a stay could only be granted under Section 7(2)(b) if the matter for determination is sustainable, and argued that Mennel's defence had no reasonable prospects of success. The Court found that Article 8 of the Model Law does not impose a requirement of sustainability,[80] and as such no requirement should be read into Section 7(2)(b) of the IAA, as to do so would involve an impermissible assessment of the merits of the case.[81] In coming to its decision, the Court noted the need for an approach of 'minimal curial intervention' when approaching arbitration agreements, warning against the 'temptation of domesticity', in which courts interpret agreements through the prism of domestic legal principles.[82]

Robotunits also resisted the stay of proceedings on the basis that the subject matter of the dispute – a breach of the Corporations Act 2001 (Cth) – was not capable of settlement by arbitration, as the allegation could constitute a serious criminal offence and there was a strong public interest in having the conduct assessed in a public forum. The Court found that, as a general proposition, there is not a sufficient element of legitimate public interest in matters involving the Corporations Act to make their resolution by arbitration (that is, outside the national court system) inappropriate.

As the Australian judiciary has made clear, although the legislative and procedural framework is important in positioning Australian as an attractive arbitral venue, the bedrock of an arbitration-friendly venue remains whether domestic courts are supportive or interventionist in their approach to arbitration.[83] It is clear from the *TCL Air* and *Robotunits* decisions that the Australian courts are committed to upholding the integrity of the arbitral

80 The Court referred to the 'reasoned judgments' of *Tjong Very Sumito v. Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 and *Tommy CP Sze & Co v. Li & Fung (Trading) Ltd* [2003] 1 HKC 418 in finding that Article 8 does not impose a requirement of sustainability (at [42]).

81 In this respect, the Court noted the differences in the language of Section 7(2)(b) of the IAA to that of legislation in other jurisdictions, in which courts had found grounds to refuse a stay where there is 'no defence to the claim': see, for example, *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334, which considered the Arbitration Act 1975 (UK) (now repealed).

82 *Robotunits* [2015] VSC 268 at [14], citing *AKN v. ALC* [2015] SGCA 18, [37], [39]. Speaking extrajudicially, Justice Croft (the presiding judge in *Robotunits*) noted that the 'temptation of domesticity' may be attractive in the short term (particularly to correct errors of law or fact made by an arbitral tribunal), but ultimately has the potential to interfere with the long-term objective of the promotion of international uniformity in international commercial arbitration practice: the Honourable James Allsop, Chief Justice of the Federal Court of Australia and the Honourable Clyde Croft, Justice of the Supreme Court of Victoria, 'The Role of the Courts in Australia's Arbitration Regime, November 2015. Commercial CPD Seminar Series, at 12–4.

83 The Honourable James Allsop, Chief Justice of the Federal Court of Australia and the Honourable Clyde Croft, Justice of the Supreme Court of Victoria, 'The Role of the Courts in Australia's Arbitration Regime, November 2015. Commercial CPD Seminar Series, at 1.

process and the finality of arbitral awards by increasing certainty in the enforcement process and adopting a strong policy of appropriate but restrained judicial supervision of international arbitral awards.[84]

iii Investor–state disputes

Australia has been a party to 21 bilateral investment treaties (BITs) since 1988,[85] all containing investor–state dispute settlement protections,[86] and six out of 10 free trade agreements (FTAs) with investment protection rules since 2003, which provide for investor–state arbitration.[87] The government is also currently engaged in two bilateral FTA negotiations[88] and five multilateral FTA negotiations.[89] On 4 February 2016, the government signed the Trans-Pacific Partnership Agreement (TPP), which has been tabled before the federal parliament and Joint Standing Committee on Treaties for consideration. The conclusion of the TPP led judicial figures to comment that the increased economic growth and integration brought by the TPP presented exciting opportunities for the Australian arbitration sector,[90] with the prospect that there will be an increase in the number of arbitrations seated in Australia.

However, the election of President Donald Trump on 8 November 2016 resulted in the withdrawal of the United States from the TPP on 23 January 2017. Without the ratification of the United States, the prospects for the TPP to enter into force are low.[91] Australian government officials, including the Trade Minister and the Prime Minister, have stated their disappointment with the recent events, but indicated an interest in pursuing ratification of the TPP regardless, or some similar alternative negotiated with other signatory states such as Japan.[92] On 21 May 2017, ministers from Australia, Brunei, Canada, Chile, Japan, Mexico, Malaysia, Peru, Singapore and Vietnam released a statement agreeing on the

84 *Hebei Jikai Industrial Group Co Ltd v. Martin* [2015] FCA 228 at [128] and Bathurst (footnote 43) at 13. However, the recent cases of *Samsung*, *Sino Dragon* and *Trina Solar*, discussed above, might be considered to be less 'arbitration friendly' than prior cases.

85 Australia has entered into BITs with Argentina, China, the Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam.

86 Luke Nottage, 'Investor State Arbitration Policy and Practice in Australia', Investor-State Arbitration Series, Paper No. 6, June 2016 at 1.

87 These are FTAs with ASEAN–New Zealand (ASEAN consists of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam), Chile, Singapore, Thailand, Korea and China (which entered into force on 20 December 2015). The FTAs with the US, Malaysia and Japan (which entered into force on 1 January 2005, 1 January 2013 and 15 January 2015, respectively) omit ISDS provisions, as does the Investment Protocol (which entered into force on 1 March 2013) to the Australia–New Zealand Closer Economic Relations Trade Agreement.

88 With India and Indonesia.

89 The Environmental Goods Negotiations, the Australia-Gulf Cooperation Council, the Pacific Agreement on Closer Economic Relations, the Regional Comprehensive Economic Partnership Agreement and the Trade in Services Agreement.

90 The Honourable James Allsop, Chief Justice of the Federal Court of Australia and the Honourable Clyde Croft, Justice of the Supreme Court of Victoria, 'The Role of the Courts in Australia's Arbitration Regime, November 2015. Commercial CPD Seminar Series, at 1.

91 The Senate Foreign Affairs, Defence and Trade References Committee, 'Proposed Trans-Pacific Partnership (TPP), Report, February 2017, at [2.18].

92 See The Hon Steven Ciobo MP, Minister for Trade, Tourism and Investment, Transcript, 22 November 2016; The Hon Steven Ciobo MP, Minister for Trade, Tourism and Investment, 'Trans-Pacific

value of realising the TPP's benefits and agreeing to launch a process to assess options to bring the TPP into force expeditiously, with plans to meet again in November 2017 to further discuss the assessment of the options.[93]

In April 2011, the former federal government released a trade policy statement announcing a discontinuance of its practice to seek the inclusion of investor–state dispute settlement (ISDS) procedures in trade agreements with developing countries.[94] However, the new federal government has since tempered this stance, stating that it will consider ISDS provisions in FTAs on a case-by-case basis and would consider dropping its opposition if there was a substantial market access offering,[95] but is still opposed to ISDS provisions that restrict its capacity to regulate in areas such as health and the environment.[96] For example, the Australia–China FTA (which entered into force on 20 December 2015) includes an ISDS provision, but with significant carve-outs and safeguards in areas such as public welfare, health and the environment, and remarkably limited protections granted to investors.[97] On 7 June 2016, the relevant spokesperson for the opposition Labour Party announced that if successful at the 2016 election, it would not agree to ISDS in future trade agreements. The federal government was instead re-elected, so the proposal was never adopted as government policy.[98]

Philip Morris Asia Limited v. The Commonwealth of Australia[99]

In June 2011, following the announcement by the former federal government of the proposed plain cigarette packaging legislation,[100] Philip Morris Asia Limited (PM Asia) (based in Hong Kong), which owns 100 per cent of the shares of Philip Morris (Australia) Limited (PM Australia), which in turn owns 100 per cent of the shares of Philip Morris Limited (PML), served a notice of claim on the Commonwealth of Australia. The claim stated PM Asia's intention to pursue legal action in relation to the plain packaging legislation, in reliance of an alleged breach of the Australia–Hong Kong BIT (A–HK BIT).[101] This UNCITRAL arbitration

Partnership', Media Release, 22 January 2017; AAP, 'Turnbull remains committed to TPP', Sky News, 27 January 2017 available at www.skynews.com.au/news/politics/federal/2017/01/27/turnbull-remains-committed-tottp.html (accessed 27 January 2017).

93 'Trans-Pacific Partnership (TPP) Agreement', Ministerial Statement, 21 May 2017.

94 Commonwealth, Gillard Government Trade Policy Statement: Trading Our Ways to More Jobs and Prosperity (2011) at 14.

95 Peter Martin, 'Robb to Tackle Trans Pacific Partnership', Business Day, *The Sydney Morning Herald*, 6 December 2013.

96 Commonwealth Department of Foreign Affairs and Trade, Frequently Asked Questions in Investor–State Dispute Settlement (ISDS) (2013): www.dfat.gov.au/fta/isds-faq.html.

97 Monichino QC and Fawke, 'International Arbitration in Australia: 2014/2015 in review' (2015) 26 *ADJR* 192, 205.

98 The Honourable Penny Wong, Address, Export Council of Australia, Australian Chamber Of Commerce And Industry Trade Forum, Sydney', 7 June 2016.

99 (Jurisdiction) (UNCITRAL, PCA Case No. 2012-12).

100 Tobacco Plain Packaging Act 2011 (Cth). The manufacturing prohibition commenced on 1 October 2012 and the sales prohibition on 1 December 2012.

101 Agreement with Hong Kong concerning the Promotion and Protection of Investments, signed on 15 September 1993, Australia–Hong Kong, 1748 UNTS 385 (which entered into force on 15 October 1993).

was launched while PM Australia's (together with other tobacco companies') challenge to the legislation's constitutional validity were on foot in the High Court of Australia.[102] As far as we are aware, this is the first ever investment treaty claim against Australia.

In broad terms, PM Asia alleged that the legislation virtually eliminates Philip Morris's branded business due to the substantial deprivation of its valuable intellectual property and goodwill, with the consequential effect of undermining the economic rationale of its investments and substantially diminishing the value of PM Asia's investments in Australia in circumstances where plain packaging will undermine rather than support the purported public health rationale of the legislation.

PM Asia sought an order for the suspension of the enforcement of the legislation or compensatory damages for the loss suffered by means of damage to its investments as a result of the enactment and enforcement of the legislation 'in an amount to be quantified but of the order of billions of Australian dollars'.

Aside from responding to PM Asia's individual claims, the Commonwealth of Australia also raised some objections as to the jurisdiction and overall merits of PM Asia's claims. At the time PM Asia acquired its shares in PM Australia, the government had publicly committed to introduce the legislation by 2012, and as such, the Commonwealth argued that an investor cannot buy into a dispute by making an investment in full knowledge of the relevant facts (i.e., that a dispute is either existing or highly probable). Against that backdrop, it was argued that the legislation cannot be regarded as a breach of any of the substantive provisions under the A–HK BIT, and that the A–HK BIT does not confer jurisdiction on an arbitral tribunal to determine pre-existing disputes that have been repackaged as BIT claims many months after the relevant governmental measure has been announced.

Following a hearing regarding bifurcation of the proceedings in February 2014, the arbitral tribunal on 14 April 2014 decided to split the proceedings into two phases to address the Commonwealth's jurisdictional objections and the merits of the dispute separately.

In December 2015, the tribunal issued a unanimous decision, finding that the tribunal had no jurisdiction to hear PM Asia's claim. In May 2016, the tribunal released a redacted version of the award, in which the tribunal concluded that PM Asia's claim constituted an abuse of right, and as such the claims raised in the arbitration were inadmissible and the tribunal was precluded from exercising jurisdiction over the dispute.

The tribunal held that the commencement of investor–state arbitration would constitute an abuse of right (or abuse of process) when an investor changes its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable. The tribunal considered that a dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialise.[103]

In applying that test to the facts of the present case, the tribunal found that a dispute concerning the plain packaging legislation was foreseeable as early as April 2010 – well

102 In October 2012, a majority of the High Court ruled that even though the Tobacco Plain Packaging Act 2011 (Cth) restricted the intellectual property rights of tobacco companies and regulated the packaging and presentation of tobacco products, the legislation was not an 'acquisition' under Section 51(xxxi) of the Australian Constitution, as there was no proprietary benefit or advantage conferred on the Commonwealth of Australia: *JT International SA v. Commonwealth; British American Tobacco Australasia Ltd v. Commonwealth* (2012) 291 ALR 669.

103 *Philip Morris Asia Limited (Hong Kong) v. the Commonwealth of Australia*, award on jurisdiction and admissibility (Permanent Court of Arbitration, PCA Case No. 2012-12, 17 December 2015) at [554], [585].

before the decision to restructure was made – when the former Prime Minister unequivocally announced the government's intention to introduce the legislation. The tribunal found that from this date, there was at least a reasonable prospect that the legislation would eventually be enacted and that a dispute would arise.[104]

The tribunal considered in its conclusion that there was no uncertainty about the government's intention from that point in time, which was reinforced by the evidence regarding PM Asia's professed alternative reasons for the restructuring. The tribunal found that this evidence showed that the principal, if not sole, purpose of the restructure was to gain protection under the A-HK BIT to bring a claim against the Commonwealth. The tribunal found that, not only was the dispute foreseeable, it was in fact foreseen by PM Asia when it chose to change its corporate structure.[105] The tribunal noted that it would not normally be an abuse of a right to bring a BIT claim in the wake of a corporate restructuring if the restructuring was justified independently of the possibility of bringing such claim. However, in this case, the tribunal was not persuaded by PM Asia's submission that tax or other business reasons were determinative factors in the decision to restructure.[106]

WTO disputes

Disputes concerning Australia's tobacco plain packaging requirements have also been brought before the WTO. Following unsuccessful dispute consultations with Australia separately requested by Ukraine,[107] Honduras[108] and the Dominican Republic[109] in 2012, and Cuba[110] and Indonesia[111] in 2013, each state filed a request with the WTO Secretariat for the establishment of a WTO dispute settlement panel. At the request of the five states, five dispute settlement panels were established by the WTO Dispute Settlement Body to examine complaints related to the same matter (the tobacco plain packaging measure).

The states' complaints are largely similar, with each alleging that the plain packaging measures appear to be inconsistent with Australia's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Agreement on Technical Barriers to Trade and the General Agreement on Tariffs and Trade 1994. On 5 May 2014, the same panellists were appointed in all five disputes and the parties agreed to the harmonisation of the timetable for the panel proceedings in all five disputes. Some 40 WTO members also reserved their third-party rights to join the dispute, with their positions variously placed on the side of the complainant parties or Australia, or as a neutral party.

On 28 May 2015, Ukraine suspended its proceedings in the dispute, stating that the suspension will be with a view to finding a mutually agreed solution with Australia.

104 Ibid, at [586].

105 Ibid, at [587].

106 Ibid at [582].

107 Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS434).

108 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS435).

109 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS441).

110 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS458).

111 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS467).

In May 2017, media outlets reported that the WTO panel had rejected the states' cases against Australia, and had published a confidential draft report to the parties to the dispute. The WTO's ruling is not expected to be made public until July 2017,[112] and a spokesman for British American Tobacco was quoted as stating there is a high likelihood of an appeal by some or all of the parties.[113]

White Industries Australia Limited v. The Republic of India[114]

In another investor–state dispute, Australian mining company White Industries Australia Limited was successful in obtaining an arbitral award against India for approximately A$10 million. As far as we are aware, this is the first known investment arbitration award in favour of an Australian investor. White initiated the arbitration under the BIT between Australia and India[115] because of the severe delay that White experienced in the Indian courts on matters concerning the enforcement of an earlier ICC award delivered in 2002 against Coal India (a state-owned company).

iv State–state disputes: Timor-Leste v. Australia

In April 2013, the Republic of Timor-Leste notified the Australian government that it had instituted arbitral proceedings in the Permanent Court of Arbitration (PCA) against Australia under Article 23 of the Timor Sea Treaty[116] in relation to a dispute concerning the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS).[117] The CMATS regulates rights to access petroleum and gas deposits in the marine area between the Australian and Timorese coastlines known as the 'Timor Gap', including the highly lucrative Greater Sunrise field.

Timor-Leste was challenging the validity of the CMATS, alleging that Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage.[118] A media release from the Australian government in response to the arbitration noted that the allegations were not new, and that it was the position of successive Australian governments not to confirm or deny the allegations. However, the government maintained it conducted the CMATS negotiations in good faith, and Australia considered that the CMATS treaty was valid and remained in force.[119]

On 17 December 2013, Timor-Leste instituted proceedings against Australia in the International Court of Justice (ICJ) relating to the seizure and subsequent detention of

112 Bruce Baschuk, 'Tobacco Logo Ban Said to Get WTO Backing in Landmark Case', Bloomberg News, 4 May 2017.

113 'Tobacco company flags appeal over plain packaging', BBC News, 5 May 2017, available at www.bbc.com/news/world-australia-39814003 (accessed 10 May 2017).

114 (Award) (UNCITRAL, 30 November 2011).

115 Agreement with the Republic of India on the Promotion and Protection of Investments, signed on 26 February 1999, Australia–India, [2000] ATS 14 (which entered into force on 4 May 2000).

116 Timor Sea Treaty between the Government of East Timor and the Government of Australia, signed on 20 May 2002, Australia–East Timor, 2258 UNTS 3 (which entered into force on 2 April 2013).

117 Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, signed on 12 January 2006, Australia–East Timor, 2483 UNTS 359 (which entered into force on 23 February 2007).

118 Joint media release, 'Australian Minister for Foreign Affairs and Special Minister of State, Arbitration under the Timor Sea Treaty', 3 May 2013.

119 Ibid.

documents and data that contained correspondence between the government of Timor-Leste and its legal advisers, including documents relating to the pending arbitration. The seizure was carried out by officers of the Australian Security Intelligence Organisation (ASIO) on the office of an Australian lawyer representing Timor-Leste.[120] On 3 March 2014, the ICJ handed down its decision, ordering by a margin of 15 votes to one that Australia must ensure that the content of the seized material is not used to the disadvantage of Timor-Leste before the arbitration is determined, to keep the materials and any copies under seal, and not to interfere in communications between Timor-Leste and its legal advisers.[121]

The Australian government returned the documents to Timor-Leste on 12 May 2015, and the case has now been removed from the ICJ's list.[122]

In June 2015, Timor-Leste announced its intention to reactivate the arbitration in the PCA,[123] and conciliation proceedings in the PCA were initiated by Timor-Leste on 11 April 2016.[124] The Australian government objected and maintained that the PCA did not have competence, but on 19 September 2016, the PCA found against the Australian government and found that the conciliation proceedings would continue.[125]

After meetings in October 2016, the Foreign Ministers of Timor-Leste and Australia together with the Conciliation Commission issued a trilateral joint statement in January 2017, stating that Timor-Leste had decided to terminate the CMATS, pursuant to Article 12(2) of that Treaty, and confirmed the commitment of both countries to negotiate permanent maritime boundaries under the auspices of the Conciliation Commission.[126] The details of the conciliation are confidential, and there is no time frame for when a decision is expected.

III OUTLOOK AND CONCLUSIONS

The international arbitration landscape in Australia has seen a raft of activities in the past few years, all of which were purposefully aimed at bolstering Australia's reputation as a first-rate, arbitration-friendly jurisdiction and as a desirable situs of international commercial arbitrations, particularly in the Asia-Pacific region. It is too early to tell if the IAA amendments truly meet the objectives that they have set out to achieve, but the international arbitration community in Australia remains fairly positive that change is on the horizon.

120 Tom Allard, 'ASIO Raids Office of Lawyer Bernard Collaery Over East Timor Spy Claim', *The Sydney Morning Herald*, 3 December 2013.

121 Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v. Australia*) (Order of 3 March 2014 on a Request for the Indication of Provisional Measures), International Court of Justice, 3 March 2014 at [49].

122 Press release (No. 2015/15), 'Questions relating to the Seizure and detention of Certain Documents and Data (*Timor-Leste v. Australia*): Case removed from the Court's list at the request of Timor-Leste', International Court of Justice, 12 June 2015.

123 See footnote 108.

124 Press release, 'Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia: The Conciliation Commission Concludes First Procedural Meeting' Permanent Court of Arbitration, 29 July 2016.

125 'Decision on Australia's Objections to Competence' (PCA Case No 2016-10), Permanent Court of Arbitration, 19 September 2016.

126 Press release, 'Joint Statement By The Governments Of Timor-Leste And Australia And The Conciliation Commission Constituted Pursuant To Annex v. Of The United Nations Convention On The Law Of The Sea', 9 January 2017.

Appendix 1

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