A New Commercial Arbitration Act for Western Australia

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Introduction

The long awaited *Commercial Arbitration Act 2012* (WA) (The Act) was passed by the Western Australian parliament on 29 August 2012 (although section 1C–1E and Pts 1–11 still have to be proclaimed). The Act is a part of uniform domestic arbitration legislation applicable in all states and territories.[3] The current uniform Commercial Arbitration Acts have their origin in a meeting of the Standing Committee of Attorneys General, held in May 2010, where it was agreed to mirror domestic arbitration law on the UNCITRAL Model Law on International Commercial Arbitration (2006 Revision) (Model Law) because the Model Law "reflects the accepted world standard for arbitrating commercial disputes".[4]

The revision of the uniform Commercial Arbitration Acts in 2010 is part of a comprehensive overhaul of arbitration legislation in Australia. Indeed, in addition to the uniform Commercial Arbitration Acts, the *International Arbitration Act 1974* (Cth) (IAA) was also revised in order to make it compatible with the Model Law, as revised in 2006. The effect of these revisions is that the Model Law is firmly implanted into Australia's domestic and international arbitration legislation as the basis of the law.

Not surprisingly, section 2A(1) of the Act contains an exhortation that 'regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) to international commercial arbitrations and the observance of good faith'.

In the First Reading speech, the Attorney General, the Hon. Christian C. Porter stated:[5]

> *The Commercial Arbitration Bill 2011 will repeal the Commercial Arbitration Act 1985 and provide a new procedural framework for the conduct of domestic commercial arbitrations. The bill facilitates the use of arbitration agreements to manage domestic*

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3 At the time of writing, this uniform law has been proclaimed in New South Wales (1 October 2010), Victoria (17 November 2011), South Australia (1 January 2012), Northern Territory (1 August 2012). In Tasmania, the Act was assented to on 16 June 2011, but it has not yet been proclaimed. The Commercial Arbitration Bill 2012 (Qld) was passed by the Queensland Legislative Assembly on 7 March 2013.

4 Extract from *Hansard*, Wednesday, 15 June 2011, p4254c-4257a.

5 Extract from *Hansard*, Wednesday, 15 June 2011, p4254c-4257a.

> *commercial disputes, and will ensure that arbitration provides a cost-effective and efficient alternative to litigation in Australia. The current act is part of a uniform domestic arbitration legislation scheme that applies in all Australian states and territories.*

The Minister further stated in his First Reading Speech that, 'The purpose of the law, also agreed by ministers, is found in clause 1C in part 1A of the bill – the paramount object provision – to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.' In concluding, the Minster noted that, 'The Commercial Arbitration Bill 2011 will ensure that Western Australian domestic arbitration laws reflect accepted international practice for resolving commercial disputes, and it will provide businesses with a cost-effective and efficient alternative to litigation'.

The key amendments made to the *Commercial Arbitration Act 1985* (WA) are:

- a Court[6] may only intervene in limited circumstances;[7]
- the opportunity to challenge and remove arbitrators is significantly curtailed;[8]
- the arbitral tribunal has power to grant interim measures;[9]
- the grounds for the appeal of the arbitral tribunal's decision are limited;[10] and
- the Act provides a detailed confidentiality regime.[11]

In addition to discussing the above amendments, a number of other provisions will also be considered in this paper, including the power of arbitrators to act as mediator, conciliator or other non-arbitral intermediary.[12]

Review of the new Arbitration Act for Western Australia

The new Act consists of eleven parts, nine of which are discussed sequentially in this paper. The paramount objective of the Act, as stipulated in section 1C(1) which appears in the Preliminary Part 1A is 'the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense'. The legislation aims to achieve this objective by 'enabling parties to agree about how their commercial disputes are to be resolved'[13] and by 'providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly'.[14] Part 10, which deals with transitional matters, and Part 11, which documents the repeal of the *Commercial Arbitration Act 1985* and lists the amendments made to that Act, are not discussed in this paper.

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6 The 'Court' means the Supreme Court: see section 2 (*Definitions and rules of interpretation*).
7 See section 5 which states that, "In matters governed by this Act, no court must intervene except where so provided by this Act." Also section 34A.
8 Section 12(3).
9 Section 17.
10 Section 34A.
11 Section 27E.
12 Section 27D.
13 Section 1C(2)(a).
14 Section 1C(2)(b).

Part 1: General Provisions

Part 1 sets out the general provisions of the Act. In particular, section 1(1) stipulates that the Act 'applies to domestic commercial arbitrations'. Arbitration is domestic if 'the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in Australia'.[15] Section 1(3)(c) clarifies that arbitration is not domestic if it is an international arbitration for the purposes of the IAA, as revised in 2010. The term 'commercial' in section 1(1) is widely interpreted 'so as to cover matters arising from all relationships of a commercial nature, whether contractual or not'.[16]

Prior to the revision of the IAA in 2010, it was possible for parties in an international arbitration to opt out of the Model Law which is appended to the IAA, thereby activating the applicability of the uniform *Commercial Arbitration Act 1985* (WA). However, section 21 of the revised IAA of 2010 now provides that 'If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.[17] Hence, the IAA, including the Model Law, is the exclusive law governing international arbitration[18] in Australia and it is no longer possible for parties to opt out of the Model Law'.

An important provision is section 4 of the Act, which deals with the circumstances in which parties are deemed to have waived their right to object. This section, which is based on Article 4 of the Model Law, stipulates that 'A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating the party's objection to such non-compliance without undue delay … is taken to have waived the party's right to object'. This provision evidences the arbitration-friendly stance of the legislation.

Part 2: Arbitration Agreement

Part 2 of the Act defines the nature and form of the arbitration agreement and expands considerably on the definition of an arbitration agreement that was found in section 4(1) of the *Commercial Arbitration Act 1985* (WA). The new Act confirms that, 'An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'[19] and that 'The arbitration agreement must be in writing'.[20] In this regard, the Act has not adopted Article 7, Option 2 of the Model Law, which recognises the existence of arbitration agreements which are orally concluded. The Act further provides that the 'writing' requirement of the arbitration agreement is satisfied if its content is recorded in 'any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by

15 Section 1(3)(a).

16 See Model Law Note to section 1. This note also gives examples of the term 'commercial'.

17 But section 21 IAA does not operate retrospectively: see *Rizhao Steel Holding Group Co Ltd v. Koolan Iron Ore Pty Ltd* [2012] WASCA 50. That means that, if the arbitration agreement is entered into prior to 6 July 2010 (which is the date the IAA came into effect), the parties would have been able to opt-out of the Model Law: see Richard Garnett and Luke Nottage, "The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?, 7(1) *Asian International Arbitration Journal* (2011).

18 See section 16(1) IAA which stipulates that "the Model Law has the force of law in Australia."

19 Section 7(1).

20 Section 7(3).

other means'. Additionally, section 7(7) provides that an arbitration agreement is in writing 'if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other'.

In accordance with section 8 of the Act, which is identical to Article 8 Model Law, 'A court before which an action is brought in a matter which is the subject of an arbitration agreement must … refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.' However, the court's obligation is dependent on a party requesting this 'not later than when submitting the party's first statement on the substance of the dispute'. Hence, a court is expected to order a stay of proceedings if parties to a dispute have committed themselves to resolving the dispute by arbitration.

Part 3: Composition of Arbitral Tribunal

Part 3 of the Act details the provisions relating to the composition of the arbitral tribunal. Where there is a failure by the parties to determine the number of arbitrators there is a presumption of a single arbitrator.[21] This differs from the Model Law, Article 10(2) of which provides for three arbitrators where the parties have not previously determined the number of arbitrators. The new Act also deals with the appointment of arbitrators and in this context it gives power to the Court to make the appointment if the parties or one of the parties fails to make the appointment.[22] Article 11(1) Model Law, which provides that no person is precluded on account of his nationality to serve as an arbitrator, is not incorporated into the new Act, presumably because this requirement seems irrelevant in a domestic arbitration context.

Section 12 of the Act introduces an express provision for the challenge of an arbitrator. Whereas, in the past, this issue was usually raised at the preliminary conference, there is now a statutory obligation in section 12(1) for the arbitrator to disclose 'any circumstances likely to give rise to justifiable doubts as to the person's impartiality or independence'. This article essentially adopts the language found in Article 11 UNCITRAL Arbitration Rules (2010 Revision) (revised Arbitration Rules), Article 12(1) Model Law and General Standard 2 of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines).

As under Article 11 of the revised Arbitration Rules, the obligation of disclosure imposed on the arbitrator by section 12(1) is ongoing and continues 'throughout the arbitral proceedings'.[23] This means that if new circumstances arise after the arbitrator has entered onto the reference, then the arbitrator must provide full disclosure to the parties. A failure to do so will constitute a procedural irregularity, and may constitute grounds for challenge under Article 34(2)(a)(iv) of the Act.

Section 12(3) provides that 'An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed to by the parties'. The first arm of Article 12(3) adopts Article 12(2) Model Law, with the notable exception that the word 'only' is omitted from the Model Law but is in the new Act. It is interesting to note that Article 13.2 of the Australian Centre for International Commercial Arbitration

21 Section 10(2).
22 Section 11(2) and (3).
23 Section 12(2).

(ACICA) Rules, which states that 'Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence' also omits the reference to 'only'. The second arm of section 12(3) – challenge for lack of necessary qualifications – is also taken up in Article 13.2 ACICA Rules and in Article 12(2) Model Law. The word "only" in section 12(3) of the new Act arguably restricts the circumstances, permitting a challenge of an arbitrator, with the result that an arbitrator may not be challenged for reasons other than a lack of impartiality and independence, and lack of qualifications agreed to by the parties.

Actual bias will always result in the removal of an arbitrator, or the setting aside of their award.[24] Actual bias is very rare, but the Act arguably does not require that the arbitrator actually lack impartiality and independence before he is removed. It is settled in Australian and English law that it is of fundamental importance in arbitration that justice be done and be seen to be done.[25] The Act has adopted in section 12(5) the 'real danger' test: there are justifiable doubts as to the impartiality or independence of an arbitrator 'only if there is a real danger of bias on the part of the person in conducting the arbitration'.[26]

Justifiable doubts will necessarily arise where the arbitrator has a pecuniary interest in the cause. In Common Law systems, the principle of disqualification for pecuniary interest in the cause is known as 'the Rule in *Dimes*'.[27] Under Australian law, the Rule in *Dimes* is separate from the rule of disqualification for apparent bias,[28] but is actionable under the same section of the Act. The Rule in *Dimes* is subject only to *de minimis*: the arbitrator will not be removed if his interest in the cause is trifling or trivial.[29] In the determination of whether a pecuniary interest is actionable or not, the IBA Guidelines will hold persuasive weight.

In accordance with section 12(4) of the Act, a party may challenge the arbitrator appointed 'by the party, or in whose appointment the party has participated, only for reasons of which the party becomes aware after the appointment has been made'. This provision is the same as Article 10(2) revised Arbitration Rules. Its function is to deem the appointing party to be aware of all matters that may give rise to justifiable doubts as to the arbitrator's impartiality or independence at the time the appointment is made. These matters are deemed known and waived – they cannot be brought up in subsequent challenges unless there has been defective disclosure under section 12(1) of the Act. In such a case, the matter which was not disclosed would still need to be material and non-*de minimis*, such that the arbitrator would reasonably be expected to have known of the matter at the time he failed to give full disclosure of it to the parties.

24 *Re the Owners of the Steamship 'Catalina' and the Owners of the Steamship 'Norma'* [1938] 61 LIL Rep 362-3, where in an arbitration between a Norwegian and a Portuguese ship owner, the award was set aside for actual bias after the arbitrator said words to the effect that all Portuguese and Italian people are liars.

25 This maxim comes from the judgment of Lord Hewart in *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 356 (at 359); Lord Hewart's dictum was approved in the context of arbitration in *Gascor v Ellicott* [1997] 1 VR 332, per Tagdell AJ at 340 and Ormiston AJ at 348-352, cited with approval by the High Court in *Sea Containers*; followed by the Supreme Court of Western Australia in *Pindan Pty Ltd v Uniseal Pty Ltd* [2003] WASC 168.

26 Section 12(5).

27 *Dimes v Grand Junction Canal Co Proprietors* (1852) 3 HLC 759.

28 *Ebner v The Official Trustee in Bankruptcy; Clanae Pty Ltd and Ors v Australia and New Zealand Banking Group Ltd* (2000) HCA 63, (2000) 205 CLR 337.

29 *Locabail (UK) Ltd & Waldorf Investment Corp. & Ors* [2000] 1 All ER 65; see also AT&T Corporation v Saudi Cable Company [2000] BLR 29.

The new provisions on challenge of arbitrators substantially modify section 44 of the *Commercial Arbitration Act 1985* (WA). Under section 44 of this Act, the Court could, on the application of a party to the arbitration agreement, remove the arbitrator if:

> *(a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings;*
>
> *(b) undue influence has been exercised in relation to an arbitrator or umpire; or*
>
> *(c) an arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute.*

Lord Denning MR held in *Modern Engineering (Bristol) Pty Ltd v C Miskin & Son Ltd* [30] that the proper test for removal of an arbitrator for misconduct of the proceedings did not relate to the fitness of the arbitrators to conduct the proceedings, but rather whether the arbitrator's conduct 'was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion'.

However, under the new Act, a party will not be permitted to apply to the Court for the removal of an arbitrator on the ground of misconduct. This will assist with respect to the finality of awards and should prevent the situation where the Western Australian Supreme Court has set aside arbitral awards for what might be described as minor or technical breaches of the rules of natural justice.[31]

In keeping with the intention of the Act to allow parties freedom of choice, section 13(1) provides for the parties to agree on a procedure for challenging the arbitrator. The Act further provides in section 13(4) for a decision of the Court where there has been an earlier rejection of the challenge by the arbitral tribunal. A decision of the Court in this regard is final.[32] In section 2 of the Act 'court' refers to the Supreme Court, mirroring the provision in section 4 of the *Commercial Arbitration Act 1985* (WA).

Part 4: Jurisdiction of Arbitral Tribunal

Part 4 deals with the jurisdiction of the arbitral tribunal and clearly establishes in section 16(1) that 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement'. In addition, 'For that purpose, an arbitration clause which forms part of a contract is to be treated as an agreement independent of the other terms of the contract'.[33] At the same time there is, however, an opportunity afforded by section 16(9) of the act for a party to request, 'within 30 days after having received notice of that ruling, the Court to decide the matter'.

Section 16, which is based on Article 16 Model Law, legislates for the well-known principle of competence-competence and the principle of the severability of the arbitration agreement. The severability principle, which in effect secures the maintenance of an arbitration agreement, even if all other parts of a contract are terminated, enables the formation of an arbitral panel which would then be

30 [1981] 1 Lloyd's Rep 135 at 138.An example where an arbitrator has been removed for incompetence is *Pratt v Swanmore Builders Ltd* (1980) 15 BLR 44.

31 *Shirley Sloan Pty Ltd v Merril Holdings Pty Ltd* [2000] WASC 99.

32 Section 13(5).

33 Section 16(2).

able to assess any objections (usually raised by the respondent) to the authority of the panel to hear to substance of the dispute.

Part 4A: Interim Measures

This Part significantly amends the *Commercial Arbitration Act 1985* (WA) in that it permits, 'Unless otherwise agreed by the parties', for the tribunal upon request of a party to grant interim measures.[34] In view of its significance in comparison to the 1985 Act, this part will be considered in detail.

An interim measure is defined in section 17(2) of the Act as 'any temporary measure', whether in the form of an award or in another form, by which, at any time prior to the issuance of the award, the arbitral tribunal orders a party to:

> *(a) maintain or restore the status quo pending determination of the dispute;*
>
> *(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*
>
> *(c) provide a means of preserving assets out of which a subsequent award may be satisfied; or*
>
> *(d) preserve evidence that may be relevant and material to the resolution of the dispute.*

Section 17(2) of the Act defines the expression 'interim measures' by reference to content. The interim measures contemplated by Section 17(2) include what Samuel Luttrell and Gabriël Moens described in their annotation to the ACICA Arbitration Rules[35] as the law's 'two nuclear weapons',[36] *Mareva* (asset preservation) and *Anton Piller* (civil search) orders. *Mareva* orders are certainly within the language of section 17(2)(c) of the Act, in that the purpose of an asset preservation order is to prevent frustration of a monetary judgment.[37] Article 17(2)(d) of the Act is a clear reference to *Anton Piller* orders, the purpose of which is to preserve material evidence which is in danger of being destroyed. This type of interim measure is especially important in intellectual property disputes.

The wording of the Act, coupled with the fact that Common Law jurisprudence acknowledges that ancillary orders are necessary 'to ensure that the exercise of *Mareva* jurisdiction is effective', suggests that an arbitral tribunal could grant all of these interim measures of protection.[38]

In his discussion of the New South Wales Act – New South Wales being the first state to enact the revised Uniform Law in 2010 – Professor Jones correctly states that the development of Part 4A of the Act represents 'a significant departure from the Uniform Acts' position regarding interim measures of

34 Section 17(1).

35 S R Luttrell & G A Moens, *Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration*, in International Commercial Arbitration (Looseleaf set, ed. E. Bergsten), Oxford University Press, 2009 (also available at www.acica.org.au.) This Commentary is relied upon throughout the discussion of interim measures in this part of the paper.

36 *Bank Mellat v Nikpour* (1985) FSR 87 (CA) per Donaldson LJ at 92.

37 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 619.

38 *Bekhor & Co v Bilton* [1981] QB 923 (CA) per Ackner LJ at 940.

protection'.[39] Under the previously applicable uniform Arbitration Act, if the arbitral tribunal was requested to grant interim measures of protection, it had to rely on the cumulative provisions of sections 14 and 37.[40] Part 4A of the new Act is largely compatible with Article 17(1) of the Model Law which relevantly provides that, 'Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures'.

Professor Jones further explains that interim measures of protection are important in order to prevent 'a Pyrrhic victory, where the claimant is granted an award in their favour but relief is no longer effective'.[41] For example, this may happen when the respondent has moved target assets to other jurisdictions or has destroyed evidence or devalued property which is the subject of the claim. Indeed, whilst the claimant waits for its case to be heard, there is often a risk that the respondent will take steps to avoid the effect of an award made against it. Thus, 'interim measures' are orders directed at the preservation of a party's rights in the period in which the claim is considered, but not yet decided, by the arbitral panel. They are intended to preserve a factual or legal situation in order to safeguard rights, the recognition of which is sought from the tribunal that has jurisdiction over the substance of the case.

However, section 17(3) of the Act, which allows the arbitral tribunal to make orders with respect to, among others, security for costs and discovery of documents and interrogatories, has no equivalent in the Model Law. This subsection states:

> *(3) Without limiting subsection (2), the arbitral tribunal may make orders with respect to any of the following –*
>
> *(a) security for costs,*
>
> *(b) discovery of documents and interrogatories,*
>
> *(c) giving of evidence by affidavit,*
>
> *(d) the inspection of any property which is or forms part of the subject-matter of the dispute,*
>
> *(e) the taking of photographs of any property which is or forms part of the subject-matter of the dispute,*
>
> *(f) samples to be taken from, or any observation to be made of or experiment conducted on, any property which is or forms part of the subject-matter of the dispute,*

39 Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co., Thomson Reuters, 2011, 180 [at 7.100]. This book is extensively reviewed in Gabriël Moens and Philip Evans, The Amazing World of Arbitration, Vol. XV *International Trade and Business Law Review*, 2012, 152-163.

40 Section 14 of the *Commercial Arbitration Act* 1985 (WA) states that, "the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit." Section 37, which outlines the duties of parties, stipulates that, "The parties to an arbitration agreement shall at all times do all things which the arbitrator or umpire requires to enable a just award to be made and no party shall wilfully do or cause to be done any act to delay or prevent an award being made."

41 Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co., Thomson Reuters, 2011, 181 [at 7.120].

> *(g) dividing, recording and strictly enforcing the time allocated for a hearing between the parties (a **stop clock** arbitration).*

Most modern institutional arbitration rules similarly provide that arbitral tribunals may grant interim measures. Relevantly, Article 28.1(b) of the ACICA Arbitration Rules provides:

> *Unless the parties agree otherwise in writing:*
>
> *(b) the Arbitral Tribunal may, on the request of any party, order interim measures of protection. The Arbitral Tribunal may order such measures in the form of an award, or in any other form (such as an order) provided reasons are given, and on such terms as it deems appropriate. The Arbitral Tribunal shall endeavour to ensure that the measures are enforceable.*

Article 17(1) of the Act and Article 28.1(b) ACICA Arbitration Rules are generally compatible with Article 17 of the Model Law, most significantly because they too allow the parties to deprive the tribunal of the power to order interim measures.

Some of the more controversial provisions of the Model Law, such as the inclusion of a power to grant *ex parte* preliminary orders, have not been incorporated in the Act and ACICA Arbitration Rules. Thus, both sides in an arbitration hearing must be heard whenever interim measures are requested, and if 'surprise' interim orders (such as freezing or civil search orders) are required, then the *ex parte* application must be made to the competent court and not the arbitral tribunal. There is, however, a growing body of opinion in favour of *ex parte* applications for interim measures of protection in arbitration, especially in the case of *Mareva*[42] orders and *Anton Piller*[43] orders, which require surprise to be effective. In such a situation, allowing the respondent to be heard would subvert the purpose of the measure, and risk irreparable harm to the applicant.[44]

Under Section 17A(1) of the Act, a party requesting an interim measure under section 17(2) (a), (b) or (c) must satisfy the tribunal that:

> *(a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and that harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*
>
> *(b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.*

42 The term '*Mareva* Injunction' originates from the decision of the English Court of Appeal in *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd's Rep 509.

43 *Anton Piller* orders are named after the English Court of Appeal case *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

44 Berger, K. P., 'Party Autonomy in International Economic Arbitration: A Reappraisal' (1993) 4 *American Review of International Law* 1, 337.

Section 17(A)(1) of the Act, which is similar to Article 17A(1) Model Law, provides a two-stage test which an applicant must pass in order for the relevant interim measures to be granted.[45] The elements of a successful application for interim measures are compound (they are 'and'-type elements), meaning that if the applicant fails under one element the tribunal will refuse to grant the interim measure. The criteria for granting interim measures under section 17A(1) of the Act draw on the elements laid down by Lord Diplock in *American Cyanamid v Ethicon*.[46] In *American Cyanamid*, the court required that the applicant first pass an accessibility threshold by demonstrating that there was a serious question to be tried (but not necessarily a *prima facie* case). Once this threshold was passed, the House of Lords applied the following criteria. First, there must be a risk that the applicant will suffer irreparable harm if an injunction is not ordered. The application will be refused if the harm can be adequately compensated at trial. The court must then evaluate the potential risk that the respondent will suffer irreparable harm if an injunction is granted and the respondent is successful on the merits. The application will be refused if the risk of irreparable harm to the respondent is too high. Second, the injunction will not be granted unless the relative hardship that will be suffered by the applicant outweighs the relative hardship that will be suffered by the respondent if the injunction is granted. If the balance of convenience is not able to be determined, then the court must decide the application based on which party is most likely to succeed on the merits. Section 17A(1)(a) of the Act captures the first arm of the ratio in *American Cyanamid*. Section 17A(1)(b) relies on His Lordship's 'balance of convenience' test. Any determination by the tribunal 'that the requesting party will succeed on the merits of the claim' does not affect the discretion of the tribunal in making any subsequent determination.[47]

Section 17(3)(a) of the Act stipulates that the arbitral tribunal may make an order with respect to security for costs. This section comports with section 17E of the Act, according to which 'The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure'. This article, which is similar to Article 28.4 ACICA Arbitration Rules, is concerned with ensuring that the respondent does not suffer irreparable harm as a result of the interim measures. It contemplates tribunal-ordered undertakings as to costs and damages given by the party seeking interim relief in favour of the respondent at the direction of the arbitrators.

By virtue of section 17D of the Act, 'The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, on application of any party or, in exceptional circumstances and on prior notice to the parties, on the arbitral tribunal's own initiative'. Section 17F stipulates that 'The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted'. This article is, in substance, similar to Article 17F(1) Model Law and Article 28.5 ACICA Arbitration Rules.[48] A good example of a material change that must

45 With regard to a request for an interim measure under section 17(2)(d), the requirements under section 17A(1)(a) and (b) "apply only to the extent the arbitral tribunal considers appropriate.": see section 17A(3)

46 [1976] 2 WLR 316.

47 Section17A(2) of the Act.

48 Article 28.5 ACICA Arbitration Rules, however, imposes that obligation on the party requesting the interim measure. Additionally, the obligation under Article 28.5 is framed in strong terms ('*shall*'), whereas the arbitral tribunal has a discretion under Section 17F(1) of the Act and Article 17F(1) Model Law (2006 Revision) to seek relevant information from any party.

be disclosed is where the financial circumstances of the claimant have deteriorated such that they may no longer be able to make good on their undertaking as to damages.[49]

Generally speaking, the parties to a dispute may elect to take their applications for interim measures to the arbitrator or the court. Indeed, the right to apply to a court for an interim measure in relation to arbitration proceedings is guaranteed by the concurrent jurisdiction clause at section 17J of the Act. In this context, Professor Jones comments that 'In an Australian domestic or international context … the parties are free to choose between the court and tribunal when applying for an interim measure. However, it is suggested that when parties agree to arbitrate, they do so with the clear intention to exclude, to the maximum extent possible, court interference'.[50] This right to elect is, of course, subject to *res judicata*: if the applicant has previously applied for the same interim measure and been refused, then an issue estoppel will lie against any further attempts to obtain the previously refused measure from the competent court. In order for the issue estoppel to arise, the application must be between the *same parties* on the *same issue* of law; a wholly new, different cause of action will not be barred. This means that if a party applies to the tribunal for a *Mareva* order and is refused they may still apply to the competent court for an *Anton Piller* order. It also means that a party who gets an interim measure of protection from the tribunal may still apply to the court for enforcement of that interim measure, because the two actions are different.

A most important provision is section 17H of the Act which provides for the recognition and enforcement of interim measures. If an interim measure is made under the law of the State, it 'is to be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced on application to the Court'. This is subject to the provisions of section 17I(1) of the Act which detail a number of grounds for refusing recognition or enforcement.[51] There is an obligation on the party who has obtained recognition or enforcement to promptly inform the Court of any termination, suspension or modification of that interim measure.[52]

Part 5: Conduct of Arbitral Proceedings

Part 5 of the Act deals with the conduct of the arbitral proceedings. As with Part 4A this Part is extensive. The premise of this Part is that both the parties and the arbitral tribunal have significant flexibility to choose the process or procedures to be followed, for the conduct of the proceedings.[53] Where they are unable to agree 'he arbitral tribunal may … conduct the arbitration in such manner as it considers appropriate'.[54] Reminescent of the language used in Article 9 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, this power conferred on the tribunal 'includes the power to

49 *Manor Electronics Ltd v Dickson* [1988] RPC 618.

50 Doug Jones, Commercial Arbitration in Australia, Lawbook Co., Thomson Reuters, 2011, 221 [7.540].

51 Recognition and enforcement may be refused at the request of the party against whom it is invoked if the court is satisfied that, among other things, such refusal is warranted on the grounds set out in section 36(1) which is discussed later in this paper.

52 Section 17H(3) of the Act.

53 Section 19(1).

54 Section 19(2).

determine the admissibility, relevance, materiality and weight of any evidence'.[55]

Section 18 incorporates the principles of natural justice by providing that 'The parties must be treated with equality and … given a reasonable opportunity to present' their case.[56] In this context, it should be noted that Article 18 Model Law stipulates that 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'. Hence, it is noteworthy that section 18 of the new Act does not require a 'full', but merely a 'reasonable' opportunity of presenting the party's case.

Section 20 of Part 5 deals with the place of arbitration and stipulates in subsection (1) that 'The parties are free to agree on the place of arbitration'. However, in accordance with section 20(2), where the parties fail to agree, the arbitral tribunal may determine the place of arbitration.[57] Section 20(1) and (2) thus allow the parties, exercising their rights under the Doctrine of Party Autonomy, to agree explicitly on the seat of arbitration, but the arbitral tribunal will determine the seat if the parties fail to select the seat. Similarly, other arbitration rules usually allow parties to arbitration to select the seat of the arbitration and, failing an agreement by the parties, the arbitral tribunal is usually authorised to select a different arbitration seat 'in view of the circumstances'.[58] This is interesting because there is a discernible trend in some arbitration rules to prevent the arbitral tribunal from fixing another seat, even if the parties have not agreed on the seat. Instead, these rules provide for a compulsory seat of arbitration. For example, Article 18(1) CEAC Hamburg Arbitration Rules states that 'If the parties have not explicitly agreed on another seat, the seat of the arbitration will be Hamburg, Germany'. This Article is similar to Article 19.1 of the ACICA Arbitration Rules, which provides for Sydney to be the default seat of arbitration.

The seat of arbitration is a most important legal concept in arbitration because a reference to the seat activates the relevant arbitration statute of the country where the arbitration is held. Indeed, 'The concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' (or 'forum' or '*lex arbitri*' of the arbitration, is well established in both the theory and practice of international arbitration'.[59] Modern jurisprudence confirms that the seat of arbitration must be distinguished from the "venue of hearing",[60] and where the parties have agreed upon the seat of arbitration, that seat does not change even though the tribunal conducts all of the hearings in another country.

Part 5 of the Act further provides that, 'Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent'.[61] Part 5 also deals with the language to be used in the

55 Section 19 (3).
56 Section 18.
57 Section 20(2).
58 See, for example, Article 16(1) London Court of International Arbitration Rules and Article 16(1) Swiss Rules of International Arbitration (June 2012).
59 Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (4th ed.), London, Sweet & Maxwell, 2004, 98.
60 *PT Garuda Indonesia v Birgen Air* [2002] 1SLR 393.
61 Section 21.

proceedings,[62] the requirements for the submission of statements of claim and defence,[63] and whether the proceedings are to be conducted on the basis of documents and other materials.[64]

With respect to representation, as with the *Commercial Arbitration Act 1985* (WA),[65] the parties may appear in person or may be represented by another person in any oral hearings.[66] The reference to the amount in dispute which was a provision of the previous Act[67] has been removed. There is no breach of the provisions of the *Legal Profession Act 2008* (WA) or any other Act where the person representing a party is not admitted to practice in Western Australia.[68] However, it should be noted that following the decision in *James Aris v Minister for Public Works*,[69] the costs of a lay advocate will not be recoverable by the successful party in an arbitration.

Section 24B is the catchall provision dealing with the general duties of the parties. In particular, parties must do all things necessary for the proper and expeditious conduct of the arbitral proceedings.[70] The previous 1985 Act did not provide the arbitral tribunal with any coercive powers in the event of tardiness or default of a party to the dispute. The new Act, in section 25, provides the arbitral tribunal with wide powers in the event of a default by a party.[71] The reference to the tribunal's power to conduct the proceedings *ex parte* is found in section 25(1)(c). As with the 1985 Act, as a consequence of any non-compliance subject to the provisions of section 33B(4), the tribunal may take any default into account with respect to the payment of costs.[72]

The use of experts in arbitration has been problematic in the past as a consequence of expert shopping or experts failing to understand that they were not advocates for a party but were attending the hearing to assist the arbitral tribunal.[73] Section 26 of the Act now permits the tribunal to appoint experts with respect to specific issues and may further require a party to provide relevant information to the expert. Further, there is a power for a party or the tribunal to request the participation of an expert in the hearing where the parties have the opportunity to put questions to the expert.[74] There is no express power for the tribunal to require concurrent evidence or order a conclave, but this could be covered by agreement at the preliminary conference.

Part 5 of the Act further provides for the assistance of the Court in taking evidence,[75] the ability[76] of the

62 Section 22.
63 Section 23. Section 23(4) confirms that these statements need not be "in a particular form."
64 Section 24.
65 See section 20.
66 Section 24A(1).
67 See section 20(1) *Commercial Arbitration Act* 1985 (WA).
68 Section 24A(2).
69 See *James Aris v Minister for Works* (1994) 11 WAR 390
70 Section 24B(1).
71 Section 25 (1) to (3).
72 See section 25(3)(d).
73 See Practice Note CM 7: Expert Witnesses in Proceedings in the Federal Court of Australia (25 September 2009); Part 3.3, Opinion – *Evidence Act 1995* (Cth); *Arnotts v TPC* (1990) ACR 555.
74 Section 26(2).
75 Section 27.
76 Section 27C(5).

parties to obtain subpoenas,[77] the powers of the court where there has been a refusal or failure of a party to attend before an arbitral tribunal or to produce documents.[78] As with the previous 1985 Act, there is an opportunity for a party to apply for an order for the consolidation of the arbitral proceedings.[79] Known as 'related proceedings', if more than one arbitral tribunal is conducting these proceedings, the tribunal that received the application must communicate this request to the other tribunals, all of which are expected to deliberate together on the request.[80]

Section 27D of the Act, which does not have an equivalent in the Model Law, is as important as it is contentious.[81] In view of the debate surrounding this provision in both the domestic and international arbitration acts, it will be considered in some detail. It is convenient to quote the section in full:

> *(1) An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement (mediation proceedings) if –*
>
> *(a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration), or*
>
> *(b) each party has consented in writing to the arbitrator so acting.*
>
> *(2) An arbitrator acting as a mediator:*
>
> *(a) may communicate with the parties collectively or separately, and*
>
> *(b) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees or unless the provisions of the arbitration agreement relating to mediation proceedings otherwise provide.*
>
> *(3) Mediation proceedings in relation to a dispute terminate if –*
>
> *(a) the parties to the dispute agree to terminate the proceedings, or*
>
> *(b) any party to the dispute withdraws consent to the arbitrator acting as mediator in the proceedings, or*
>
> *(c) the arbitrator terminates the proceedings.*
>
> *(4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.*
>
> *(5) If the parties consent under subsection (4), no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section.*

77 Section 27A.
78 Section 27B.
79 Section 27C.
80 Section 27C(2).
81 See Report 67: Report of the standing Committee on Uniform Legislation and Statutes Review in Relation to the Commercial Arbitration Bill 2011. November 2011, 18 to 25.

> *(6) If the parties do not consent under subsection (4), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.*
>
> *(7) If confidential information is obtained from a party during mediation proceedings as referred to in subsection (2)(b) and the mediation proceedings terminate, the arbitrator must, before conducting subsequent arbitration proceedings in relation to the dispute, disclose to all other parties to the arbitration proceedings so much of the information as the arbitrator considers material to the arbitration proceedings.*
>
> *(8) In this section, a reference to a **mediator** includes a reference to a conciliator or other non-arbitral intermediary between parties.*

Although section 27 of the *Commercial Arbitration Act 1985* (WA) also permitted the arbitrator to act as mediator, conciliator or other non-arbitral intermediary, section 27D of the new Act is controversial for reasons which have also been detailed by Professor Jones. He states that 'the lack of structure of the 'arb-med' process is both its strength and its weakness'.[82] He explains:[83]

> *The rationale for it being a strength is that it allows the parties and the neutral party to adopt procedures which they consider to be best for the resolution of the dispute and therefore has great scope for the ad hoc management of procedure. The neutral party, in this role, also gains a more thorough knowledge of the file and can intervene more actively in pursuing its resolution. This is also a weakness because where the neutral party remains through the entire process, information might be acquired during the mediation which might compromise their position once the proceedings become arbitral and in respect of which the neutral party must act as the impartial arbitrator.*

It is often argued that a person without appropriate personal skills is unlikely to be a good mediator. These skills include, but are not limited to, an ability to facilitate a discussion between the parties in the hope that it might lead to an amicable resolution of the dispute. In contrast, it is generally accepted that specialised training in and knowledge of arbitration law, as well as relevant arbitration experience are essential to becoming a good arbitrator who is able to render a binding and enforceable award. Although section 27D of the Act is undoubtedly based on the theoretical assumption that it is possible for a good mediator to also be a good arbitrator, the question should be asked whether it is appropriate to perform both roles in the same dispute or even to act as a mediator in some disputes and as an arbitrator in other cases. Although the answer to this question is unlikely to solve the conundrum posed by Professor Jones in his book, it will reveal the inherent weaknesses of the arb-med system.

The weakness lies in the realisation that mediators cannot realistically respect the rules of natural justice when seeking a settlement by mediation (or conciliation) because these rules are largely incompatible with the efficient conduct of mediation. In contrast, arbitrators are expected to rigidly adhere to these rules because their breach would invariably result in the setting aside of the arbitral award. The Western

82 Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co., Thomson Reuters, 2011, 331 [8.1530].
83 Ibid.

Australian Supreme Court has consistently set aside awards for what may be considered as minor or technical breaches of the rules of natural justice.[84] However, as indicated by Professor Jones, at law, there are no obvious legal impediments to a person performing the dual role of mediator and arbitrator in the same dispute.[85]

Section 27(D) of the Act recognises that the parties may request a more expeditious settlement procedure, unless the arbitration agreement states otherwise. Specifically, section 27D(1)(a) stipulates that the arbitration agreement may provide for the arbitrator to act as a mediator 'whether before or after proceeding to arbitration, and whether or not continuing with the arbitration'. In addition, if an arbitrator acts as a mediator and the mediation fails to produce a settlement of the dispute acceptable to the parties, 'no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section'.[86]

However, although there are no legal impediments, the clearly distinct roles of mediators and arbitrators, as reflected in the attitudes to rules of natural justice, militate against a combination of these roles. Indeed, how is it possible for the arbitrator to retain the essential requirement of neutrality and third party independence necessary in arbitral proceedings if the mediation process does not result in settlement and the arbitration resumes? If the mediator acts as an arbitrator, the issue arises whether he will still need to respect the rules of natural justice when seeking a settlement by arbitration. This issue has arguably been addressed in section 27D(7) of the Act which, as stated by Professor Jones 'is directed at natural justice requirements'.[87] It imposes an obligation on the arbitrator to disclose 'before conducting subsequent arbitration proceedings … to all other parties to the arbitration proceedings so much of the information as the arbitrator considers material to the arbitration proceedings'.

Nevertheless, section 27D of the Act does not answer the question of whether there are any policy arguments which militate against a person embracing this dual role of mediator/conciliator and arbitrator. It is the view of the authors of this article that the roles of mediators and arbitrators are distinct and incompatible and, therefore, these roles should not be combined in any way. The mediator's role, in essence, is to assess the demands of the parties to the dispute. If the demands of the parties are outrageous, a mediator will communicate that view to the parties. He or she will ensure that both sides understand the other side's case. Mediators are also expected to prevent arguments over technicalities. Mediators must say what they think about each party's case (this might be done in camera, caucus or in a plenary session), but they still communicate their views to the parties without imposing a solution upon them.

In contrast, arbitrators cannot really perform the role of a mediator. Indeed, if arbitrators were to indicate how they feel about a party's case, they could, in most jurisdictions, be challenged for bias and partiality, involving a violation of the rules of natural justice. This is well illustrated in the Australian case of *Pindan Pty Ltd v Uniseal Pty Ltd*.[88] Uniseal wrote to the arbitrator during the course of the arbitration

84 See *Shirley Sloan Pty Ltd v Merril Holdings Pty Ltd* [2000] WASC 99.
85 Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co., Thomson Reuters, 2011, 330 [8.1520].
86 Section 27D(5) of the Act.
87 Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co., Thomson Reuters, 2011, 336 [8.1580].
88 [2003] WASC 168.

advising that they were in financial difficulties and would have problems paying the arbitrator's fees. The arbitrator replied in part, that he 'sincerely sympathised with Uniseal's position'. This resulted in an application by Pindan to have the arbitrator removed for misconduct on the basis of a reasonable apprehension of the possibility of bias.

Further, where a party's arguments, positions, personal or financial interests are revealed to the arbitrator while acting as mediator, the arbitrator, when resuming the arbitration in the event of the mediation failing to result in settlement, could well be perceived to have been influenced by, or have some sympathy with, a party's situation. The arbitrator must really behave like a judge, who may be equally disliked but is impartial and unbiased, whereas the mediator is deemed to be a mutual friend of the parties. Hence, it may be concluded that a good mediator should not really act as an arbitrator, at least not in the same case.

Additionally, according to Article 27(D)(5) of the Act, if an arbitrator has acted as a mediator and the mediation fails to produce a settlement of the dispute acceptable to the parties 'no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section'. This section, however, does not imply that the rules of natural justice can be displaced. Natural justice is inherent in any process which affects one's rights, interests and legitimate expectations and can only be dispensed with in any legislation if expressly included. No express wording voiding the requirement of natural justice is featured in the respective provisions of the Act. Also, the word 'solely' in section 27D(5) of the Act only suggests that no objection can be taken if the arbitrator subsequently resumes the arbitration in the event that the mediation fails. It does not expressly preclude objection on other grounds, such as a breach of the rules of natural justice.

If this conclusion is correct, section 27D of the Act should be amended by making it clear that the roles of mediator and arbitrator are largely incompatible with each other. If the arbitrator does not strictly follow the rules of natural justice the rendered award will be subject to appeal. If the mediator attempts to apply these rules in mediation, his role will be ineffective. The role of the mediator is therefore inconsistent with that of the arbitrator and if 'mediation within arbitration' is to be contemplated, despite the current provisions in the Act, the Act should be amended to require different persons to carry out the separate functions.[89]

Although in our opinion section 27D, in allowing arb-med processes to occur, is problematic, the support or lack of it for these processes probably depends on cultural sensitivities. For example, despite the angst about the combination of these roles, in the People's Republic of China it is very common to combine arbitration with mediation and this combination has been reasonably successful in practice. Therefore, those who are familiar with the Chinese practice of combining conciliation, mediation and arbitration

89 This view is probably not shared by Professor Jones. He states: "Since the overarching obligation of failing to comply with rules of natural justice has been removed, the concern that a party may be procedurally disadvantaged vis-à-vis another party is instead safeguarded by the requirement for party consent at all relevant times." Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co., Thomson Reuters, 2011, 336 [8.1580]. See also section 27D(4) of the Act.

may applaud section 27D and comparable provisions in other arbitration statutes.[90] In this context, Professor Tang Houzi has argued that using the same person as an arbitrator and mediator does not violate any principles of natural justice or create any wrong perception about the parties in the eyes of that arbitrator.[91] This view, which, among others, is codified in the CEAC Hamburg Arbitration Rules which provide for the combination of conciliation, mediation and arbitration processes, will therefore be attractive for the Chinese party and reflects 'Chinese preferences for settlements and negotiations' during arbitration.[92] In fact, it has been reported by the Chinese International Economic and Trade Arbitration Commission (CIETAC), which is the premier arbitration authority in the People's Republic of China, that med-arb processes have been used to successfully resolve up to 30% of commercial disputes in China.[93]

Although arbitrations were held in private under the *Commercial Arbitration Act 1985* (WA), there was no implied term with respect to confidentiality.[94] If the proceeding were to be confidential, this required an express term in the arbitration agreement or agreement between the parties at the preliminary conference.

The new Act, in sections 27E to 27I, now contains extensive express provisions regarding the confidentiality of the arbitral proceedings. Section 2(1) of the Act defines 'confidential information' in relation to arbitral proceedings as 'information that relates to the arbitral proceedings or to an award made in those proceedings'. The commencing substantive section is section 27E:

> *(1) The provisions of this section apply in arbitral proceedings unless otherwise agreed by the parties.*
>
> *(2) The parties must not disclose confidential information in relation to the arbitral proceedings unless —*
>
> *(a) the disclosure is allowed under section 27F; or*
>
> *(b) the disclosure is allowed under an order made under section 27G and no order is in force under section 27H prohibiting that disclosure; or*
>
> *(c) the disclosure is allowed under an order made under section 27I.*
>
> *(3) An arbitral tribunal must not disclose confidential information in relation to the arbitral proceedings unless —*
>
> *(a) the disclosure is allowed under section 27F; or*

90 For example. See Article 1(4) CEAC Hamburg Arbitration Rules. The CEAC itself suggests that "it is sometimes wise to combine a CEAC arbitration clause with a mediation or conciliation clause": see Eckart Brödermann and Thomas Weimann, "CEAC", *Global Arbitration Review*, 2011, 10-15:

91 See Tang Houzi, "Combination of Arbitration and Mediation" and "Is there an expanding culture that favours combining arbitration with conciliation or other ADR Procedures", respectively available at http://www.cityu.edu.hk/slw/ADR_Moot/doc/Combination_of_Arbitration_and_Mediation.pdf and http://www.cityu.edu.hk/slw/ADR_Moot/doc/Expanding_culture.pdf .

92 See CEAC Newsletter, 1st Edition, March 2009, 1.

93 www.corrs.com.au/thinking/insights/mediation-arb. Accessed on 14 September 2012.

94 *Esso Australia Resources Ltd v Plowman* (1994) 183 CLR 10.

(b) the disclosure is allowed under an order made under section 27G and no order is in force under section 27H prohibiting that disclosure; or

(c) the disclosure is allowed under an order made under section 27I.

The effect of section 27E(1) is that, unless the parties expressly agree to 'opt out' of the confidentiality provisions, then they will be bound to maintain the confidentiality of the proceedings. This is different in the IAA Act 1974 (as revised in 2010), which requires parties to opt in for the purpose of keeping arbitral proceedings confidential.[95]

As can be seen in section 27E(2), there are limited circumstances where confidential information may be disclosed. Sections 27F, 27G and 27I further discuss additional circumstances where confidential information may be disclosed and section 27H provides that the Court may prohibit disclosure of confidential information in certain circumstances.

Part 6: Making of Award and Termination of Proceedings

Part 6 of the new Act concerns the making of an award and the termination of the arbitral proceedings. The commencing provision is section 28:

(1) The arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.

(2) Any designation of the law or legal system of a given State or Territory must be construed, unless otherwise expressed, as directly referring to the substantive law of that State or Territory and not to its conflict of laws rules.

(3) Failing any designation by the parties, the arbitral tribunal must apply the law determined by the conflict of laws rules which it considers applicable.

(4) The arbitral tribunal must decide the dispute, if the parties so agree, in accordance with such other considerations as are agreed to by the parties.

(5) In all cases, the arbitral tribunal must decide in accordance with the terms of the contract and must take into account the usages of the trade applicable to the transaction.

As can be seen, the section allows the parties to choose the rules relating to substance of the dispute. The determinations of the tribunal must be decided in accordance with the terms of the contract.[96]

Any decision made by an arbitral panel must be made by a majority of all its members.[97] However, interestingly, 'questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal'.[98] This section is innovative because the conduct of the

95 See IAA, section 22(3) in relation to section 23(C)-(G).
96 Section 28(5).
97 Section 29(1).
98 Section 29(2).

proceedings is likely to be facilitated if procedural decisions can be made by a presiding arbitrator, acting alone. Section 30 allows for the handing down of what was termed under the *Commercial Arbitration Act 1985* (WA) as an award on agreed terms following agreement of the parties to settle the dispute during the period of the arbitral proceedings. As under the previous uniform law, such an award will have the same status as any other award on the merits of the case.[99]

The form and contents of the award are essentially as required by section 31 and are the same as previously found in the *Commercial Arbitration Act 1985* (WA), with minor procedural additions.[101] The section now states;

> *(1) The award must be made in writing and must be signed by the arbitrator or arbitrators.*
>
> *(2) In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal suffices, provided that the reason for any omitted signature is stated.*
>
> *(3) The award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 30.*
>
> *(4) The award must state its date and the place of arbitration as determined in accordance with section 20.*
>
> *(5) The award is taken to have been made at the place stated in the award in accordance with subsection (4).*
>
> *(6) After the award is made, a copy signed by the arbitrators in accordance with subsection (1) must be delivered to each party.*

There is no strict form that an award must follow. While dealing with the form and reasons in an expert determination, the High Court in *Shaolhaven City Council v Firedam Civil Engineering Pty Ltd*[101] considered for the first time the standard of reasoning required of an expert; this standard is relevant to an arbitrator as well. Apart from the legal issues, the parties are entitled to understand the logic of the award. Consequently, there are good practices that should be adopted. Waye suggests that an award should consist of three parts, namely (i) a narrative explaining the circumstances of the arbitration, the persons involved, and the general story and findings derived from the story, (ii) the determination (or award proper), and (iii) the reasons behind the determination.[102]

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99 Section 30(3).

100 Section 29.

101 [2011] HCA 38. See also *Gordian Runoff v Westport Insurance Corporation* [2010] NSWCA 57 where the court noted that, compared to litigation, the arbitration award is "the outcome of a private and consensual, process which is meant to be shorn of the costs, complexities and technicalities often cited … as the indicia and disadvantages of curial decision making." The decision was subsequently appealed in *Westport Insurance Corporation v Gordian Runoff Ltd* [2007] HCA 37; however, the High Court confirmed that the nature and extent of reasons for an award depends upon the circumstances of the particular dispute. It must be noted, however, that this was a decision based on the operation of section 38 of the previous Uniform Arbitration Act. There is no direct application to the new Act.

102 *A Guide to Arbitration Practice in Australia* (Ed V. Waye) 2nd Edition University of Adelaide and Institute of Arbitrators and Mediators Australia, 2006.

In the Act, there is an express provision, section 32(2), which allows for the arbitral tribunal to issue an order for the termination of the proceedings in certain circumstances apart from the handing down of the final award which renders the tribunal *functus officio*:[103]

> *(2) The arbitral tribunal is to issue an order for the termination of the arbitral proceedings when —*
>
> *(a) the claimant withdraws his or her claim, unless the respondent objects and the arbitral tribunal recognises a legitimate interest on the respondent's part in obtaining a final settlement of the dispute; or*
>
> *(b) the parties agree on the termination of the proceedings; or*
>
> *(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible; or*
>
> *(d) the arbitral tribunal makes an award under section 25(2)(a) dismissing the claim.*

The power to correct an award (known generally as the 'slip rule') is provided in section 33. This section has been expanded in comparison with the relevant provisions in the previous 1985 Act.[104] The important feature of the provision is that the power only extends to the correction in the award of 'any errors in computation, any clerical or typographical errors or any errors of a similar nature'.[105]

An interesting inclusion in the Act is the provision which permits the parties, with agreement, to request the arbitral tribunal to give an interpretation of a specific point or part of the award.[106] It is considered that this may be problematic in that it could give rise to an attempt by parties to 'revisit' the award. Historically, with the handing down of the award the tribunal is *functus officio* and cannot 'revisit' the award, with the exception of corrections permitted under the slip rule described above. However, the tribunal has discretion with respect to the justification of the request. Where a correction or interpretation is considered justified, the tribunal must make the change within 30 days of the receipt of the request.[107] Where an interpretation has been made it subsequently forms part of the award.[108]

An important inclusion is section 33(5) of the Act which states that, "Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award." By comparison, under the provisions of the *Commercial Arbitration Act 1985* (WA), where the tribunal's award failed to address an issue pleaded, this would give rise to an application from a party to have the award set aside on the basis of misconduct.[109]

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103 Section 32(3).
104 Section 30.
105 Section 33(1)(a).
106 Section 33(1)(b).
107 Section 33 (2).
108 Section 33 (3).
109 See sections 4 and 42 of the Commercial Arbitration Act 1985 (WA) and *Villani &Anor v Delstrat Pty Ltd* [2002] WASC 112

The power of the tribunal to make an award ordering specific performance unless otherwise agreed by the parties is retained in the Act.[110] The power of the tribunal in this regard would obviously depend on the law applicable to the contract. For example, if the United Nations Convention on Contracts for the International Sale of Goods (CISG) is the applicable law, then by virtue of its Article 28, "a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention'. This means in effect that, in common law systems such as Australia, specific performance will not often be ordered because the award for damages is the usual remedy. This contrasts with civil law systems, where specific performance is the normally expected remedy for breach of contract.

Specifically in Australia, courts have been reluctant to make orders for specific performance involving a continuing obligation, such as rectification of defective work. This appears to be for the reason that courts cannot ensure that performance has occurred in accordance with the order.[111] However, this is not an absolute rule and supervision is one of the matters that a court will take into consideration in deciding to make the order.[112] There are very few Western Australian cases involving an arbitrator making an award for specific performance. However, in *IR and CA Hassell v Silent Vector Pty Ltd t/a Sizer Homes*,[113] a Commissioner of the Supreme Court upheld an arbitrator's award for the order of specific performance relating to the replacement of windows in a building. It would appear that the decision of the court was influenced by the fact that the contract was an architect-administered contract and ongoing supervision was thus available.

The powers of the tribunal and the court with respect to determination of the costs of the arbitration are provided in sections 33B(1) to (7) and 33C and 33D. As with the previous 1985 Act,[114] the costs of the arbitration are discretionary. Section 33B(1) states:

> *Unless otherwise agreed by the parties, the costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators) are to be in the discretion of the arbitral tribunal.*

The Western Australian Supreme Court, in considering the relevant section in the previous 1985 Act, has held that the section had the effect that the costs of an arbitration was clearly at the discretion of the arbitrator.[115] While the award of costs is at the discretion of the arbitrator who may direct to and by whom and in what manner the whole or any part of the costs shall be paid, the arbitrator is under an obligation to act judicially and at the same time ensure that the costs are dealt with in a fair and equitable manner.[116]

The starting point is that in the absence of any special circumstances or contrary agreement by the parties the arbitrator should award the costs to the successful party.[117] In the context of claims and counterclaims,

110 Section 33A.
111 See *JC Williamson Ltd v Lukey* (1931) 45 CLR 282, 297.
112 See *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 46.
113 Unreported SCWA 15 May 2005.
113 Section 34 (1).
115 See *Afkos Indudtries Pty Ltd v Pullinger Stewart (A Firm)* [2001] WASCA 372.
116 See *Lloyd del Pacifico v Board of Trade* (1930) 35 Com Cas 325.
117 See *Oshlack v Richmond River Council* (1998) 193 CLR 72 per McHugh J at 97.

particularly under a building contract, the successful party will generally be the party securing the final flow of money.[118] Whilst an arbitrator is not entitled to determine the successful party on the basis of the balance of who has won the most issues, as in *Miles v Palm Bridge Pty Ltd*, the issue will be different where the defendant succeeds on a number of discrete and substantial issues.[119]

The courts recognise that there are circumstances where an arbitrator can depart from the general rule. Specifically, if an arbitrator is confronted by a set of facts where the issues in dispute are separate and distinct so that one party is clearly identifiable as being the 'winner' in respect of a specific issue, the alternative is to 'apportion costs' between the parties.[120]

When considering how to apportion costs, the arbitrator must attempt to balance the time taken and the costs incurred by the parties in presenting their case on issues they were successful on. In addition, the arbitrator must also form an overall view of the time and costs incurred in dealing with various interlocutory applications in respect to which no cost order has been made, as in *Triden Contractors v Belvista*. It is a matter of discretionary balance for the arbitrator and not one of any form of mathematical apportionment.[121]

Unless otherwise agreed by the parties, as with costs, there is a discretionary power for the tribunal where there has been an award for the payment of money to include in the sum awarded interest, at a reasonable rate as determined by the tribunal.[122] The purpose of the provision is not to compensate the winning party for its loss arising out of the matter, but rather to compensate the successful party 'for the detriment that he suffered by being kept out of his money, and not to punish the defendant for having been dilatory in settling the plaintiff's claim'.[123]

The new provision has replaced section 31 of the previous 1985 Act, which provided that an arbitrator could not award interest at a rate which exceeded the rate at which interest was payable on a judgment debt of the court. There is no assistance in the Act with respect to determining what is 'reasonable'. Professor Jones suggests that there are, however, a number of factors which a tribunal could consider.[124] These include the rate of interest prescribed by the contract or the arbitration agreement; in the absence of the former, the rates of interest are usually prescribed by the proper law of the contract and the lex arbitri (apply the general rule that interest should be awarded at the maximum rate as prescribed for the Supreme Court judgment debts).[125] Note that there are some limitations to section 33E as a consequence of section 33E(1), in particular, the prohibition on the awarding of compound interest.

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118 See *Miles v Palm Bridge Pty Ltd* [2001] WASC 42.

119 See *Jacobs, Commercial Arbitration Law and Practice*, Vol 1B (Law Book) at paragraph 32.163.

120 See *Triden Contractors Pty Ltd v Belvista Pty Ltd*, unreported, Supreme Court NSW 26 September 1989; *Re Eligindata* (No 2) [1993] 1 All ER 232; Mustill M and Boyd S. *The Law and Practice of Commercial Arbitration* (2nd ed) Butterworths, London 1989, 396-397.

121 See *Lewis Emanuel & Sons Ltd v Sammutt* [1959] 2 Lloyd's Rep 629; *Matheson v Tabah* [1963] 2 Lloyds's Rep 270.

122 See section 33E.

123 See *Batchelor v Burke* (1981) 148 CLR 448, 455. See Also *Hungerfords v Walker* (1989) 171 CLR 125 where the High Court held that an award of damages at common law could include an amount for the loss of the use of the winning parties' money as a consequence of the other parties' breach. See also *Leighton Contractors Pty Ltd v. Kilpatrick Green Pty Ltd* [1992] 2 VR 505.

124 Doug Jones, Commercial *Arbitration in Australia*, Lawbook Co., Thomson Reuters, 2011, 440 [9.970]

125 In Western Australia, see *The Civil Judgements Enforcement Act* 2004 (WA)

Part 7: Recourse Against Awards

Part 7 of the Act concerns the recourse against arbitral awards. It details the circumstances in which an application can be made for the setting aside of an award and the grounds upon which the parties can appeal the award. It represents significant changes to the provisions of the previous *Commercial Arbitration Act 1985* (WA) and should assist in achieving the objective of finality in arbitral determinations.

In the previous 1985 Act parties were able to appeal against a decision of an arbitrator on a question of law. The grounds for judicial appeal were set out in section 38(4) and (5):

> *(4) An appeal … may be brought by any of the parties to an arbitration agreement —*
>
> *(a) with the consent of all the other parties to the arbitration agreement; or*
>
> *(b) subject to section 40, with the leave of the Supreme Court.*
>
> *(5) The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that*
>
> *(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and*
>
> *(b) there is —*
>
> *(i) a manifest error of law on the face of the award; or*
>
> *(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.*

Unfortunately, despite the objective of finality in arbitration, appeals from arbitrators' decisions were not uncommon. Professor Jones notes that there have been over 500 cases involving appeals on questions of law.[126] In contrast, the new Act will make appeals on a question of law virtually impossible.

Firstly, it is difficult to envisage that both parties would agree to the appeal as required by section 34A:

> *(1) An appeal lies to the Court on a question of law arising out of an award if —*
>
> *(a) the parties agree, before the end of the appeal period referred to in subsection (6), that an appeal may be made under this section; and*
>
> *(b) the Court grants leave.*
>
> *(2) An appeal under this section may be brought by any of the parties to an arbitration agreement.*

Secondly, the requirements for setting aside the award are quite stringent by virtue of section 34(2), which states:

126 Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co., Thomson Reuters, 2011, 470 [10.360]
127 Section 34(3).

(2) An arbitral award may be set aside by the Court only if —

(a) the party making the application furnishes proof that —

(i) a party to the arbitration agreement referred to in section 7 was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitral tribunal or of the arbitral proceedings or was otherwise unable to present the party's case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act;

or

(b) the Court finds that —

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

Furthermore, an application for the setting aside of the award must be made within three months from the date of receipt of the award.[127] In addition, the Court, 'when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside of proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside'.[128] When making a decision on the appeal under section 34A, the Court may by order (i) confirm the award, (ii) vary the award, (iii) remit the award to the arbitrator for reconsideration, or (iv) set aside the award in whole or in part.[129]

128 Section 34(4).
129 Section 34A(7).

Part 8: Recognition and Enforcement of Awards

Part 8 of the Act concerns the recognition and enforcement of arbitral awards. In accordance with section 35(1), awards may be enforced regardless of the state or territory in which they were made.[130] Section 35 of the Act is modelled on Articles III and IV of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). It is expected that the success of the New York Convention in enforcing international arbitration awards will translate to the enforcement of domestic arbitration awards.

However, section 36 details situations which enable a party to resist the enforcement of the award:

> *(1) Recognition or enforcement of an arbitral award, irrespective of the State or Territory in which it was made, may be refused only —*
>
> *(a) at the request of the party against whom it is invoked, if that party furnishes to the Court proof that —*
>
> *(i) a party to the arbitration agreement was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of the State or Territory where the award was made; or*
>
> *(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the party's case; or*
>
> *(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or*
>
> *(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the State or Territory where the arbitration took place; or*
>
> *(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the State or Territory in which, or under the law of which, that award was made;*
>
> *or*
>
> *(b) if the Court finds that —*
>
> *(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or*
>
> *(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.*

130 Section 35(1).

Where there has been a challenge to the jurisdiction or composition of the tribunal under the competence-competence doctrine, it is the tribunal itself which decides upon its own jurisdiction.[131] However, the express provision in section 36(1)(b)(i) of the Act now permits the Court to consider the arbitrability of the dispute at the recognition and enforcement stage.

Since arbitration is a consensual process, with the parties also subscribing to the objective of finality, it would be anticipated that the award would be honoured. Professor Jones suggests that in the majority of cases a refusal by the unsuccessful party to comply with the award arises from 'a lack of debtor assets rather than deficiencies in the arbitral or legal proceedings'.[132]

Part 9: Miscellaneous

Part 9 deals with a number of miscellaneous provisions including death of a party,[133] interpleader,[134] arbitrator's immunity,[135] court rules[136] and the making of regulations.[137]

Conclusion

The Act as defined earlier, will significantly change the application and effectiveness of the resolution of commercial disputes by arbitration. In particular, a court will only be permitted to intervene in limited circumstances; the opportunity to challenge and remove arbitrators will be significantly reduced; the arbitral tribunal will have substantial power to grant interim measures; the grounds for the appeal of the arbitral tribunal's decision will be limited; and the Act provides for a detailed confidentiality regime.

The Act will ensure that Western Australian domestic arbitration laws reflect accepted international best practice for resolving commercial disputes and will provide business and industry with a cost-effective and efficient alternative to litigation. It will give effect to the essential feature of commercial arbitration in that it will provide a quick and cost-effective means of resolving commercial disputes in a nationally harmonised system by reducing the grounds for appeal which were an unacceptable feature of the former *Commercial Arbitration Act 1985* (WA).

131 Section 16(1).
132 Doug Jones, *Commercial Arbitration in Australia*, Lawbook Co., Thomson Reuters, 2011 , 493 [11.100]
133 Section 37.
134 Section 38.
135 Section 39.
136 Section 40.
137 Section 41.