

International Arbitration Amendment Act 2010 (Cth) – Towards a New Brand of Australian International Arbitration

Peter Megens* and Adam Peters**

On 6 July 2010, the International Arbitration Amendment Act 2010 (Cth),¹ amending the International Arbitration Act 1974 (Cth),² came into force in Australia after receiving Royal Assent. The Amending Act introduces and implements important reform in relation to Australia's international arbitration regulatory framework. These reforms will impact on parties involved in cross-border construction disputes who choose to have their disputes resolved in Australia, or who choose to enforce a foreign arbitral award in Australia. This paper examines the significant features of the Amending Act and summarizes the key changes that it implements in the area of international arbitration practice and procedure in Australia. Part I canvasses the background and scope of the review of the IAA and Amending Act. Part II addresses the key amendments with respect to the enforcement of foreign arbitral awards. Part III discusses the incorporation of the UNCITRAL Model Law on International Arbitration (as amended in 2006)³ and the practical effect that this will have on international arbitral disputes governed by the IAA (as amended). Lastly, the paper considers in Part IV the salient features of the 'opt-in' and 'opt-out' regime introduced by the Amending Act and the increased powers available to arbitrators under the new regime.

Introduction

The growing importance of arbitration as a means for resolving construction disputes has resulted from the many of the perceived advantages of arbitration over traditional litigation in the courts. The perceived benefits relate to such matters as confidentiality, privacy, expertise of arbitrators, reduced costs, speedier final resolution, flexibility, preservation of continuing business relationships and avoidance of crowded court lists. Some of these perceived benefits are more illusory than real, but the point remains that arbitration is a viable and at times a more effective and more efficient alternative for resolving disputes than traditional litigation through the courts.

* BComm, LLB (Hons), Grad Dip Finance Law, Adjunct Professor of Law, Murdoch University, Partner Mallesons Stephen Jaques, Solicitors, FIAMA, FCI Arb, FACICA, FSIA, Chartered Arbitrator.

** BComm, LLB (Hons), Senior Associate, Mallesons Stephen Jaques (Melbourne).

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1 The *International Arbitration Amendment Act 2010* (Cth) is referred to as the Amending Act throughout this paper.

2 The *International Arbitration Act 1974* (Cth) is referred to as the IAA throughout this paper.

3 The *UNCITRAL Model Law on International Arbitration* (as amended in 2006) is referred to as the Model Law (2006) or the "2006 Model Law" throughout this paper.

It is generally recognised that the best feature and most prominent advantage of arbitration over traditional court litigation can be found in the context of cross-border disputes. This is particularly so in the context of enforceability, where by reason of the New York Convention which has been signed by 144 State members, a party who receives a favourable arbitral award can, with much greater ease and effectiveness, enforce that award in any one of the Convention countries. There is simply no parallel regime (in terms of global application) to enforce a judgment obtained in a State court of one country in other countries. In the context of cross-border construction transactions, between parties who ordinarily reside in different countries, it is imperative that they include in their contract an agreement to arbitrate any disputes arising out of or under their contract so as to provide an effective means for enforcing any award obtained following the dispute resolution process. If the parties do not have an arbitration clause in their contract, there is a real, and not insignificant, risk that a party who obtains a favourable judgment may not be able to enforce it against the other contracting party who has its assets in a different jurisdiction.

International arbitration is, in many respects, a self-contained market which operates within a wider industry of dispute resolution services available to parties involved in cross-border transactions who fall into dispute. And within the market of international arbitration, there are institutional bodies and countries vying for position to convince parties to use their particular brand of international arbitration dispute resolution services. In fact, it has been noted recently that with the goal of becoming more competitive in this market, several international arbitration institutions operating within our region, such as the Singapore International Arbitration Centre and the Australian Centre for International Commercial Arbitration, have recently modified their rules, administrative process, fee structure and have established impressive new facilities to encourage parties to resolve their disputes in those particular regions.⁴

The amendments introduced by the Amending Act are also an integral part of a broader movement to establish Australia's place as a preferred forum for international arbitration. Whilst Australia will always have to contend with its tyranny of distance from other countries, in order to maximize the attractiveness of Australia as a forum for international arbitration, it was necessary for Australia to reform its regulatory framework. This was, in part, due to several decisions of the courts (which are discussed in this paper) which introduced some uncertainty into the application of the regulatory framework which existed prior to the Amending Act and which generally had the effect of working against Australia promoting itself as a venue of choice for parties to resolve their disputes. This is important for parties who are involved in cross-border transactions of all types, including those in the construction industry, as the choice of venue and regulatory regime which governs arbitration proceedings can make a real and significant difference to the effectiveness and efficiency of the arbitral process.

Significantly, the Amending Act gives the force of law to most of the key provisions of the Model Law (2006). Following the enactment of the Amending Act, Australia became one of only nine jurisdictions to adopt the Model Law (2006),⁵ thereby signalling to the broader arbitration community its intent to establish itself as a progressive venue for the resolution of international arbitral disputes with the view to remaining at the forefront of international developments. In itself, this represented a

4 Stephen McCormish, 'New Dawn for International Arbitration', *Lawyers Weekly*, 2 September 2010.

5 Those jurisdictions are Australia (2010), Georgia (2009), Ireland (2010), Mauritius (2008), New Zealand (2007), Peru (2008), Rwanda (2008), Slovenia (2008) and Florida (2010).

significant step towards improving the certainty, efficiency and cost-effectiveness of international arbitration in Australia.

At the same time, it will take time before the full benefit and utility of the amendments to the regulatory framework manifest themselves at a practical level as parties, arbitrators and the courts alike deal with the practical effect of the amending provisions for the first time. Nevertheless, on their face, the amendments to the IAA, together with a judiciary that is supportive of arbitration, have the potential to dramatically improve the Australian international arbitration landscape.

Part I - Background and Scope of the Amending Act

On 21 November 2008, the Attorney-General, Robert McClelland, announced a wide ranging review of the IAA and released a discussion paper⁶ as the basis for stimulating debate and framing consultation on potential amendments to be made to the IAA. A webpage was created on the Attorney-General's website outlining the scope of the review and, ultimately, links to 30 submissions and comments made by various interested organisations, practitioners, Judges, barristers and academics were established to provide transparency and promote discussion on which proposed amendments ought to be adopted.⁷ The discussion paper outlined the following three objectives in amending the IAA, being to:

- '(i) ensure it provides a comprehensive and clear framework governing international arbitration in Australia;*
- (ii) improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration; and*
- (iii) consider whether to adopt 'best-practice' developments in national arbitral law from overseas.'*⁸

In addition to these objectives, the review also cited the aim of ensuring that the IAA 'best supports international arbitration in Australia'.⁹ The Attorney-General also issued a media release on 21 November 2008 outlining the impetus for the review of the IAA. The Attorney-General cited the need to ensure that the IAA provides a 'clear and comprehensive framework governing international arbitration in Australia' and that the Australian Government's aim was 'to adopt international best-practice developments in arbitral law'.¹⁰ Behind these stated reasons for the review were a number of problematic

6 Attorney-General's Department, *Review of the International Arbitration Act 1974*, Discussion Paper, November 2008 ("Discussion Paper").

7 See Attorney General's Department, *Review of International Arbitration Act 1974*, (2008) <<http://www.ag.gov.au/internationalarbitration>>.

8 Discussion Paper, above n 6, 2.

9 Ibid [4].

10 Attorney-General's Department, 'Australian Government Moves to Modernise International Arbitration' (Press Release, 21 November 2008).

decisions by the Australian courts, including *Australian Granites Limited v Eisenwerk*,¹¹ *Resort Condominiums International Inc v Bolwell and Another*¹² and *American Diagnostica Inc v Gradipore*,¹³ which had created uncertainty in the law.¹⁴

Further, given that the Model Law was amended in 2006, it was necessary to update the IAA to reflect those amendments. Importantly, the Attorney-General also highlighted the Australian Government's commitment to 'developing Australia as a regional hub for international commercial dispute resolution', noting the importance of Australia's participation in the 'dramatic growth of international commercial arbitration in recent years, particularly in the Asia-Pacific region'.¹⁵ This movement toward Australia becoming a regional hub for international arbitration was recently reaffirmed by the Attorney-General when he stated at the launch of the Australian International Disputes Centre in Sydney that he saw 'a vibrant international arbitration culture as a vital tool for Australian business in the modern, global economy'. He further stated that a key component of building that culture would be to promote an "'Australian brand of arbitration" — one that genuinely meets the needs of the parties ... [by] doing away with unnecessary formalities and get[ting] on with identifying and solving the real dispute in issue... arbitration [which] delivers swift and cost-competitive outcomes.'¹⁶

With these objectives in mind, the review of the IAA, covered the following areas:¹⁷

- the meaning of the writing requirement for an arbitration agreement and whether it should be amended to reflect the broader, updated definition in the Model Law;
- the removal of the Australian courts' residual discretion to refuse to enforce awards, reversing the potential effect of *Resort Condominiums*;
- the exclusion of the application of State and Territory laws to international commercial arbitrations taking place in Australia - reversing *Gradipore*;
- the reversal of the *Eisenwerk* decision such that adoption by the parties of a set of institutional arbitral rules would not result in an implied opting out of the Model Law;
- the clarification of drafting inconsistencies in relation to the opt-in provisions of the IAA;
- the adoption of the 2006 amendments to the Model Law;
- clarification of whether the courts or other authority should exercise various functions under the Model Law, such as those in relation to the appointment and challenges to arbitral tribunals;
- whether the Federal Court should be given exclusive jurisdiction over all matters arising under the IAA;
- some other recommendations for improving the IAA.

11 [2001] 1 Qd R 461 (*'Eisenwerk'*).

12 [1995] 1 Qd R 406.

13 (1998) 44 NSWLR 312.

14 See also Juli Tomaras, *International Arbitration Amendment Bill 2009*, No. 163, 1 June 2010, 5.

15 Above n 10.

16 Attorney-General Robert McClelland, 'Remarks at the Launch of the Australian International Disputes Centre' (Speech delivered in Sydney on Wednesday, 3 March 2010).

17 See generally, Discussion Paper, above n 6.

Almost a year after consultation and consideration of the various submissions and relevant case law, journal articles and overseas arbitral practice, the International Arbitration Amendment Bill 2009 (Cth) was read for the first time in the House of Representatives on 25 November 2009.¹⁸ International arbitration practitioners reviewed the 2009 Bill and provided further submissions to the Government seeking amendments to the Bill clarifying and adding certain measures. In particular, clarification was sought in relation to the application of the ‘opt-in’ regime under the IAA and new provisions were proposed concerning security for costs, additional powers for arbitral tribunals to obtain and consider evidence, and the immunity from liability for entities charged with appointing arbitrators.¹⁹ The Government adopted some of the proposed amendments and circulated a Schedule of Amendments. *The International Arbitration Act Amendment Bill 2010* (Cth) was passed by the Houses of Representatives on 13 May 2010 and the Senate on 17 June 2010. The Amending Act was then given Royal Assent and commenced operation on 6 July 2010.²⁰

The amendments to the Act can generally be divided into the following four categories:²¹

- (a) Amendments to the application of the Act and the Model Law.
- (b) Amendments concerning the interpretation of the Act.
- (c) Amendments to provide additional option provisions to assist a party to a dispute.
- (d) Miscellaneous amendments to improve the operation of the Act.

Before exploring in detail some of the more specific amendments to the IAA implemented by the Amending Act, it is important to highlight the addition of a new ‘Objects’ section to the IAA under section 2D. The new section 2D reads as follows:

‘The objects of this Act are:

- (a) *to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and*
- (b) *to facilitate the use of arbitration agreements made in relation to international trade and commerce; and*
- (c) *to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and*
- (d) *to give effect to Australia’s obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and*

18 *International Arbitration Amendment Bill 2009* (Cth).

19 Supplementary Explanatory Memorandum, *International Arbitration Amendment Bill 2009* (Cth);

20 It should be noted that Items 6, 8 and 25 of Schedule 1 commenced on 7 December 2009, being the commencement date of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth).

21 As set out in the Outline to the Revised Explanatory Memorandum, *International Arbitration Amendment Bill 2010* (Cth), incorporating the Amendments made by the House of Representatives to the Bill as Introduced (‘Revised Explanatory Memorandum’).

- (e) to give effect to the *UNCITRAL Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
- (f) to give effect to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* signed by Australia on 24 March 1975.’

The new section 2D should be read with the addition of section 39 to the IAA, which details the matters that courts must have regard to when interpreting and exercising various functions and powers under the IAA, such as in relation to the enforcement or setting aside of arbitral awards. More specifically, section 39(2)(a) requires courts to have regard to the objects of the IAA. As the Explanatory Memorandum makes clear, these objects were inserted into the IAA principally to further the primary purpose of the IAA, namely, to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes.²² Moreover, it is apparent that these objects are designed to ensure that Australian courts take a more ‘facilitative’, and arguably a more ‘pro-international arbitration’, approach, in the sense of being more willing to enforce foreign awards (and less willing to set aside awards made within Australia) and paying due regard to and giving effect to the various international instruments regulating the field.

Part II - Enforcement of Foreign Arbitral Awards

A. New Federal Court jurisdiction

A key area of focus by Parliament in the Amending Act was that of the enforcement of foreign arbitral awards. It is not surprising that this area of the IAA should receive such attention as an important distinguishing feature and strength of arbitration compared to other international dispute resolution processes, including litigation, is that it is generally easier and more effective to enforce arbitral awards than judgments internationally. Overall, a clear intention to facilitate and ‘streamline’ arbitral enforcement mechanisms can be deduced from the Amending Act. This intention is particularly evident in how the various enforcement-related amendments are designed to increase certainty in the law principally by limiting and, in some cases, removing the courts’ discretion to refuse to enforce foreign arbitral awards.

A key issue addressed by the Amending Act, is the jurisdictional uncertainty in Australia in respect of the application of the IAA and the States’ and Territories’ Commercial Arbitration Acts²³ to the enforcement of international arbitral awards. For example, in *Brali v Hyundai Corp*,²⁴ the NSW Supreme Court held that a foreign award gives rise to a cause of action under State law thereby conferring

²² Ibid. [4]-[7].

²³ *Commercial Arbitration Act 2010* (NSW) (replacing the *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration Act 1986* (SA); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1986* (ACT); and *Commercial Arbitration Act 1985* (ACT).

²⁴ (1988) 15 NSWLR 734.

jurisdiction on the State court to enforce the arbitral award.²⁵ Further, the prospect of having a number of different State and Territory Supreme Courts continuing to interpret the same legislative framework gave rise to some concern of inconsistent findings across different jurisdictions within Australia, which, if correct, would do little to enhance Australia's reputation in the international community.

In an attempt to address these concerns, the Government suggested in its 2008 Discussion Paper that the Federal Court of Australia should be given exclusive jurisdiction for all matters arising under the IAA. Indeed, the Attorney-General noted at the time that 'one advantage of such a move... may be the development of a more uniform body of jurisprudence in applying the IAA.'²⁶ This suggestion received staunch criticism from the Chief Justices of the State and Territories Supreme Courts who argued that '[n]othing is more calculated to undermine this sense of [judicial] collegiality or the prospect of a national judiciary than this kind of suggestion'.²⁷ The Chief Justices also disputed the existence of any lack of consistency between the courts.²⁸

Perhaps, because of this criticism, but more likely because of the political complexities involved, instead of being conferred with exclusive jurisdiction, the Federal Court was conferred with *concurrent* jurisdiction over IAA matters together with the State and Territory Supreme Courts.²⁹ This is reflected in section 8(3) of the IAA, which provides that 'a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.' An earlier version of the Bill suggested there might be an additional leave requirement to be sought from the Court. This requirement had the potential to create an additional hurdle to enforcing a foreign award by conferring a broad catch-all discretion upon courts to refuse enforcement.³⁰ Lobby groups were successful in persuading the Government to amend the Bill to remove the requirement for leave.

There can be little doubt that the conferral of jurisdiction on the Federal Court over IAA matters ought to result in increased efficiency in relation to the enforcement of arbitral agreements and awards in Australia and is a welcome change. However, the precise impact of the introduction of the Federal Court into the framework regulating arbitration agreements and awards in Australia, both from a jurisprudential standpoint as well as at a practical level, remains to be seen. In particular, it remains to be seen to what extent the arbitration community embraces the Federal Court as their venue of choice when court assistance is sought.

It is hoped that the creation of new specialist arbitration lists, such as the recently established List G of the Supreme Court of Victoria will also enhance the quality, certainty, efficiency and cost-effectiveness of arbitral enforcement proceedings in Australia and may do so as much as, or even possibly more than, the simple conferral of jurisdiction on the Federal Court. This seems plausible not least

25 Ibid. 743.

26 Attorney-General Robert McClelland, 'Simply resolving disputes, International Commercial Arbitration Conference: Making it Work for Business', (Speech delivered at Hotel Intercontinental, Friday, 21 November 2008).

27 Chief Justices of the States and Territories, Submission to Attorney-General's Department, *Review of the International Arbitration Act 1974* (Cth), 10 December 2008, 1.

28 Ibid.

29 Concurrent jurisdiction over IAA matters was conferred on the *Federal Court by the Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2008* (Cth), Sch 2.

30 See The Honourable Justice Clyde Croft, 'Arbitration Law Reform and the Arbitration List G of the Supreme Court of Victoria' (Paper presented at BDPS discussion night, 5 May 2010), 10.

because allocating Judges with international arbitration expertise to these new lists creates a more targeted approach to handling litigation in relation to arbitrations. As His Honour Justice Croft, the Judge in charge of Arbitration List G of the Supreme Court of Victoria, recently opined, '[o]ne of the benefits of the Arbitration List is that a consistent body of arbitration related decisions will be developed by a single judge or group of judges. This should provide parties with greater certainty when judicial intervention or support is required.'³¹ Moreover, from this point of view, consistency in decision making, facilitated through the creation of dedicated arbitration lists, whether in the Supreme or Federal Courts, is as essential to improving the attractiveness of Australia as a forum for international arbitration as is the conferral of jurisdiction on the Federal Court.

However, there does remain a residual concern that a single port of call has not been established for international arbitration matters which come before the courts, and the success of the reforms made under the Amending Act will depend, in part, on the judicial approach adopted. For example, with the introduction of specialist lists not only for arbitration matters but also other disciplines throughout Australia, it remains to be seen how the courts will deal with an arbitration related issue which manifests itself in a matter, which otherwise, would be dealt with in a different list due to the subject matter which forms the substance of the overall dispute.

B. Interplay of IAA and State Commercial Arbitration Acts

A further area of uncertainty in Australia's arbitral award enforcement regime targeted by the Amending Act was in relation to the previous section 8(2) of the IAA which provided that 'a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory *in accordance with the law of that State or Territory*' (emphasis added). This provision had been interpreted by the courts to mean that an application for enforcement of a foreign award had to be made having regard to the applicable State or Territory legislation rather than under the IAA.³² Stakeholders in the field have expressed concern that this interpretation potentially added to the grounds available for a court to refuse to enforce an award, in addition to those outlined under sections 8(5) and 8(7) of the IAA, as the uniform State and Territory legislation gives the courts a wider discretion on which to refuse to enforce an award.³³ Accordingly, by removing any reference to the law of a State or Territory in section 8(2), Parliament has moved to enhance the certainty of the law in this area by evincing a clear intention that courts should no longer apply the law of State and Territories in enforcing awards and may only refuse to enforce awards on the limited grounds listed in sections 8(5) and (7) of the IAA.³⁴

31 Ibid. 24.

32 See for example *Brali v Hyundai Corp* (1988) 15 NSWLR 734; *International Movie Group Inc and Anor v Palace Entertainment Corporation Pty Ltd* (Unreported, Supreme Court of Victoria, Mahony M, 7 July 1995).

33 See Revised Explanatory Memorandum, [24]-[25]; and ACICA, Submission to Attorney-General's Department, *Review of International Arbitration Act 1974* (Cth), 8.

34 See also *International Arbitration Act 1974* (Cth), s 8(3A); and Revised Explanatory Memorandum, [26 and 40].

C. Removal of residual discretion of a court to refuse enforcement

In addition to the above amendments relating to the grounds for refusing to enforce awards, the Amending Act also introduced section 8(3A) into the IAA which clarifies that a court may only refuse to enforce an award in the circumstances provided for in sections 8(5) and 8(7).³⁵ As the Revised Explanatory Memorandum notes, this amendment was required in response to judicial authority which held that the grounds under sections 8(5) and (7) were not exhaustive such that the courts retained a residual discretion to refuse to enforce foreign awards. In particular, the intent of the amendment was to legislate out of existence the effect of the decision in *Resort Condominiums Inc v Bolwell* [1995] 1 Qd R 406 where the Queensland Supreme Court held that a court retains a discretion to refuse to enforce a foreign arbitral award even if none of the grounds in section 8 of the IAA are made out.

The existence of a residual discretion by which courts could refuse to enforce awards potentially where none of the grounds contained in sections 8(5) and 8(7) had been made out introduced uncertainty into this area of the law and was inconsistent with the New York Convention, and, in so doing, arguably had a negative impact on Australia's reputation as an attractive forum for international arbitration. Accordingly, by effectively removing this residual discretion, this amendment to the IAA reduces the uncertainty of the law relating to the enforcement of foreign awards in Australia.

D. Amendments to public policy basis for refusing to enforce an arbitral award

Previously under the IAA, section 8(7) provided that a court may refuse to enforce an award where to enforce it would be contrary to public policy, implementing Article V(2)(b) of the New York Convention. However the expression 'public policy' as used in section 8(7) was not defined, thereby posing a threat to the proper functioning of the enforcement provisions of the IAA.³⁶ To address this, the Amending Act inserts section 8(7A) which provides as follows:

'(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

- (a) the making of the award was induced or affected by fraud or corruption; or*
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.'*

The new section 8(7A)³⁷ provides guidance on when the enforcement of a foreign award would be 'contrary to public policy'. By adding some definition to the 'public policy' ground for refusing to enforce an award, Australia is doing what it can to lead the way in the development of a clearer and more effective system for the enforcement of foreign arbitral awards.

35 See Revised Explanatory Memorandum, [36]-[42].

36 The Honourable Neil Brown QC and Sam Luttrell, Submission to Attorney-General's Department, *Review of the International Arbitration Act 1974* (Cth), 16 January 2009, 4.

37 It should be noted that the new section 8(7A) now replicates section 19 of the IAA, thereby ensuring a consistent interpretation of the expression 'contrary to public policy'.

Part III - Implementation of the 2006 Amendments to the Model Law

A. Model law now covers the field

Under the new section 21 of the IAA, parties are no longer able to exclude the operation of the Model Law. Prior to the amendment of section 21, it was possible for the parties to opt-out of the application of the Model Law by agreeing that any dispute between them would be settled otherwise than in accordance with the Model Law. The parties could, for example, choose to adopt an alternative law³⁸ to apply to an arbitral proceeding or simply agree that the Model Law will not apply. While this ability to tailor the governing law of arbitration was consistent with arbitration's consensual underpinnings, it gave rise to a number of problems.

First, while the parties could choose to opt-out of the Model Law, other provisions of the IAA could continue to apply even though those provisions were reliant upon the Model Law.³⁹ Second, particular difficulties could arise if parties had agreed to exclude the Model Law but had not specified an alternative law to govern an arbitration.⁴⁰ In such a case, a dispute between the parties will be further compounded by the need to decide what law will govern the arbitral proceedings. Finally, the unamended formulation of section 21 has given rise to problematic decisions such as *Eisenwerk*.⁴¹

In *Eisenwerk*, the Queensland Court of Appeal held that if parties have chosen to adopt a set of institutional arbitral rules (in that case the ICC Rules) to govern an arbitration, then they had in that case evinced an intention to exclude the operation of the Model Law for the purposes of section 21 of the IAA.⁴² Such an implied exclusion has the detrimental consequence of depriving a party of an avenue for recourse under the Model Law that ought properly be available to it. The *Eisenwerk* decision, it is submitted, is clearly wrong and has been subject to criticism for its failure to recognise that the Model Law can co-exist with alternative systems of arbitral rules.⁴³ We note with some concern that the Qld Court of Appeal recently had an opportunity to itself overrule *Eisenwerk* but declined to do so.⁴⁴

To address these concerns, the Amending Act has revised section 21 of the IAA to provide simply that if the Model Law applies to an arbitration, the law of a State or Territory relating to the arbitration does not apply to that arbitration. The new section 21 is aptly headed "Model Law covers the field" and the ability to opt-out of the Model Law's application has noticeably been removed. This illustrates a clear Parliamentary intention to have the Model Law apply in all cases of international arbitration governed by the IAA. The amendment to section 21 also clarifies the position that if the Model Law applies, then any potentially applicable State or Territory laws (such as the state Commercial Arbitration Acts) have no residual application. Such a position makes clear, particularly to the courts, that the exclusive application of the IAA and the Model Law should not be undermined. The choice of an institutional set

38 For example, parties could expressly state in their arbitration agreement that the domestic *Commercial Arbitration Act* applies which would ultimately result in greater court supervision.

39 Revised Explanatory Memorandum, [112].

40 *Ibid.*

41 *Eisenwerk* [2001] 1 Qd R 461.

42 *Eisenwerk* [2001] 1 Qd R 461, 466.

43 See Revised Explanatory Memorandum, [113]; Croft, above n 30, 8-9.

44 *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219

of procedural rules will now also not exclude the operation of the Model Law. This amendment to section 21 also settles the much vexed issue of whether State and Territory laws have any residual application in the context of international arbitration. It is now clear that no such residual application exists.

However there have been concerns expressed that the removal of the ability to opt-out of the Model Law has “undesirably compromise[d] party autonomy”.⁴⁵ The response to these concerns is contained in the Model Law itself. In particular, Article 19 of the Model Law preserves the ability of the parties to decide what procedural rules will govern an arbitration, and Article 28 contemplates the parties’ right to decide the law that will apply to the substance of their dispute. On its face, it does not seem possible for the Model Law to always ‘cover the field’ harmoniously in circumstances where the parties have chosen to adopt a set of rules for the procedural aspects of the arbitration. In such circumstances, there are two potentially conflicting sets of rules - the Model Law and the arbitral rules chosen to govern procedure . However by enacting the new section 21, Parliament must have intended for the Model Law to ‘co-exist’ with any alternative rules which the parties have nominated to govern the arbitration. In practice, we suggest that what this is likely to mean is that the nominated rules will apply, but in the event that the nominated rules do not provide for the particular issue in dispute, then the parties may have recourse to the Model Law. Such an interpretation arguably strikes a desirable balance between maintaining the autonomy of the parties on the one hand and ensuring that the Model Law covers the field in relation to international arbitration.

B. Implementation of the 2006 Amendments

Part III of the IAA by incorporating the Model Law into Australian domestic law⁴⁶ includes the 2006 amendments to the Model Law⁴⁷ (save for the provisions relating to *ex parte* orders which do not apply). Although the original 1985 formulation of the Model Law played a significant role in assisting member states to reform and modernise their international arbitration laws, there was certainly room for improvement to make the Model Law more efficient and relevant in the face of an ever changing global economy.

Accordingly, on 7 July 2006 the Model Law was amended by UNCITRAL at its thirty-ninth session.⁴⁸ Broadly speaking, the 2006 revision to the Model Law consisted of the following amendments:

- the inclusion of a new Article 2A, which provides guidance when interpreting the Model Law;
- the relaxing of the writing requirement for an arbitration agreement in Article 7;
- the adoption of a new chapter IVA on interim measures and preliminary orders; and
- the inclusion of provisions relating to the challenge of an arbitral tribunal.

Each of these amendments is considered in greater detail in the following section.

C. Article 2A - promoting a uniform interpretation of the Model Law -

One of the amendments made to the Model Law in 2006 was the introduction of a new Article 2A, which reads as follows:

45 See Croft, above n 30, 9.

46 *International Arbitration Act 1974* (Cth), s 16.

47 *International Arbitration Act 1974* (Cth), s 15(1) and Schedule 2.

48 Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17).

'Article 2A. International origin and general principles

- (1) *In the interpretation of the [Model Law], regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith.*
- (2) *Questions concerning matters governed by the [Model Law] which are not expressly settled in it are to be settled in conformity with the general principles on which the [Model Law] is based.'*

Article 2A is modelled on a similar provision in the United Nations Convention on Contracts for the International Sale of Goods.⁴⁹ It exists as an aid for interpretation and seeks to promote a uniform understanding of the Model Law.⁵⁰ Whilst it is an interpretive provision, its objects are similar to the interpretive provision contained in the Amending Act, being to encourage a more facilitative and pro-international arbitration approach.

D. Writing requirement in Article 7

Although the 2006 revision of the Model Law provides member states with the option to significantly relax the formalities for arbitration agreements, the Commonwealth Parliament has chosen to adopt a middle ground on the issue of formalities in the Amending Act. Under Article 7 of the 1985 Model Law, an arbitration agreement had to be in writing. In contrast, the 2006 amendments to Article 7 allows member states to choose between two formality requirements for arbitration agreements. The first option (“**Option 1**”) provides that an arbitration agreement must be in writing or at least evidenced in writing.⁵¹ The second option (“**Option 2**”) omits the writing requirement altogether, simply stating that an arbitration agreement is one where the parties have agreed to submit all or certain disputes to arbitration.⁵² The Amending Act implements Option 1 into the IAA,⁵³ thereby adopting a middle ground between the relatively strict writing requirement under the 1985 Model Law and the relaxed requirement under Option 2 of the 2006 Model Law. Option 1 is not as strict as the 1985 incarnation in that it is sufficient if the content of an arbitration agreement is recorded in any form (even if the arbitration agreement was concluded orally or by conduct), but Option 1 does not go so far as doing away with formality requirements altogether as is the case with Option 2.

The adoption of the middle ground in Option 1 is a laudable step. First, the writing requirement in Option 1 avoids the potentially costly and lengthy process of ascertaining the existence of an arbitration agreement in the absence of any written record of the agreement. Second, by maintaining a writing requirement, the Amending Act ensures that the Model Law will only apply in circumstances where the

49 *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

50 UNCITRAL, *Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006*, [4].

51 Model Law (2006), art 7 (Option 1).

52 Model Law (2006), art 7 (Option 2).

53 See *International Arbitration Act 1974* (Cth), s 16(2). It should also be noted that a new s 3(4) has been inserted into Part II of the Act (which uses the New York Convention definition) so that Part II and Part III of the *International Arbitration Act 1974* (Cth) have the same definition for 'agreement in writing'.

parties have objectively intended to submit their disputes to arbitration.⁵⁴ In the absence of such a writing requirement, there is a risk that an arbitration agreement may be inferred or implied from the circumstances of the case and such a risk is untenable in light of the consensual nature of arbitration. In essence, the adoption of Option 1 is a move away from a strict need for the whole of the arbitration agreement to be in writing towards a more flexible definition of ‘arbitration agreement’ that encompasses agreements that have been recorded in any form, whether or not those agreements have been concluded orally, by conduct or by other means. For these reasons, it is hoped that the adoption of the flexible definition of ‘arbitration agreement’ in Option 1 will ensure that the Model Law continues to have relevance in the continually evolving arena of international trade and commerce.

E. Interim measures and preliminary orders

One of the key amendments made to the Model Law in 2006 was the introduction of a robust regime for interim measures and preliminary orders. Prior to the 2006 amendments, Article 17 of the 1985 Model Law gave a party to an arbitration agreement a basic right to request an interim measure from an arbitral tribunal. However, the type of interim measure available to the party was limited to a protective measure in relation to the subject-matter of the dispute. For example, an arbitral tribunal could, at the request of one of the parties, make an order requiring the other party to preserve its assets in order to prevent that party from dissipating those assets and prejudicing the outcome of the arbitration. It was also possible for an arbitral tribunal to make an order for security against the party seeking the protective interim measure. This was the extent of an arbitral tribunal’s ability to make interim orders. The principal concern that emerged in relation to Article 17 of the 1985 Model Law was that there appeared to be no ability for the courts to enforce an interim measure ordered by an arbitral tribunal.⁵⁵ While the 1985 Model Law empowered the courts to enforce an arbitral award,⁵⁶ it did not allow the courts to enforce an interim measure. Accordingly, in theory, compliance with an arbitral tribunal’s interim measure was solely at the whim of the party against whom it was made.

To address these concerns, a hotch-potch of measures were used to make interim measures enforceable. For example, the former section 23 of the IAA provided that an arbitral award is to be taken to include an interim measure. This meant that a court could use its ability to enforce an arbitral award under Article 35 of the Model Law in order to enforce an interim measure. However Article 9 of the 1985 Model Law preserved the right of a party to request an interim measure of protection direct from a court. Accordingly a party had the option of seeking an interim measure from an arbitral tribunal, the court or from both an arbitral tribunal and the court. The danger with this option, as His Honour Justice Croft points out, is that it raises issues of *res judicata* in that the court may be called upon to adjudicate on issues which have already been determined by an arbitral tribunal.⁵⁷ Not only would such a situation pose a waste of valuable resources for those involved, there is also a risk that the decision of the arbitral tribunal may be inconsistent with a decision of the court.

54 See Chartered Institute of Australian Arbitrations, Submission to the Attorney-General’s Department, *Review of the International Arbitration Act 1974 (Cth)*, 10 (‘CIARB Submission’).

55 See Croft, above n 30, 7; and Revised Explanatory Memorandum, [70].

56 Model Law (1985), art 35.

57 Croft, above n 30, 7-8.

The 2006 amendments to the Model Law, and its incorporation into the IAA through the Amending Act, represents a significant overhaul of the interim measures regime. Specifically, a new Chapter IV A has been inserted into the Model Law which, amongst other things,⁵⁸ deals with:

- the granting of interim measures;⁵⁹
- preliminary orders (*ex parte* orders);⁶⁰ and
- the recognition and enforcement of interim measures;⁶¹

Save for the provisions relating to preliminary orders (or *ex parte* orders),⁶² the regime on interim measures in Chapter IV A has been incorporated into the IAA and it is worthwhile briefly considering the important aspects of that regime.

Article 17 of the 2006 Model Law specifies the types of interim measures that may be ordered by an arbitral tribunal, and the conditions that must first be satisfied before such an order can be made. The interim measures that may be ordered by an arbitral tribunal include an order maintaining or restoring the status quo;⁶³ an order requiring a party to act or refrain from acting to avoid imminent harm or prejudice to the arbitral process;⁶⁴ an order to preserve a party's assets out of which an award may be satisfied;⁶⁵ and an order preserving evidence relevant to the resolution of the dispute.⁶⁶ Whilst these interim measures in the 2006 Model Law share the same 'protective' element as their predecessor in the 1985 Model Law, they go further than their predecessor in clearly elucidating for an arbitral tribunal the types of interim measures that may be ordered. Further guidance is also given to an arbitral tribunal in the form of Article 17A of the 2006 Model Law, which sets out preconditions for the granting of an interim measure.

Generally speaking, Article 17A requires a party requesting an interim measure to satisfy the arbitral tribunal firstly that an award of damages would be inadequate to repair the harm that they may suffer, and that such harm substantially outweighs any harm that the other party may suffer if the measure were granted; and secondly that they have a prima face case on the merits. The introduction of these preconditions not only ensures that arbitral tribunals exercise a structured discretion when granting an interim measure, but they also put the parties on notice of the preliminary hurdles that must first be crossed before an interim measure can be granted.

Preliminary orders, unlike interim measures, are not available under the IAA. Article 17B of the 2006 Model Law allows a party, in the absence of the other, to approach the arbitral tribunal and seek a preliminary order directing the other party not to frustrate the purpose of an interim measure.

58 See also Model Law (2006), arts 17D (allows modification, suspension or termination of an interim measure); 17E (an arbitral tribunal may require a party seeking an interim measure to provide appropriate security); 17F (ability to require parties to disclose a material change in circumstances which formed the basis of the interim measure); and 17G (party requesting an interim measure is liable to pay for the costs and damages caused by the measure being granted); and 17J (court retains ability to order interim measures).

59 Model Law (2006), arts 17 and 17A.

60 Model Law (2006), arts 17B and 17C.

61 Model Law (2006), arts 17H - 17I.

62 See *International Arbitration Act 1974* (Cth), s 18B.

63 Model Law (2006), art 17(2)(a).

64 Model Law (2006), art 17(2)(b).

65 Model Law (2006), art 17(2)(c).

66 Model Law (2006), art 17(2)(d).

Accordingly, to the extent that a preliminary order may be granted in the absence of one of the parties, it is an *ex parte* order.

However despite Article 17B of the 2006 Model Law, section 18B of the IAA provides that a party cannot apply for a preliminary order and an arbitral tribunal may not grant such an order. The provisions relating to preliminary orders in the 2006 Model Law are the only amendments made to the Model Law which have not been incorporated into the IAA by the Amending Act. The reason for this exclusion stemmed from the concerns that a preliminary order, being of an *ex parte* nature, would be antithesis to the consensual nature of arbitration and would deprive parties of the basic right to procedural fairness.⁶⁷

While on their face these concerns appear valid, they may be misguided in a number of respects. First, Article 17B allows the parties to contract out of the right to apply for preliminary orders. Accordingly, if the parties had agreed not to contract out of Article 17B and to retain the ability to apply for a preliminary order, then they would have in effect consented to a valid preliminary order being made against them.⁶⁸ Second, and related to the first, is that the choice to contract out of or to retain the ability to apply for a preliminary order is consistent with the doctrine of party autonomy, an important bedrock upon which arbitration is built. Third, while a preliminary order is made *ex parte*, there are measures in the Model Law to ensure that a balance is struck between the need to protect the party requesting the preliminary order and the need to afford the other party an opportunity to be heard. For example, a preliminary order may only be granted if an arbitral tribunal considers that prior disclosure of the request for an interim measure to the other party would frustrate the purpose of the measure.⁶⁹ In other words, an arbitral tribunal must first be satisfied that the risk of frustrating the purpose of an interim measure outweighs the need to disclose the request to the other party.

Further, Article 17C of the 2006 Model Law provides that when an arbitral tribunal has granted a preliminary order against a party, the tribunal must immediately notify that party of the order, give that party an opportunity to present its case and then decide promptly on any objection to the preliminary order. In this way, a preliminary order serves as a temporary protective measure to preserve the status quo, with both parties still having the right to present their case in relation to the preliminary order. This process is similar to the process prescribed by Order 9 of Chapter II of the Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 and Practice Note No, 2 of 2010 - Arbitration Business, for the enforcement of a foreign award under the IAA. If the *ex parte* process (with the right for an aggrieved party to come back before the court) is appropriate for the purpose of enforcement of an award, then why should it also not be appropriate for the purpose of obtaining a preliminary order?

Significantly, the 2006 revision of the Model Law has addressed concerns that an interim measure lacks enforceability by a court. Article 17H now provides for the recognition and enforcement of an interim measure. More specifically, it provides that an interim measure shall be recognised as binding and enforceable upon application to a competent court. Not only does the new Article 17H give ‘teeth’ to the otherwise ‘toothless’ interim measure regime that existed under the 1985 Model Law, it also avoids the need that previously existed to equate an interim measure with an arbitral award in order for an interim measure to be enforceable. It was desirable to separate the enforcement system for an interim

67 See for example Discussion Paper, above n 6, 6; and CIARB Submission, above n 54, 10.

68 Croft, above n 30, 8.

69 Model Law (2006), art 17B(2).

measure on the one hand and an arbitral award on the other, because an interim measure is only a interim protective measure whereas an arbitral award finally determines the issues in dispute which are dealt with in that award. Article 17I of the 2006 Model Law goes further and sets out the grounds on which a court may refuse to recognise or enforce an interim measure. These grounds are generally the same as those grounds for refusing to enforce an arbitral award and include:

- incapacity of one of the parties or an invalid arbitration agreement;⁷⁰
- that the party against whom the measure is made was not able to present their case or given proper notice of the appointment of the arbitrator or the arbitral proceedings;⁷¹
- that the party in whose favour the measure was granted has not complied with an order for security;⁷²
- that the interim measure has been terminated or suspended⁷³
- that the recognition and enforcement of the interim measure would be contrary to the public policy of Australia.⁷⁴

Ultimately, the introduction of a more robust system for interim measures is a step in the right direction. The new regime sets out the conditions that must be satisfied before an interim measure may be granted; the types of measures available to the parties; and an effective means for recognising and enforcing interim measures. In doing so, the new regime clearly spells out to the parties the landscape in relation to interim measures, and it is hoped that this will instil in the parties a greater level of confidence in the arbitral regime that they have chosen to determine their dispute.

F. Challenging the appointment of arbitrators

The recent amendments to the IAA have clarified the circumstances when the appointment of an arbitrator may be challenged on the grounds of bias. Article 12(2) of the Model Law provides that an arbitrator may only be challenged if the circumstances give rise to ‘justifiable doubts as to the impartiality or independence’ of the arbitrator. For the purposes of Article 12(2), a new section 18A has been inserted into the IAA which provides that there will be ‘justifiable doubts as to the impartiality or independence’ of an arbitral tribunal only if there is a real danger of bias on the part of the arbitral tribunal in conducting the arbitration. The introduction of the ‘real danger of bias’ test heralds the adoption of the approach in the English decision in *R v Gough*⁷⁵ and a move away from the established ‘reasonable apprehension of bias’ test as previously established by Australian courts.⁷⁶ The fundamental difference between the two tests is that the former (the ‘real danger of bias’ test) is a stricter test than the latter (the ‘reasonable

70 Model Law (2006), arts 17I(1)(a)(i) and 36(1)(a)(i).

71 Model Law (2006), arts 17I(1)(a)(i) and 36(1)(a)(ii).

72 Model Law (2006), art 17I(1)(a)(ii).

73 Model Law (2006), art 17I(1)(a)(iii).

74 Model Law (2006), art 17I(1)(b)(ii) and Article 36(1)(b)(ii). See also *International Arbitration Act 1974* (Cth), s 19 for guidance on the meaning of ‘contrary to public policy’.

75 In *R v Gough* [1993] AC 646 at 670, Lord Goff of Chieveley formulated the bias test as follows: “I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators... [H]aving ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party the issue under consideration by him” (emphasis added).

76 See for example decisions in *R v Webb* (1993) 181 CLR 41; *ICT Pty Ltd v Sea Containers Ltd* [2002] NSWSC 77 and *Gascor v Elliot & Ors* [1997] VR 332.

apprehension of bias' test). The practical effect of section 18A is that it will make it more difficult than in the past to successfully mount a challenge against an arbitral tribunal on the grounds of bias.

In their submission to the Attorney-General on the review of the IAA,⁷⁷ the Honourable Neil Brown QC and Sam Luttrell argued convincingly that a move towards a stricter test for bias is a positive one. First, they have observed that there is an increasing number of bias challenges being brought as a procedural tactic in high value international arbitrations. It is their view that the introduction of a stricter test would deter frivolous or unfounded claims of bias being made against arbitral tribunals, saving the parties time and costs.⁷⁷ Second, Brown and Luttrell point out that an arbitral tribunal, unlike a judge, is not a part of the judicial arm of government. The role of an arbitrator derives from a contractual source, unlike a judge who serves a public function. Arguably an arbitral tribunal should not be subject to the same level of scrutiny that a judge should properly be subjected to.⁷⁹ Ultimately, by introducing the 'real danger of bias' test in section 18A, Australia is more fully recognising the differences between arbitration and litigation and moving towards a system of arbitral laws that is better suited to the circumstances of arbitration.

Part IV - New Optional Provisions

A. The new Division 3

Division 3 of the IAA contains provisions that supplements the Model Law. Prior to the Amending Act coming into operation, Division 3 contained a small number of provisions that parties could choose to apply to a dispute between them. For example, under the old regime parties could opt-in to provisions relating to the consolidation of arbitration proceedings, interest and costs. The Amending Act makes two important changes to Division 3. First, a greater gamut of provisions has been introduced into Division 3, designed to further assist parties to resolve their dispute in a fairer and more effective manner. For example, there are now provisions allowing parties to apply to a court for a subpoena⁸⁰ or relief where a party fails to assist an arbitral tribunal.⁸¹ Second, the new provisions in Division 3 apply either on an opt-in or opt-out basis, depending on the nature of the provision and not on a purely opt-in basis as was the case under the former Act. If a provision is an 'opt-in provision', then the parties must expressly elect to have that provision apply to a dispute. An 'opt-out provision' on the other hand will apply to a dispute automatically unless the parties have agreed that it will not apply. Significantly, many of these opt-out provisions increase the powers available to arbitral tribunals and this is discussed in further detail below.

Set out in the table below is a summary of the provisions in Division 3 including whether they apply on an opt-in or an opt-out basis.

77 Brown and Luttrell, above n 36.

78 Ibid. 12.

79 Ibid. 12-13

80 *International Arbitration Act 1974* (Cth), s 23.

81 *International Arbitration Act 1974* (Cth), s 23A.

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| Section | Description of the provision | Opt-in/ opt-out |
|---------|--|--------------------|
| 23 | Parties may obtain subpoenas | Opt-out |
| 23A | Failure to assist an arbitral tribunal | Opt-out |
| 23B | Default by a party to an arbitration agreement | Opt-out |
| 23C | Disclosure of confidential information | Opt-in |
| 23D | Circumstances in which confidential information may be disclosed | Opt-in |
| 23E | Arbitral tribunal may allow disclosure in certain circumstances | Opt-in |
| 23F | Court may prohibit disclosure in certain circumstances | Opt-in |
| 23G | Court may allow disclosure in certain circumstances | Opt-in |
| 23H | Death of a party to an arbitration agreement | Opt-out |
| 23J | Evidence | Opt-out |
| 23K | Security for costs | Opt-out |
| 24 | Consolidation of arbitral proceedings | Opt-in |
| 25 | Interest up to making of award | Opt-out |
| 26 | Interest on a debt under an award | Opt-out |
| 27 | Costs | Opt-out |

The notable additions to Division 3 include:

- sections 23 and 23A which allow parties to obtain assistance from the court;
- sections 23C to 23G relating to confidentiality; and
- sections 23H to 23K relating the death of a party, evidence and security for costs.

B. Obtaining court assistance

As the Explanatory Memorandum to the Amending Act notes, one of the significant concerns expressed by stakeholders during the review of the IAA was the lack of an ability to seek assistance from the court.⁸² The need for assistance is particularly acute in circumstances where one of the parties is attempting to frustrate the arbitral process. For this reason, sections 23 and 23A have been incorporated into Division 3. Section 23 allows a party to apply to a court for a subpoena requiring a person to appear for examination before an arbitral tribunal and/or to produce a document to the tribunal⁸³. Section 23A

⁸² Revised Explanatory Memorandum, [135].

⁸³ It should be noted that s 23 of the *International Arbitration Act 1974* (Cth) requires certain conditions to be satisfied before a subpoena will be issued.

allows a party to seek assistance from the court in circumstances where a person fails to assist an arbitral tribunal. A person fails to assist a tribunal where, for example, that person refuses to appear before the tribunal or to produce documents.⁸⁴ In such cases, a party may request the court to make an order requiring the person to appear or to produce documents. Generally speaking, judicial involvement in arbitral proceedings should be kept to a minimum to preserve the fundamental distinctions between the two forms of dispute resolution.⁸⁵ However where the efficiency of arbitral proceedings are being hampered by a party's attempt to frustrate the proceedings, then the ability to call upon the court's assistance in a supervisory capacity is necessary to ensure that the arbitral process proceeds efficiently.

C. Confidential information⁸⁶

One of the consequences flowing from the contractual nature of an arbitration is that an arbitration is a private dispute resolution process between the parties. This is unlike litigation where the parties submit their dispute before the courts of the State for adjudication. The latter dispute resolution process must necessarily remain transparent to preserve public confidence in the State adjudication process, but, by reason of its very nature, no such requirement is deemed necessary for arbitration.

However, in *Eso Australia Resources Ltd v Plowman*⁸⁷ the High Court of Australia held that whilst arbitration proceedings were private, in that members of the public were not entitled to attend, they were not confidential. In some quarters, this decision has been seen to put Australia out of touch with the law in other jurisdictions and at a forensic disadvantage in promoting itself as a venue of choice for parties to determine their arbitral disputes. Accordingly, in a number of the submissions which were provided to the Attorney-General as part of the review of the former IAA, the desirability of enacting a statutory duty of confidentiality (subject to defined exceptions) was recommended.⁸⁸

It is the authors view' that parties should be at liberty to agree to keep key aspects of their dispute which is the subject of an arbitration proceeding confidential, thereby, for example, avoiding commercially sensitive information from being disclosed to the public.

The Amending Act recognises this as an advantage of arbitration, and introduces a number of opt-in provisions modelled on the *Arbitration Act 1996* (NZ). These new provisions afford parties greater protection of confidential information relating to an arbitration. A new section 23C has been added to Division 3 which prohibits parties and the arbitral tribunal from disclosing confidential information relating to an arbitral proceeding. Sections 23D and 23E go on to specify when confidential information may be disclosed.⁸⁹ Finally sections 23F and 23G specify when a court may allow or prohibit the disclosure of confidential information. The inclusion of these new opt-in provisions makes it easier for

84 For further examples of when a person fails to assist a tribunal, see *International Arbitration Act 1974* (Cth), s 23A(1).

85 See for example Revised Explanatory Memorandum, [136]; Peter Megens and Beth Cubitt, 'The Continuing Role of State Supreme Courts in domestic International Arbitration in Australia', (2010) 21 *ADJR* 124.

86 See *International Arbitration Act 1974* (Cth), s 15(1) for the definition of "confidential information".

87 (1995) 183 CLR 10.

88 See CIARB Submissions Upon a Review of the *International Arbitration Act 1974* dated 23 January 2009, 20-21; Clifford Chance Submission in Response to the Discussion Paper of November 2008, dated 26 January 2009, 35-38; ILSAC Submission on Discussion Paper Concerning Review of the *International Arbitration Act 1974* of November 2008, dated 20 January 2009, 9-10; NSW Bar Association's comments on the Review of the *International Arbitration Act 1974* dated 14 January 2009, 16; The Law Society of NSW Review of the *International Arbitration Act 1974* dated 15 January 2009, 5.

parties to readily include in an arbitration agreement a comprehensive regime for the protection of confidential information.

One potential criticism of the Amending Act is that it does not go far enough in the sense that the confidentiality provisions are included on an opt-in basis, not an opt-out basis. This view is not shared by the authors.

As noted in the submissions of the Victorian Bar,⁹⁰ in the US, neither the Federal Arbitration Act nor the Uniform Arbitration Act contain specific confidentiality provisions. The point being that it is not universal practice to legislate for confidentiality. In addition to the opt-in provisions under the IAA, parties involved in arbitration proceedings in Australia are able to incorporate confidentiality obligations into those proceedings by choosing institutional procedural rules which expressly impose confidentiality obligations on the parties or by entering into a specific confidentiality agreement (which is enforceable by the courts). It is the authors view that these provisions sufficiently protect parties who want to keep their arbitral disputes confidential.

D. Increased powers of the arbitral tribunal

Generally, the powers of an arbitral tribunal consist of those powers which the parties have expressly given to the arbitral tribunal in the arbitration agreement (which also include those contained in the set of institutional rules and arbitral law chosen by the parties). The Amending Act introduces a regimen of opt-out provisions in Division 3 that increase the powers available to arbitrators for international arbitrations now conducted in Australia. For example, unless the parties agree otherwise, arbitral tribunals may make orders in respect of evidence, security for costs, interest and the costs of the arbitration. Set out below is a summary of these provisions.

Section 23J allows an arbitral tribunal, in certain circumstances, to make an order relating to the inspection of evidence held by one of the parties to the arbitration.

Section 23K allows the arbitral tribunal, in certain circumstances, to make an order requiring one of the parties to an arbitral tribunal to pay security for costs. The arbitral tribunal has a very wide discretion whether to order a party to provide security for the other party's costs.⁹¹ However, section 23K(2) specifically provides that the arbitral tribunal shall not make such an order solely on the basis that: (i) the party is not ordinarily resident in Australia; (ii) the party is a corporation incorporated or association formed under the law of a foreign country; or (iii) the party is a corporation or association the central management or control of which is exercised in a foreign country. These provisions are quite clearly intended to give foreign entities comfort that they will not be unfairly targeted, so as to not undermine Australia's goal of being seen by the international community as an attractive venue for parties to resolve their disputes. To this extent, the approach adopted in the IAA is similar to the approach adopted in Hong Kong, Singapore and the United Kingdom.⁹²

89 For example see *International Arbitration Act* 1974 (Cth), s 23D which provides that confidential information may be disclosed with the consent of the parties; to an adviser of the parties; or if disclosure is required by a court-ordered subpoena. Further s 23E allows an arbitral tribunal to make an order allowing the disclosure of confidential information in certain circumstances.

90 Submissions of the Victorian Bar in Response to the November 2008 Discussion Paper Reviewing the *International Arbitration Act* 1974, dated 24 December 2008, [44] and [45].

91 Revised Explanatory Memorandum, [173].

92 Revised Explanatory Memorandum, [174].

Section 25 allows an arbitral tribunal to make an award of interest for the period of time between the date the cause of action arose and the date on which the award is made. Section 26 goes further and allows the arbitral tribunal to award interest, including compound interest, on debts due under an award. Although sections 25 and 26 existed under the former IAA, they now clearly apply on an opt out basis (previously there were drafting inconsistencies in the IAA which suggested that these provisions may have applied on an opt-in basis) and the power to award compound interest on debts due under the award is an added power.

Finally section 27 allows an arbitral tribunal to make orders in relation to the costs of an arbitral proceeding, including directions about the taxation or settlement of costs and any limitations on costs. Section 27 now clearly applies on an opt out basis (previously there were drafting inconsistencies in the IAA which suggested that these provisions may have applied on an opt-in basis). The fact that these provisions are now clearly on an opt-out basis means that, in practical terms, there is more scope for application by the arbitral tribunal in arbitration proceedings conducted in Australia.

By implementing these increased powers of arbitral tribunals on an opt-out basis, the Amending Act creates an appropriate balance between the desire to preserve party autonomy in deciding the limits of an arbitral tribunal's powers and the desire for arbitral tribunals to have power to make orders in relation to matters which are often over-looked by the parties - matters such as security for costs, interest and costs orders.

Ultimately, the changes introduced by the Amending Act to Division 3 of the IAA represent an overhaul of the existing provisions that apply to an arbitral proceeding. The new provisions, together with the ability to opt-in or opt-out of those provisions, allow parties to easily tailor a number of aspects of an arbitral proceeding to suit their needs simply by picking and choosing which provisions they would like to apply or not apply to the dispute between them. With increased flexibility and options available to parties who choose to resolve their disputes in Australia, it is hoped that this will further help to stake out Australia's position on the international arbitration map.

Conclusion

The amendments introduced by the Amending Act are part of a broader movement to establish Australia's place as a preferred forum for parties to resolve their international arbitration disputes. Whilst Australia will always have to contend with its tyranny of distance from other countries, the amendments to the regulatory framework, which underpins how international arbitration matters proceed and are supervised, ought to maximize the attractiveness of Australia as a forum for international arbitration.

This is brought about, in part, by the greater certainty which now exists under the IAA. For example, following the amendments, it is now clear the Australian courts no longer have a residual discretion to refuse to enforce a foreign award which comes under the auspice of the New York Convention but are limited to the narrow grounds set out in section 8 of the Act. The amendments also cement in the Model Law so it applies to any international arbitration matter conducted in Australia and eliminates the uncertainty that existed in the past as to the role and relevance of the State Acts which govern domestic arbitration and the interplay between the Model Law and a set of institutional rules chosen by the parties. So too with interim measures, which have been clarified in the Amending Act and which now are able to be fully recognized and enforced by the courts.

Further, by reason of the Amending Act, parties who chose Australia as their venue for their dispute now have more options and choices at their disposal through the array of opt-in and opt-out provisions now set out in the IAA. This is all aimed at providing parties with more tools to assist them in resolving their disputes as efficiently as possible and to providing an avenue of relief against recalcitrant parties, thereby facilitating and enhancing the effectiveness of the arbitration process.

Whilst it will take time before the full benefit and utility of the amendments to the regulatory framework manifest themselves at a practical level, the amendments to the IAA, together with an experienced and internationally recognized local profession and a supportive judiciary, have the potential to re-shape the international arbitration landscape in Australia and produce the sort of efficiency, cost and certainty of outcomes that parties require. If the amendments are successful in playing their part in achieving that outcome, then Australia will be well placed to achieve its goal of becoming a regional hub for international arbitration. For those who are involved in cross-border transactions, the amendments to the IAA gives them added reason to choose Australia as the venue of choice for resolving their disputes.