IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S178 OF 2012

BETWEEN: **TCL AIR CONDITIONER (ZHONGSHAN) CO LTD**
Plaintiff

AND: **THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA**
First Defendant

CASTEL ELECTRONICS PTY LTD
Second Defendant

SUBMISSIONS OF THE COMMONWEALTH ATTORNEY-GENERAL (INTERVENING)

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Attorney-General**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART IV LEGISLATIVE PROVISIONS

3. The relevant constitutional provisions are found in Ch III of the Constitution. The relevant legislative provisions are found in the *International Arbitration Act 1974* (Cth) (**IA Act**).

4. The Attorney-General proceeds on the basis that the IA Act as set out in Annexure A to the plaintiff's submissions is the relevant version of that Act for the purpose of this proceeding. That version, as at 5 May 2011, incorporates the amendments effected by the *International Arbitration Amendment Act 2010* (Cth) (**Amendment Act: Annexure A**). Certain amendments effected by the Amendment Act apply only to arbitration agreements entered into on or after 6 July 2010.[1] The extent to which the old s 21 might continue to apply has not been authoritatively decided[2] and need not be decided in this case. Prior to its amendment, s 21 of the IA Act permitted parties to an arbitration agreement to, in effect, opt-out of the application of the UNCITRAL Model Law[3] (**Model Law**). Section 21, as it stood before it was repealed by the Amendment Act (and the current s 21 substituted in its place), is set out in **Annexure B** to these submissions. No attempt to opt-out was made in this case. It is submitted that the IA Act is valid in either form.

PART V ISSUES PRESENTED BY THE APPEAL

I. Overview

5. The Attorney-General submits, in summary, as follows. First, subject to the Ch III issues raised in this matter, the IA Act is a valid exercise of the Commonwealth Parliament's legislative power pursuant to, at least, ss 51(i) and 51(xxix) of the Constitution (the plaintiff raises no Ch I issue).

6. Second, the plaintiff's five preliminary propositions lay an inadequate foundation on which to resolve the two constitutional points raised: see further Section IV below.

7. Third, what is critical to the constitutional questions, and largely overlooked by the plaintiff, is a close identification of the "matter" that arises under s 16 of the IA Act and the Model Law in respect of which the Federal Court is vested with jurisdiction under ss 76(ii) and 77(i) of the Constitution and s 39B of the *Judiciary Act 1903* (Cth). The relevant matter is whether an applicant has a right to orders from the Court recognising and enforcing the rights claimed to derive from the arbitrator's

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1 See Item 32, Schedule 1 of the Amendment Act.

2 *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Limited* [2012] WASCA 50 at [123] – [149] per Martin CJ (Buss JA agreeing), at [201] – [207] per Murphy JA. Cf., *Castel Electronics Pty Limited v TCL Air Conditioner (Zhongshan) Company Limited* [2012] FCA 21; 201 FCR 209 at [65] – [74].

3 Being the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 (as amended on 7 July 2006).

award. This requires the court to determine whether the award has operated as a valid exercise of the private power conferred by the parties on the arbitrators to extinguish the original causes of action and replace them with a new set of rights; validity being judged by reference to such of the seven available grounds of defeasance in Art 36 of the Model Law as are raised in the particular case. The action for enforcement under Art 35 involves the court's jurisdiction with respect to that "matter", not the anterior dispute: see further Section V below.

8. Fourth, with that background, the IA Act does not impair, substantially or at all, the institutional integrity of the Federal Court. The Court retains full power to apply the judicial method to the resolution of the "matter" actually before it, as defined above. In resolving that "matter", its decisional independence is in no way compromised. To describe the court as the "junior partner" to the arbitral tribunal is to mistake the very different roles being played by each: see further Section VI below.

9. Fifth, the making of the award does not involve any exercise of judicial power, let alone the judicial power of the Commonwealth. It is not an exercise of sovereign power, but rather an exercise of power sourced in the voluntary action of the parties, embodied in a binding contract, to confer on the arbitrator the authority to extinguish the original causes of action and substitute them with new rights; and their agreement to abide by the result of the arbitration. In so doing, the arbitrator creates new rights, even if that follows the formation of an opinion about existing rights and questions of fact. Accordingly, the court's subsequent exercise of judicial power, requiring the application of statutory norms to the award to determine if it is binding, does not alter the characterisation of the arbitrator's function as non-judicial: see further Section VII below.

10. Sixth, while it is unnecessary in this appeal to examine the full scope of each of the seven grounds of defeasance in Art 36, the developing jurisprudence on them here and in other countries which have adopted the Model Law or Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration (**New York Convention**) confirms that they engage the court in a real and substantial process of the application of judicial power separate to the making of the award: see further Section VIII below.

11. Finally, there is nothing in the history of the relationship between arbitration and the courts which requires any different conclusion: see Section IX below.

II. Factual background

12. The Attorney-General accepts the facts set out in the plaintiff's submissions at [6] – [12] with one addition and one point of emphasis. The addition is that, shortly after the commencement of the arbitration, the plaintiff (**TCL**) moved to strike out part of the second defendant's (**Castel**) claim as beyond the scope of the arbitration clause in the General Distribution Agreement (**GDA**). The arbitrators made an interim award rejecting that challenge but, on 8 December 2009, Hargrave J in the Supreme Court of Victoria set aside that interim award finding that the arbitration clause in the GDA did not extend to that part of the claim of Castel to which TCL objected.[4] The point of emphasis is that none of the claims agitated before the arbitrators (being purely common law claims for breach of the GDA) gave rise to

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4 *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Limited* [2009] VSC 553.

"matters" within the jurisdiction of a court exercising federal judicial power under Ch III of the Constitution.[5]

III. Statutory framework

13. Part II of the IA Act gives effect to Australia's obligations under the New York Convention. Part III enacts into Australian law the Model Law. The New York Convention and the Model Law provide a framework for the facilitation, support, conduct and enforcement of commercial arbitration agreements, arbitrations and arbitral awards that are of an international character. They promote the ability of the parties to reach agreement as to how their disputes will be resolved and obviate the risk that contractual expectations will be defeated by the application of parochial municipal rules and procedures to interfere with or decline to enforce international arbitral awards.[6]

14. The provisions of the Model Law fall into four broad categories. First, provisions providing default rules for the arbitration, applicable in the absence of agreement by the parties. Those default rules provide for the number of arbitrators, the method of appointment or challenge of arbitrators, the rules of procedure, the law to be applied, the language of and place of arbitration, the method of decision making by arbitrators, provision of reasons, and the power to make interim measures or appoint expert witnesses.[7] Additional default powers of arbitrators appear in Part III, Division 3 of the IA Act giving the arbitrators power to make orders for the inspection or testing of real evidence, permitting disclosure of confidential information, for security for costs, consolidation of proceedings, award interest and costs of the arbitration.[8] Second, provisions which establish basic norms of conduct for arbitrators; namely, the disclosure of possible grounds for recusal, the equal and fair treatment of the parties and provision of a signed award in writing.[9] Third, provisions which confer powers on the court to facilitate and resolve disputes about the conduct of arbitration; namely, challenges to the appointment of and jurisdiction of arbitrators, appointment of replacement arbitrators, making of interim measures and provision of assistance with the taking of evidence.[10] Additional facilitative powers of the court, which apply either by agreement or in default of agreement of the parties to the contrary, appear in Part III, Division 3 of the IA Act and enable the issue of subpoenas by the court for arbitral proceedings and the making of orders prohibiting or allowing disclosure of confidential information.[11] Fourth, provisions which confer power on the court to enforce agreements referring matters to arbitration and to set aside or recognise

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5 As is conceded at [88] of the plaintiff's submissions.

6 See, eg, *Scherk v Alberto-Culver Company* 417 US 506 (1974) at 516 – 517 per Stewart J; *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc* 473 US 614 (1985) at 638 – 639 per Blackmun J; *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 at 674 – 675 per Cooke P; 687 – 688 per Richardson J, at 691 per McMullin J, at 694 – 595 per Barker J; *Comandate Marine Corp v Pan Australia Shipping Pty Limited* [2006] FCAFC 192; 157 FCR 45 (***Comandate v Pan***) at [192] – [194] per Allsop J (Finn and Finkelstein JJ agreeing).

7 See Art 10 (number of arbitrators), Art 11 (appointment of arbitrators), Art 13 (procedure for challenge), Arts 17 - 17I (interim measures - contrary to [29] of the plaintiff's submissions the power to make interim measures is subject to the agreement of the parties), Arts 19, 23, 24 (arbitral procedure), Art 20 (place of arbitration), Art 21 (commencement of arbitration), Art 26 (appointment of experts), Art 28 (applicable law), Art 29 (method of decision making), Art 31 (provision of reasons).

8 Section 23E (confidential information), s 23J (evidence), s 23K (security for costs), s 24 (consolidation), ss 25 and 26 (interest) and s 27 (costs).

9 See Art 12 (disclosure of possible grounds for recusal), Art 18 (equal and fair treatment), Art 31 (award in writing).

10 Art 13 (challenge to arbitrators), Art 14 (replacement of arbitrators), Art 16 (jurisdictional challenge), Art 17J (interim measures), Art 27 (assistance with taking evidence).

11 See ss 23 - 23B (subpoenas) and ss 23F - 23G (confidential information).

and enforce arbitral awards.[12] The Model Law identifies seven bases on which an arbitral award can be set aside or not recognised or enforced. Those bases are discussed in detail below with reference to Art 36 of the Model Law.[13]

IV. The proper foundation for determining the constitutional questions

15. Contrary to the plaintiff's five preliminary propositions, the correct framework in which the constitutional questions arise is as follows. First, an arbitral tribunal of the present kind is not a hybrid authority sourced in both public and private power. Rather, it is a body exercising private power, pursuant to the authority derived from the contract of the parties. Its award is given legal force by virtue of the common law, as amended by statute from time to time, here the IA Act. The court may be called to play a separate, albeit complementary, role through the exercise of judicial power to give effect to the function of the tribunal, and in turn, the parties' contract; and to determine whether, in accordance with norms defined by the common law and now the IA Act, the award is binding on the parties, so as to be recognised and enforced.

16. Second, the power exercised by the arbitral tribunal is quite different from the exercise of judicial power in the trial of an action for breach of contract, where the existing rights and obligations of the parties are determined by the application of the identified law to the facts as found concerning the parties' controversy and as such then enforced. By contrast, what the arbitral tribunal does by its award (provided it is valid) is to exercise the authority conferred by the parties so as to form an opinion which is the base for the award; to extinguish the original claims and causes of action; and to substitute them with the new rights and obligations reflected in the award. The result of the making of a valid award is that, through the parties' agreement, there no longer remains the original causes of action upon which any determination of existing right is or can be made.

17. This critical difference between what a court does in the exercise of judicial power and what the arbitral tribunal does in an exercise of private, contractual power was correctly explained in *Dobbs v National Australia Bank Limited*[14] and *Waterside Workers Federation of Australia v JW Alexander Limited*.[15] The plaintiff's attempts to assimilate the two very different functions fail.[16]

18. Third, the plaintiff's explanation of what the court does when it recognises or enforces the award under Arts 35 and 36 of the Model Law is erroneous. Whether a given award is a valid exercise of the private power conferred by the parties on the tribunal is a question for the common law, as amended by statute from time to time, here the IA Act. The common law, informed by notions of the intentions of the parties, actual or imputed, developed principles as to when an award would be valid. That law has not stood still. Various statutes, from 1698 to the present day, have intervened to restate or modify those principles.

19. The Model Law in Articles 35 and 36 is doing at least these things. First, stating exhaustively the grounds on which the presumptively binding force of the award can be challenged. Second, in the "recognition" limb, declaring that an award

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12 Art 8 (enforcement of arbitration agreements), Art 17H (recognition and enforcement of interim measures), Art 34 (setting aside award), Art 35 (recognition and enforcement of award).
13 See Arts 17I, 34 and 36.
14 (1935) 53 CLR 643 at 652-4. The relevant extract appears at [38] below.
15 (1918) 25 CLR 434 at 444, 452.
16 See the plaintiff's submissions at [42].

which survives challenge on the seven stated grounds announces the new rights of the parties for the future. Thus, if a disgruntled party sues on the original cause of action and the other party pleads the award, and the award survives challenge, it operates as a valid plea in bar. Third, in the "enforcement" limb, vesting jurisdiction in specific courts to hear an affirmative action for enforcement of the award: the award, if it survives challenge on the seven grounds, is the basis on which the court in the exercise of its judicial power enters a judgment. That judgment then opens up the usual post judgment enforcement remedies of that court and other related courts (for example, the court of bankruptcy).

20. Accordingly, the court does not merely "duplicate" the award or engage in any "fictional" enterprise. Rather, it applies the law (Articles 35 and 36) to the facts as found in relation to any of the seven grounds of defence raised so as to determine if the award operates as a valid exercise of the power granted by the parties' contract. Based on that finding of right, it makes its own orders and then administers its remedies.

21. Fourth, the seven stated exceptions to the award being binding cannot be dismissed as merely "process-based". Nor is it appropriate in this matter to assume, or find, that the public policy exception is "narrow" not "wide", as no concrete controversy about the applicability or scope of that exception has been raised by the parties. It is enough to observe that the various exceptions will find their true scope as courts deal with them on a case by case basis. As a package, they may not entirely mirror the pre-existing common law (or statutory) position, but they reflect a legislative choice, within a legitimate range, of the norms under which a given award will be treated as other than an effective exercise of the authority derived from the parties' agreement. For completeness, some further submissions are made on the extensive scope of the exceptions in Section VIII below.

22. Fifth, the courts' "traditional supervisory jurisdiction" in relation to arbitral awards was neither immutable in terms nor reflective of any principle going to the "essential characteristics" of a court. It rather reflected varying views, either of the common law or statute, on the basic question of when a given award should be treated as given sufficiently within the parameters charted by the parties (expressly or impliedly) to mean that the original dispute was at an end. Notions of public policy may have intruded into such judgments, as occurs in other areas of contract law (for example, restraint of trade). But the fact that review for error of law was not always or necessarily available (for example, not available where no reasons were given; and not available where the parties' agreement showed they intended to be bound by the opinion of the arbitrator on the point of law, whether right or wrong; and, not available where it was expressly excluded) shows that this "jurisdiction" did not go to the heart of the essential and immutable features of a court. For more on the history, see Section IX below.

V. The correct identification of the "matter" under Art 35 of the Model Law

23. A "matter" within the meaning of s 77 of the Constitution is ordinarily concerned with "some immediate right, duty or liability to be established by the determination of the Court". The Parliament may "prescribe the means by which the determination of a Court is to be obtained, and ... may ... adopt any existing method of legal procedure or invent a new one".[17] The "matter" for which

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17 *In re Judiciary and Navigation Act* (1921) 29 CLR 257 (***In re Judiciary***) at 265 – 266 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

Parliament invests jurisdiction in a Ch III court need not embrace a determination of all the issues in controversy between the parties.[18] Where the "matter" arises under a law made by Parliament, Parliament may, by creating the rights and obligations in question, define the content of the "matter" and hence the jurisdiction of the court with respect to the "matter".[19]

24. In an action under Art 35 of the Model Law, the "immediate right, duty or liability" which is sought to be established is whether there is a right to orders from the court recognising and enforcing the rights claimed to derive from the arbitrator's award. The content of that right has been defined by Parliament in the Model Law and is, first, the existence of an "arbitral award" of a kind which engages Art 35 of the Model Law and, secondly, whether the right to have that award enforced is defeated by any of the seven available grounds under Art 36 of the Model Law. Therefore, the relevant "matter" of which a court is seized in an application under Art 35 is not the rights, duties and liabilities asserted in the anterior dispute that was the subject of the arbitration. As was explained in *Dobbs v National Australia Bank Limited* (see [38] below) the question for the court is whether those rights have been extinguished by the arbitrator's award through an accord and satisfaction and/or superseded by the new rights created by the award.

25. The distinct nature of the "matter" involving the recognition and enforcement of an arbitral award under Art 35 of the Model Law from the anterior dispute agitated before the arbitrator may also be seen in the different ways in which an award can be "recognised" under the Model Law. Recognition of an arbitral award under the Model Law might be sought offensively as part of an application seeking orders enforcing the award. Equally, it might be sought defensively as a plea in bar to an action brought in relation to the dispute the subject of the award.[20] In each case a distinct "matter" arises; distinct from each other and the anterior dispute.

26. The distinct nature of the "matter" with which a court is seized under Art 35 of the Model Law (read with s 16 of the IA Act) is not affected by the potential existence of further, separate hypothetical "matters" that may have arisen (but did not arise on the facts here) had the various powers of the court under the Model Law or the IA Act to facilitate the arbitral process been engaged.[21] Contrary to the plaintiff's suggestion, those facilitative powers and potential "matters" do not create an overall unity in the role of courts under the Model Law (as here, more than one court may be involved) and the role of the arbitrators, or a relationship of co-operation or partnership between courts and arbitrators in the determination of a single "matter".[22]

VI. No interference with the institutional integrity of the Federal Court

27. Once it is recognised that the relevant "matter" with which a court is seized under an application to enforce an award under Art 35 of the Model Law is the determination of the rights created by the arbitral award and the IA Act / Model

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18 *Abebe v Commonwealth* [1999] HCA 14; 197 CLR 510 (***Abebe v Commonwealth***) at [25] – [26], [36] – [37] per Gleeson CJ and McHugh J, at [220] - [233] per Kirby J, at [279] per Callinan J.

19 *TNT Skypak International (Aust) Pty Limited v Federal Commissioner of Taxation* (1988) 82 ALR 175 at 181 per Gummow J; *O'Toole v Charles David Pty Limited* (1989) 90 ALR 112 at 158 per Gummow J (Bowen CJ and Morling J agreeing); *Abebe v Commonwealth* at [279] per Callinan J.

20 *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* [2012] FCA 276; 201 FCR 535 (***Traxys v Balaji***) at [61] per Foster J.

21 See Articles 13, 14, 17J and 27 of the Model Law and Part III, Division 3 of the IA Act: see [14] above.

22 Cf, Plaintiff's submissions at [38], [67] and [80].

Law, and not the rights asserted in the anterior dispute, the plaintiff's proposition that the Parliament in the IA Act and Model Law has infringed the institutional integrity of the court and deprived it of "decisional independence" by removing a mere error of law in the award from the grounds on which the court can refuse to recognise or enforce the award loses all force.[23] Except to the extent that they may be engaged by one of the circumstances under Art 36 of the Model Law, the presence or absence of errors of law in the arbitral tribunal's award forms no part of the law the court is administering in the "matter" with which it is seized under the IA Act / Model Law. Contrary to the plaintiff's submission, the court is not being directed to act in a legally erroneous manner because the (assumed) legal errors are, by hypothesis, irrelevant to its task.[24] The court retains its province and duty to "say what the law is", but the court applies a different body of law from that which formed the basis of an arbitrator's award.[25]

28. There is nothing unusual or surprising about this conclusion. The creation of federal statutory rights having as their basis an anterior decision or determination not made in the course of an exercise of federal judicial power has considerable precedent.[26] Moreover, it is closely analogous to the approach the common law adopted in recognising and enforcing a foreign judgment. A court, administering the common law, enforced a foreign judgment because (subject to the fulfilment of certain criteria eg, the foreign court had international jurisdiction and the judgment was final and conclusive) it recognised an obligation on the judgment debtor evidenced by the foreign judgment to pay the foreign judgment debt; the foreign judgment did not itself create an enforcement obligation on a domestic common law court.[27] The common law also provides certain defences which, if successfully raised by the judgment debtor, will allow the court to refuse the enforcement of the foreign judgement which otherwise would satisfy the common law criteria. Defences include where there was fraud by the plaintiff or the court, (possibly) knowing and deliberate disregard of the law,[28] a breach of the rules of natural justice or a contravention of public policy.[29] However, it was no answer to an application to enforce a foreign judgment that it was infected by legal error, even if the error was an error as to the law of the forum and the error appeared on the face of the judgment. The domestic court does not sit in appeal from the foreign court.[30] A similar approach now obtains under ss 6 and 7 of the *Foreign Judgments Act 1991* (Cth).[31]

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23 Plaintiff's submissions at [64], [69], [74] and [76].

24 Cf, Plaintiff's submissions at [76].

25 Cf, Plaintiff's submissions at [78].

26 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 244 per Stephen J (Menzies and Gibbs JJ agreeing), at 250 per Mason J (Gibbs J agreeing); *Re Macks; Ex Parte Saint* [2000] HCA 62; 204 CLR 158 at [14] – [15] and [30] – [31] per Gleeson CJ, at [74] – [79] per Gaudron J, at [108] – [113] per McHugh J, at [206] – [213] per Gummow J, at [366] – [367] per Hayne and Callinan JJ; *South Australia v Totani* [2010] HCA 39; 242 CLR 1 (***SA v Totani***) at [71] per French CJ, at [136] per Gummow J, at [467] - [468] per Kiefel J; *Haskins v Commonwealth* [2011] HCA 28; 244 CLR 22 [21] – [24] per French, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

27 *Goddard v Gray* (1870) LR 6 QB 139 at 149 – 152 per Blackburn and Mellor JJ.

28 See, eg, *Simpson v Fogo* (1863) 1 Hem & M 199; 71 ER 85.

29 *Ainslie v Ainslie* (1927) 39 CLR 381 at 402 per Higgins J; *Benefit Strategies Group Inc v Prider* [2005] SASC 194; 91 SASR 544 (***Benefit Strategies***) at [58] – [75] per Bleby J (Vanstone and Anderson JJ agreeing).

30 *Goddard v Gray* (1870) LR 6 QB 139 at 149 – 150; see also, *Castrique v Imrie* (1870) LR 4 HL 414 at 446 per Lord Hatherley, at 448 per Lord Chelmsford and at 448 per Lord Colonsay. *Benefit Strategies* at [77] – [80] per Bleby J.

31 See also as to the 'Recognition and Enforcement in Australia of Specified Judgments of New Zealand Courts and Tribunals', Part 7 of the *Trans-Tasman Proceedings Act 2010* (Cth).

29. The effect of the IA Act / Model Law is to assimilate an arbitral award to which the Model Law applies to a position akin to that which a foreign judgment traditionally assumed at common law. As will be further observed below, there is considerable similarity between the bases on which a court can refuse to recognise and enforce an arbitral award under the Model Law and the bases on which a court at common law could refuse to recognise and enforce a foreign judgment.

30. Indeed, the field of resolution of disputes in international trade sees a variety of situations, beyond just enforcement of arbitral awards or foreign judgments, where the "matter" coming before an Australian court for the exercise of judicial power is not co-terminous with the anterior dispute. Examples include disputes as to whether the parties have, by simple agreement, reached a binding compromise extinguishing the underlying claims; and disputes as to whether Australian proceedings should be stayed in favour of foreign proceedings on the grounds of an exercise of an exclusive foreign jurisdiction clause.

31. *South Australia v Totani*, on which the plaintiff chiefly relies,[32] has no parallel to this case. Nor do any of the other cases in which this Court has applied the principles derived from *Kable v Director of Public Prosecutions*.[33]

32. The vice of the legislation in *South Australia v Totani* was that it required the Magistrates Court of South Australia to make an *ex parte* order creating restrictions on the defendants' liberty of association and exposing them to criminal sanctions on the basis of a declaration by the executive that an organisation (or some members of it) was involved in serious crime and evidence that the defendant was a member (widely defined) of the organisation (but not necessarily one who engaged in serious crime). This was in circumstances where the organisation was not unlawful and without the Court being required or able to consider whether there was any basis for an apprehension of criminal conduct by the defendant. This led to the conclusion that the Court was being required to act at the behest of or as an instrument of the executive.[34] In *Kable*, the impugned legislation provided for the Supreme Court of New South Wales to make an order for the preventative detention of an identified individual based on an opinion, formed on the civil standard and on the basis of material not complying with the rules of evidence, that he was likely to commit a serious act of violence.[35] The legislation in *International Finance Trust Company Ltd v New South Wales Crime Commission* required the Supreme Court of New South Wales to entertain an *ex parte* application for a freezing order by the defendant Commission and make such an order if, on the basis of an affidavit of an officer of the Commission, it was satisfied there were reasonable grounds for the officer's suspicion that the subject of the order had engaged in serious crime related activities. This was in circumstances where the legislation provided no ready facility for the subject of the order to approach the court to have it set aside.[36] The objectionable feature of the legislation in *Wainhou v New South Wales* was the investing in "eligible judges" of the Supreme Court of New South Wales of an administrative power to make

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32 Plaintiff's submissions at [70] - [73].

33 (1996) 189 CLR 51. In *Wainohu v New South Wales* [2011] HCA 24; 243 CLR 181 at [105] it was said that *Kable* is expressive of a constitutional principle which has a common foundation applicable to both State and Federal courts.

34 *SA v Totani* at [82] – [83] per French CJ, at [139] – [144] per Gummow J, at [214] – [230] per Hayne J, at [431] – [436] per Crennan and Bell JJ, at [464] – [470] per Kiefel J.

35 (1996) 189 CLR 51 at 98 per Toohey J, at 106 – 107 per Gaudron J, at 120 – 121 per McHugh J, at 134 per Gummow J.

36 [2009] HCA 49; 240 CLR 319 at [45] – [48] and [54] – [56] per French CJ, at [93] – [97] per Gummow and Bell JJ, at [155] – [164] per Heydon J.

declarations in respect of organisations linked with serious criminal activity with no requirement to provide reasons.[37]

33. All those cases, involving a distortion of the traditional judicial process, are very distant from the circumstances of an application under s 16 of the IA Act and Art 35 of the Model Law. Here the issue is the recognition and enforcement of rights created by a combination of the parties' agreement, an instrument (the award) issued pursuant to an authority granted by the parties' agreement and the interaction of those matters with a law of the Commonwealth (the IA Act / Model Law). That application occurs in an exercise of federal judicial power and, there being nothing to the contrary in the Model Law or IA Act, according to ordinary curial processes (including the application of the ordinary rules of evidence, ordinary procedure for hearing and the giving of reasons).[38]

34. Further, the plaintiff's suggestion that there may not be an effective opportunity for the resisting party to invoke any of the available seven grounds finds no support in the IA Act. The right to the recognition and enforcement of the award is subject to the exceptions in Art 36 which ensure the arbitrator acted within power, by procedurally fair means and that the award does not conflict with public policy, including the need to maintain the integrity of the court. There is no sense in which the Federal Court is being used as an instrument of any other arm of government or being required to do anything which might adversely affect its ability to impartially administer justice according to law. This is further addressed in Section VIII below.

VII. The IA Act and the Model Law do not confer the judicial power of the Commonwealth on arbitral tribunals

35. Neither the IA Act, nor the Model Law by force of that Act, purport to confer federal judicial power on arbitral tribunals in contravention of the separation of powers derived from Ch III of the Constitution.

36. First, the exercise of the judicial power of the Commonwealth necessarily involves an exercise of power that finds its foundation and legitimacy in the authority and sovereignty of the polity.[39] By contrast, as noted above, the authority of an arbitrator acting in an arbitration covered by the IA Act / Model Law finds its foundation and legitimacy in the agreement of the parties to the arbitration to submit their dispute to him or her and to abide by its resolution by the arbitrator.[40] This necessarily, and at the threshold, takes it outside of the realm of judicial power. Indeed, the present case is *a fortiori* because there was no dispute before

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37 [2011] HCA 24; 243 CLR 181 at [68] per French CJ and Kiefel J, at [109] per Gummow, Hayne, Crennan and Bell JJ.

38 *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554 at 559 – 560; *Gypsy Jokers Motorcycle Club Incorporated v The Commissioner of Police* [2008] HCA 4; 234 CLR 532 at [19] per Gummow, Hayne, Heydon and Kiefel JJ. See also *Aviation Solutions Pty Limited v Altain Khuder LLC* [2011] VSCA 248; 282 ALR 717 at [141] per Hansen JA and Kyrou AJA.

39 *Huddart, Parker & Co Pty Limited v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; *Re Wakim; Ex parte McNally* [1999] HCA 27; 198 CLR 511 (***Re Wakim***) at [108] per Gummow and Hayne JJ.

40 *Waterside Workers Federation of Australia v JW Alexander Limited* (1918) 25 CLR 434 (***WWF v Alexander***) at 444 per Griffith CJ, at 452 per Barton J; *Construction Forestry Mining and Energy Union v The Australian Industrial Relations Commission* [2001] HCA 16; 203 CLR 645 at [31]; *Attorney General (Commonwealth) v Breckler* [1999] HCA 28; 197 CLR 83 (***AG v Breckler***) at [38], [43] – [44] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Attorney General (Commonwealth) v Alinta Limited* [2008] HCA 2; 233 CLR 542 (***Takeovers Panel case***) at [158] per Crennan and Kiefel JJ. See also, *Hi-Fert Pty Limited v Kiuking Maritime Carriers Inc* (1998) 90 FCR 1 (***Hi-Fert***) at 14 per Emmett J (Branson J agreeing).

the arbitrators that, had it not been arbitrated, could have engaged the judicial power of the Commonwealth.[41]

37. It is correct to say that the judicial power of the Commonwealth is engaged by the IA Act / Model Law to enforce arbitration agreements and awards, resolve disputes about arbitrations (for example, jurisdictional disputes) and facilitate (in some respects) arbitrations (for example, issue of subpoenas) and, at these points, the arbitral process engages public authority.[42] But that says nothing about the nature of the power arbitrators exercise and provides no support for the plaintiff's characterisation of arbitral tribunals as hybrid authorities, part public/part private.[43] No arbitral tribunal under the Model Law possesses any authority except by reason of an agreement of the parties to arbitrate their disputes that engages the Model Law. Contrary to the plaintiff's submission, there is no obligation in the Model Law on anyone to agree to submit any dispute to such arbitration.[44] A few basic norms of conduct aside, the provisions of the Model Law which deal with the procedures and powers of arbitral tribunals operate subject to the agreement of the parties and in order to facilitate the exercise by the arbitrators of their essential authority sourced in the agreement of the parties.[45]

38. Second, a hallmark of judicial power is the ascertaining and declaring of the existing rights of the parties.[46] The plaintiff is incorrect to assert that a court order creates new rights and obligations.[47] As a general rule, court orders create a "new charter" for the ascertainment and enforcement of *existing* rights or obligations.[48] In contrast, an arbitrator when making an award to which the Model Law applies does not determine existing rights. The award is the basis for the creation of new rights and extinguishment of old rights through accord and satisfaction. This is so even if the new rights created by the award proceed by reference to the arbitrator's opinion of the existing rights of the parties under law.[49] That is why at common law the action to enforce an award was "really founded on the agreement to submit [to arbitration] the difference of which the award is the result"; it was not an action founded on the rights that founded the claims submitted to arbitration.[50] The legal operation of an arbitrator's award was correctly explained by Rich, Dixon, Evatt and McTiernan JJ in *Dobbs v National Australia Bank Limited*[51] as follows:

> By submitting claims to arbitration the parties confer upon the arbitrator an authority to conclusively determine them. That authority enables him to extinguish an original cause of action. His award will do so if it operates, not merely to ascertain the existence and measure of the original liability, but to impose new obligations as a substitute, whether the obligation results from

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41 See [88] of the plaintiff's submissions.

42 *Westport Insurance Corporation v Gordian Runoff Limited* [2011] HCA 37; 244 CLR 239 (***Westport v Gordian***) at [20] per French CJ, Gummow, Crennan and Bell JJ.

43 Plaintiff's submissions at [38] – [39].

44 Plaintiff's submissions at [91].

45 See [14] above.

46 *The Queen v Trade Practice Tribunal; Ex parte Tasmanian Breweries Pty Limited* (1970) 123 CLR 361 (***Tasmanian Breweries***) at 374 – 375 per Kitto J.

47 Plaintiff's submissions at [42].

48 *Tasmanian Breweries* at 374 – 375 per Kitto J; quoted and emphasized by Hayne J in *SA v Totani* at [227].

49 *WWF v Alexander* at 463 per Issacs and Rich JJ; *Re Cram; Ex parte Newcastle Wallsend Co Pty Limited* (1987) 163 CLR 140 at 149 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; *AG v Breckler* at [45] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. *Takeovers Panel case* at [155] – [156] per Crennan and Kiefel JJ.

50 *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753 at 764 per Slesser LJ (Romer LJ agreeing). See also, *FJ Bloemen Pty Limited v Council of the City of Gold Coast* [1973] AC 115 (PC) at 126 per Lord Pearson.

51 (1935) 53 CLR 643 at 653 – 654.

> the tenor of the award or from an antecedent undertaking of the parties to give effect to the determination it embodies. ... The award given under authority of the parties operates as a satisfaction pursuant to their prior accord of the cause of action awarded upon. ... [W]hen an arbitrator, exercising a subsisting authority, delivered his award, the law gave full effect to it. A valid award was recognized by the Courts as precluding recourse to the original rights the determination of which had been referred to arbitration.

39. The supplementation of the common law contractual rights to the enforcement of an award with the statutory rights created by Art 35 of the Model Law does not change the nature of the function performed by the arbitral tribunal. The arbitration agreement and the award provide the basis for the engagement of the statutory rights created by Art 35 of the Model Law, the latter being the rights declared and enforced by a court under the Model Law.

40. Third, the position of an arbitral tribunal under the Model Law arbitrating a common law contract claim bears little analogy to the defendant in *Brandy v Human Rights and Equal Opportunities Commission*.[52] The defendant Commission possessed statutory authority to make determinations as to whether federal law had been contravened and what "should" be done to remedy a contravention. The authority could be invoked by a complainant without the need for both parties to agree, as occurs with an arbitration. The lodgement of the Commission's determination with the Federal Court Registry and the Registrar's registration of it (both of which were mandatory) gave the Commission's determination the force and stature of an order of the Federal Court, leaving the other party to bring proceedings in the Federal Court for a review of the determination within a specified time, during which time the effect of the order was suspended. Absent those proceedings, the order took effect after the expiry of the period.[53]

41. In contrast, nothing in the IA Act / Model Law purports, by its own force or by mere mandatory administrative functions, to give an arbitrator's award (made under the authority of the agreement of the parties) the force and stature of an order of a Ch III court. Further, an arbitral tribunal entirely lacks the capacity to enforce its award – an indicator of an absence of judicial power.[54]

42. Furthermore, and unlike in *Brandy*, there is no facility in the Model Law for orders to be made enforcing an award without an occasion arising for the matters in Art 36 to be agitated before the court. It is not incumbent on the party resisting the enforcement of the award to commence proceedings, as it was in *Brandy*. The grounds in Art 36 cannot be characterised as a mere "administrative function"[55] or stigmatised as merely "process based",[56] but are real and of substance and involve genuine adjudication.[57] To say, as the plaintiff does, that none of them may be applicable in a given case is to say no more than that in some circumstances there may be no defence to an action to enforce an award.[58]

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52 (1995) 183 CLR 245 (***Brandy v HREOC***) cf., Plaintiff's submissions at [83] – [86].

53 *Brandy v HREOC* at 254 - 255 per Mason CJ, Brennan and Toohey JJ; at 270 per Deane, Dawson, Gaudron and McHugh JJ.

54 *Brandy v HREOC* at 257 – 259 per Mason CJ, Brennan and Toohey JJ; 268 – 269 per Deane, Dawson, Gaudron and McHugh JJ. *AG v Breckler* at [41] – [45] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. *Takeovers Panel case* at [95] – [96] per Hayne J, at [158] – [159] per Crennan and Kiefel JJ.

55 Cf, *HREOC v Brandy* at 260 per Mason CJ, Brennan and Toohey JJ; 270 per Deane, Dawson, Gaudron and McHugh JJ.

56 Plaintiff's submissions at [71].

57 *SA v Totani* at [136] per Gummow J.

58 Plaintiff's submissions at [86].

43. Fourth, as an aspect of its exercise of sovereign power, a court exercising judicial power applies law external to the parties to determine their rights and obligations.[59] This is so even if that law is determined, in some circumstances, by some anterior election of the parties; for example, the choice of law under a contract. Arbitrations under the Model Law depart from this aspect of the exercise of judicial power. Under Art 28(1) of the Model Law the parties to the arbitration are entitled to choose the law to be applied in the arbitration. Further, if the parties to the arbitration so agree, the arbitral tribunal may decide *ex aequo et bono* or as *amiable compositeur* (Art 28(3)). The width of the tribunal's power in the latter situation is inconsistent with a characterisation of the arbitrator as exercising judicial power.[60]

44. Fifth, the parties to the arbitration, or the arbitral tribunal or both determine the procedure of the arbitration free from legal forms and procedures to a degree that is inconsistent with a characterisation of it as exercising judicial power.[61] Under the Model Law, the parties determine the number and identity of the arbitrators (Arts 10 and 11). The parties determine the procedure but, failing agreement, the tribunal is free to determine its own procedure, including the evidence it admits, free from an obligation to apply the rules of evidence (Art 19). The tribunal is free to hold an oral hearing or make a determination on the papers (except if an oral hearing is requested) (Art 24). The arbitration is held in private,[62] departing from the "open justice" principle that is generally characteristic of the exercise of judicial power.[63]

45. Sixth, the fact that the arbitral tribunal will form an opinion on the relevant facts and law is not a conclusive, or even strong, indicator that it is exercising judicial power.[64] As noted above, those opinions are not formed so as to make a binding and enforceable declaration of the existing rights and obligations of the parties, but as a step towards the making of an award, which creates new rights and obligations. Further, some (but not all) arbitrations may proceed in a way that mimics in many respects the procedures of a court.[65] However, the fact that a tribunal may exhibit the "trappings of a court", for example, the taking of evidence on oath or having counsel appear, does not lead to the conclusion that it is exercising the judicial power of the Commonwealth.[66]

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59 *In re Judiciary* at 266 – 267 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ. *Tasmanian Breweries* at 374 and 377 per Kitto J; *Brandy v HREOC* at 259 per Mason CJ, Brennan and Toohey JJ; *Abebe v Commonwealth* at [25] per Gleeson CJ and McHugh J; *Re Wakim* at [108] per Gummow and Hayne JJ.

60 *Moses v Paker* [1896] AC 245 (PC) at 248 per Lord Hobhouse; *Tasmanian Breweries* at 377 per Kitto J; at 399 – 400 per Windeyer J; *Precision Data Holdings Limited v Wills* (1991) 173 CLR 167 at 189.

61 *Canadian Pacific Railway v Toronto Corporation and Grand Trunk Railway of Canada* [1911] AC 461 (PC) at 471 per Lord Atkinson; *The Tramways Case [No 1]* (1913) 18 CLR 54 at 72 per Isaacs J. *Takeovers Panel* case at [6] per Gleeson CJ.

62 *Esso Australia Resources Ltd v Plowman* [1995] HCA 19; 183 CLR 10 at 25 – 26 per Mason CJ.

63 *SA v Totani* at [62] per French CJ.

64 *Luton v Lessels* [2002] HCA 13; 210 CLR 333 at [21] per Gleeson CJ; *Takeovers Panel case* at [161] per Crennan and Kiefel JJ; *Albarran v Companies and Liquidators Disciplinary Board* [2007] HCA 23; 231 CLR 350 at [25] – [28] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ. Cf, Plaintiff's submissions at [40].

65 *Bremer Vulkan v South India Shipping Corporation Ltd* [1981] AC 909 (***Bremer Vulkan***) at 976 per Lord Diplock.

66 *The Shell Company of Australia Limited v The Federal Commissioner of Taxation* (1930) 44 CLR 530 (PC) at 543 – 544 per Lord Sankey LC. *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 585 per Bowen CJ and Deane J.

46. Seventh, it is of no moment in an assessment of whether an arbitral tribunal exercises judicial power that it can consider and reach an opinion on its own jurisdiction.[67] So can administrators.[68] What is important is that, like administrators but unlike a court, an arbitral tribunal cannot authoritatively determine the limits of its jurisdiction.[69] Contrary to the plaintiff's submission, arbitrators are not "custodians of their own jurisdiction".[70] The jurisdictional limits of arbitrators under the Model Law are subject to an appeal to a court from an interim award as to jurisdiction,[71] and the absence of or an excess of jurisdiction forms a basis to set aside or refuse to enforce an award under Articles 34 and 36 of the Model Law.[72]

VIII. A more detailed examination of the exceptions in Art 36 of the Model Law

47. The grounds on which a court might decline to recognise or enforce an arbitral award under Art 36 of the Model Law fall into three broad, but overlapping, categories: jurisdictional, procedural and substantive. They are not merely "process-focussed".[73] They do not embrace as such a mere error of law on the part of the arbitrators, but would embrace an error of law which went to the authority of the arbitrator to decide and there is room for argument that a sufficiently egregious error of law would engage the "public policy" exception in Art 36(b)(ii) of the Model Law. The "public policy" exception also provides scope for the Court to decline to recognise or enforce awards that endanger its integrity. The full scope of the grounds in Art 36 of the Model Law need not be determined in this case, but will be ascertained in future cases in which they are tested in concrete fact situations. What is critical is that the various grounds engage the court in a genuine adjudicative activity.

Jurisdictional grounds

48. Paragraphs (a)(i), (iii) and (b)(i) of Art 36 of the Model Law deal with "jurisdictional" bases of refusing to recognise or enforce an arbitral award. They "[ensure] that the [arbitral] tribunal correctly identified the limits of its decision-making authority".[74] Those limits arise, in the first instance, from the existence and scope of the arbitration agreement. Paragraphs (a)(i) and (iii) of Art 36 of the Model Law deal with the contractual limitations of the arbitrator's authority. Thus, a court may refuse to recognise and enforce an arbitral award if there is no or no valid arbitration agreement between the parties (sub-paragraph (a)(i)).[75] If there is a valid arbitration agreement, a court may refuse to enforce an award if the dispute it deals with is one not covered by the arbitration agreement (sub-paragraph (a)(iii)). This may arise, for example, if the arbitrator wrongly determines a fact essential to the nature of the dispute the arbitrator had authority to deal with, for example that one of the parties had a certain status[76] or that the arbitrated claim was of a certain

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67 See Art 16 of the Model Law.
68 *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239 at 242 per Brennan J.
69 *Craig v South Australia* (1995) 184 CLR 163 at 179 - 180.
70 Plaintiff's submissions at [84].
71 Under Art 16(2) of the Model Law and as occurred in this case, see *TCL Air Conditioner (Zhongshan) Co v Castel Electronics Pty Limited* [2009] VSC 553.
72 See [48] and [49] below and the authorities there cited.
73 Plaintiff's submissions at [74].
74 *United Mexican States v Cargill Incorporated* 2011 ONCA 622; 107 OR (3d) 528 (***Mexico v Cargill***) (Ontario Court of Appeal) at [48].
75 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763 (***Dallah v Pakistan***) at [24] – [29] per Lord Mance JSC, at [75] – [78] per Lord Collins JSC.
76 *Mexico v Cargill* at [49].

character which brought it within the scope of the submission to arbitration.[77] Even if the dispute with which the award deals is within the scope of the submission to arbitration, the award may exceed the authority of the arbitrator because of the way in which the arbitrator deals with it; for example, by awarding damages of a kind or quantum in excess of those the arbitrator had power to award.[78] Also, the United States Supreme Court has held that an arbitral tribunal exceeded its authority by giving a decision according to its policy preferences and not by way of an attempt to apply the law selected by the parties.[79] That may be an example of an arbitrator exceeding their authority by "asking the wrong question"[80]. The court's ability to examine the jurisdictional basis of the arbitral award is unconstrained by any decision of the arbitrator(s) as to their jurisdiction.[81]

49. The second source of jurisdictional limits to an arbitrator's authority arises from the lawful limits as to the nature of the disputes that can be the subject of arbitration and those that must be determined by an exercise of judicial power.[82] This finds expression in Art 36(1)(b)(i) of the Model Law and, in particular, in the concept of a "dispute [that] is not capable of settlement by arbitration". Whilst it has been recently said that "it is only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will be held to be non-arbitrable",[83] claims involving a grant of legal status, for example, bankruptcy, divorce, adoption and insolvency may be non-arbitrable.[84] Another example may be claims for the exercise of powers by specialist tribunals involving a consideration of the public interest.[85]

Procedural grounds

50. The procedural bases on which a court can refuse to recognise or enforce an award to which the Model Law applies appear in Articles 36(a)(ii) and (iv). The first (sub-paragraph (a)(ii)) applies where the party against whom the award is invoked was not given proper notice of the arbitration or was unable to present its case. It may be engaged not only where the party is wholly unaware or unable to participate in the arbitration, but where the arbitrator makes the award on a point not ventilated during the arbitration,[86] or on the basis of evidence or submissions to which the party has not had an opportunity to respond[87] or where the arbitral procedure is otherwise infected with a serious defect causing unfairness.[88] The second (sub-paragraph (a)(iv)) deals with the proper constitution of the arbitral

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77 *PT Asurani Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41; [2007] 2 SLR 597 (***PT Asurani***) at [43] – [44] per Chan Sek Keong CJ. *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 at [30] – [33] per VK Rajah JA.

78 *Mexico v Cargill* at [50].

79 *Stolt-Nielsen SA v AnimalFeeds International Corp* 130 S.Ct 1758 (2010) at 1767 - 1770 per Alito J, applying s 10(a)(4) of the *Federal Arbitration Act* (9 USC) which is considered cognate to Art 34(a)(iii) of the Model Law: *Parsons Whittemore Overseas Co v Societe Generale De L'Industrie du Papier (RAKTA)* 508 F 2d 969 (1974) (***Parsons Whittemore***) at 976.

80 *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 at [82] per McHugh, Gummow and Hayne JJ.

81 *China Minmetals Materials Import and Export Co Ltd v Chi Mei Corporation* 334 F 3d 274 (2003) at 289; *Dallah v Pakistan* at [28] – [30] per Lord Mance JSC, at [82] – [85] per Lord Collins JSC.

82 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 351 per Deane and Gaudron JJ.

83 *Rinehart v Welker* [2012] NSWCA 95 (***Rinehart v Welker***) at [167] per Bathurst CJ.

84 *A Best Floor Sanding Pty Limited v Skyer Australia Pty Limited* [1999] VSC 170; *Rinehart v Welker* at [212] per McColl JA.

85 *Metrocall Inc v Electronic Tracking Systems Pty Limited* [2000] NSWIRComm 136; 52 NSWLR 1 at [63] – [80].

86 *Iran Aircraft Industries v Avco Corporation* 980 F 2d 141 (1992).

87 *Paklito Investment Limited v Klockner East Asia Limited* [1993] 2 HKLR 39.

88 *Parsons Whittemore* at 975 – 976; *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183 at 193 – 194.

tribunal, and the arbitral procedure according to the parties' agreement or applicable law. Procedural defects in an arbitration may also arise under Art 36(b)(ii) of the Model Law – the public policy ground. That is considered below.

Substantive grounds

51. The substantive grounds on which a court may refuse to recognise or enforce an award under the Model Law appear in Articles 36(a)(v) and (b)(ii). The first applies when the factum creating the rights sought to be recognised and enforced under Art 35 is absent because the award is not yet binding or has been set aside or suspended under Art 34 or otherwise (paragraph (a)(v)). The second applies where recognition or enforcement of the award would be contrary to Australian public policy (paragraph (b)(ii)). Two kinds of awards whose enforcement would be contrary to public policy are expressly identified: those induced or affected by fraud or corruption and those in connection with which a breach of the rules of natural justice occurred (s 19, IA Act). Thus, an award made by an arbitrator who is actually or apparently biased need not be recognised or enforced under the Model Law.[89]

52. The prevailing body of international authority (including Australian) is to the effect that the public policy ground concerns awards whose enforcement would contravene fundamental conceptions of morality and justice, both procedural and substantive, of the enforcing state. It is not engaged merely because of an error of law or fact in the award.[90] An award arising out of a criminal or illegal enterprise, whether under foreign or municipal law, is one example of an award whose enforcement may be contrary to public policy. More generally, awards whose enforcement would damage the integrity of the court engage Art 36(b)(ii) of the Model Law.[91] It has been held in Canada that the "public policy" in the Model Law embraces the "principle ... that a tribunal not exceed its jurisdiction" including by a "decision which is patently unreasonable ... [showing] a complete disregard of the law so that the decision constitutes an abuse of authority amounting to injustice".[92] This is similar to the "manifest disregard of law" doctrine for vacating arbitral awards that obtains in some circuit Courts of Appeal in the United States under the *Federal Arbitration Act*.[93] An award made by an arbitrator without engaging with a party's substantial submissions is apt not to be recognised and enforced under Art 36(b)(ii) because it will have been made in connection with a breach of the rules of natural justice.[94] In New Zealand, it has been held that an award made on

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89 *Kempinski Hotels SA v PT Prima International Developments* [2011] SGHC 171 at [65] – [67] per Judith Prakash J.

90 **United States:** *Parsons Whittemore* at 973 – 974; **Canada:** *Schreter v Gasmac Inc* (1992) 7 OR (3d) 608 at 622 – 624; **Hong Kong:** *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111 at 118 per Litton PJ, at 122 – 123 per Bokhary PJ, at 138 – 139 per Sir Anthony Mason NPJ; **Singapore:** *PT Asurani* at [55] – [60] per Chan Sek Keong CJ; *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] SGHC 62; [2010] 3 SLR 1 at [44] – [48] per Judith Prakash J. **New Zealand:** *Amaltal Corporation Ltd v Maruha (NZ) Corporation Limited* [2004] 2 NZLR 614 (***Amaltal v Maruha***) at [41] – [45] per Blanchard J. **Australia:** *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; 277 ALR 415 at [125] – [133] per Foster J, *Traxys v Balaji* at [87] – [105] per Foster J. Cf., *Oil and Natural Gas Corporation Ltd v SWA Pipes Limited* AIR 2003 SC 2629 at [31] where the Supreme Court of India held that an award which had a "patent" error of law could be set aside under Art 34(b)(ii) of the Model Law; see also, J Gaya "Judicial Ambush of Arbitration in India" (2004) 140 *LQR* 571.

91 *Soleimany v Soliemany* [1999] QB 785 at 800 per Waller LJ; *Amaltal v Maruha* at [46].

92 *Canada (Commonwealth) v SD Myers Inc* [2004] 3 FCR 368 at [55] per Kelen J. See generally, M Hwang and A Lai "Do Egregious Errors Amount to a Breach of Public Policy?" (2005) 71 *Arbitration* 1.

93 *T.Co Metals LLC v Dempsey Pipe and Supply Inc* 592 F 3d 329 (2nd Cir 2010) at 339 – 340.

94 *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [24] per Gummow and Callinan JJ, at [95] per Hayne J. *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887; 78 NSWLR 533 at [224] – [231] per Ward J.

findings of fact not based on some logically probative evidence is a breach of the rules of natural justice and apt not to be recognised and enforced under Art 36(b)(ii) of the Model Law.[95]

IX. The history requires no different result

53. The plaintiffs rely on three matters to assert a general "historical function" of courts "super-intending awards", which it is said, the IA Act impermissibly "ousts" or "cuts across":[96] first, "the autonomy of parties to revoke submissions to arbitration";[97] second, the common law jurisdiction to set aside an award for error of law on the face of the award; and, third, the facility of an arbitrator to state a question of law as a case for a court. Each is considered below. None of the matters bear out the historical proposition asserted by the plaintiff. Even if they did, establishing that courts have historically exercised a particular function does not in and of itself lead to the conclusion that the function is a constitutionally entrenched defining characteristic of a court. The historical proposition the plaintiff asserts also meets the threshold difficulty that in *Bremer Vulkan v South India Shipping Corporation Ltd* the House of Lords rejected the proposition that, statute and contract aside, courts possessed an inherent general jurisdiction to supervise arbitrations.[98]

Ability to revoke a submission to arbitration

54. The capacity of a party to revoke the authority of an arbitrator and bring an action in court rested on the theory that arbitration clauses ousted the jurisdiction of the court and that could not validly be done.[99] Nevertheless, a revocation gave rise to an action for damages for breach of contract or forfeiture of a bond.[100] It was not, as the plaintiff would have it, a course the law endorsed as an anticipatory means of avoiding an arbitrator making an unsatisfactory award.[101] The capacity of a party (except by leave of the court) to revoke a submission to arbitration was abolished in England in 1833 in relation to submissions to arbitration made a rule of court and in 1889 in relation to all arbitrations and that was carried into Australian legislation.[102] It has long ceased being of significance.

Common law jurisdiction to set aside an award for error of law

55. The origin and basis of the common law's power to set aside an arbitral award for an error of law on the face of the award is obscure.[103] In the seventeenth century, the Court of Chancery exercised a jurisdiction to set aside an arbitral award for "manifest error in the body of an award".[104] The common law courts possessed no

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95 *Downer Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 at [83] and [103]. See also, *Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2002] HCA 32; 210 CLR 222 at [25] – [27] per Gleeson CJ.

96 Plaintiff's submissions at [76] and [77].

97 Plaintiff's submissions at [57].

98 [1981] AC 909 at 977 – 979 per Lord Diplock (Lords Edmund-Davies and Russell agreeing).

99 *Vynior's Case* (1610) 8 Co Rep 81b; 77 ER 597 at 600. *Dolman & Sons v Ossett Corporation* [1912] 3 KB 257 at 267 – 268 per Fletcher Moulton LJ.

100 *In re An Intended arbitration between Smith & Service and Nelson & Sons* (1890) 25 QBD 545 at 549 – 550 per Lord Esher MR, at 553 – 554 per Bowen LJ, *Dobbs v National Australia Bank* (1935) 53 CLR 643 at 652 – 653 per Rich, Dixon, Evatt and McTeirnan JJ.

101 Plaintiff's submissions at [57] and [59].

102 *Civil Procedure Act 1833*, (3&4 Wm 4, c42), *Arbitration Act 1889* (UK), s 1; GL Williams, "The Doctrine of Repugnancy – II: In the Law of Arbitration (1944) 60 *LQR* 69 at 69; *Arbitration Act 1892* (NSW), s 1.

103 *Racecourse Betting Control Board v Secretary for Air* [1944] 1 Ch 114 (***Racecourse Betting***) at 127 per Goddard LJ.

104 *Brown v Brown* (1693) 1 Vern 157 at 158; 23 ER 384 at 384.

similar power.[105] The *Arbitration Act 1698* (UK) was passed to facilitate arbitration by permitting parties to agree, in the event of a dispute, that the dispute should be submitted to arbitration and made a rule of court, thereby attaching remedies for contempt for a failure to comply with the award.[106] It also provided for an award to be set aside only for "corruption or undue means".[107] The *Arbitration Act 1698* did not address voluntary submissions to arbitration not made a rule of court.[108]

56. The scope of the power to set aside awards under the *Arbitration Act 1698* was a source of controversy.[109] In 1758 Lord Mansfield construed it as declaratory of a jurisdiction he asserted courts of law had always possessed to set aside an award in an arbitration made a rule of court for "such legal objections as appear on the face of the award".[110] A contrasting approach was adopted in Chancery. In 1791, Lord Thurlow twice rejected attempts to challenge arbitral awards made on a general reference to arbitration except on grounds of corruption, or mistake of fact or law admitted by the arbitrator saying, in one case, that the parties "by choosing private judges placed it beyond reach of any principle of law".[111] To a similar effect, in 1801 Lord Eldon refused to entertain an application to set aside an award for error of law where a question of law had been referred to an arbitrator, saying "[i]f a question of law is referred to an arbitrator, he must decide upon it, though he decides wrong, you cannot help it".[112]

57. In 1802 in *Kent v Elstob*[113] the Court of King's Bench, likely acting under but without reference to the *Arbitration Act 1698*,[114] set aside an arbitral award in a court referred arbitration for an error of law disclosed in reasons delivered contemporaneously with the award. In the delivery of reasons, the court found an intention that the award should be legally correct to be effective. Notwithstanding its roots in the *Arbitration Act 1698*, *Kent v Elstob* broke free from them and was treated as the origin of a general common law power to set aside arbitral awards for error of law on the face of the award.[115] Two years later, Lord Eldon distinguished *Kent v Elstob* and declined to review an award for error of law in circumstances where a question of law was referred to a barrister and no reasons given, finding in those circumstances an intention to abide the arbitrator's decision whether right or wrong.[116] Lord Ellenborough in two decisions, one in 1811 and one in 1816, reached the same conclusion where a general reference was made to a barrister on facts and law and no reasons given for the awards.[117] Following those decisions, the identity of the arbitrator as a relevant matter in ascertaining an

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105 *Rex v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338 (***Ex parte Shaw***) at 351 per Denning LJ. W Holdsworth, *A History of English Law,* Vol XIV (London, 1964) (**Holdsworth**) at 200.

106 M Mustill and S Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed, 1989) (**Mustill & Boyd**) at 433.

107 Holdsworth at 197. Mustill & Boyd at 437.

108 Mustill & Boyd at 433 – 434.

109 Mustill & Boyd at 437.

110 *Lucas d Markham v Wilson* (1758) 2 Burr 701; 97 ER 522.

111 *Price v Williams* (1791) 1 Ves Jun 365; 30 ER 388; *Knox v Symmonds* (1791) 1 Ves Jun 369; 30 ER 390.

112 *Ching v Ching* (1801) 6 Ves Jun 282; 31 ER 1052.

113 (1802) 3 East 18; 102 ER 502.

114 *Nicholas v Roe* (1834) 3 My&K 431 at 439; 40 ER 164 at 167; *Nichols v Chalie* (1807) 14 Ves Jun 266 at 270; 33 ER 523 at 524.

115 *In re Jones and Carter's Arbitration* [1922] 2 Ch 599; *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 (***Melbourne Harbour***) at 585 per Isaacs J; *Racecourse Betting* at 120 per Lord Greene MR; *Gold Coast City Council v Canterbury Pipe Lines (Aust) Pty Limited* (1968) 118 CLR 58 at 76 per Windeyer J.

116 *Young v Walter* (1804) 9 Ves Jun 364; 32 ER 642.

117 *Chace v Westmore* (1811) 13 East 357; 104 ER 408; *Sharman v Bell* (1816) 5 M&S 504; 105 ER 1135

intention for the award to be reviewable for error of law fell away and the delivery of reasons by the arbitrator forming part of his award was treated as decisive. There was no obligation for the arbitrator to provide reasons.[118] At the same time, the reference to arbitration of a pure question of law was recognised as manifesting an intention to accept the arbitrator's opinion on the question of law and exclude the common law's jurisdiction to set aside the award for error of law.[119]

58. In 1857 the Court of Queen's Bench in *Hodgkinson v Fernie*[120] confirmed that an arbitral award was final and binding, except in cases of corruption or fraud, or an error of law arising on the face of the award. Two members of the Court – Williams and Willes JJ – expressly regretted the second exception, but found it too well established to be disturbed. The Court of Exchequer decided similarly the next year in *Hogge v Burgess*, with Martin B expressing similar regret.[121] In 1923 Lord Dunedin, delivering the advice of the Privy Council, joined in regretting its existence,[122] as did Jordan CJ[123] and Barwick CJ more recently in this Court.[124] The jurisdiction to set aside arbitral awards for error of law on their face found no purchase in the United States.[125]

59. The jurisdiction of the common law courts in England to set aside awards for error of law on the face of the award was abolished by the *Arbitration Act 1979* (UK) and replaced with a *discretionary* power of the court to grant leave to appeal from an arbitral award on a question of law.[126] That course was followed in Australia in the uniform *Commercial Arbitration Acts*.[127] The *Arbitration Act 1996* (UK) has further restricted the mandatory review of awards to cases of serious irregularity, which does not include mere error of law.[128]

60. Four matters may be drawn from this history. First, the jurisdiction of the common law courts to set aside an arbitral award for error of law on its face is properly described as a "legal anomaly".[129] It arose from an expansion by the common law courts of the power conferred in the *Arbitration Act 1698* beyond the text and scope of the statute to embrace errors of law on the face of the record and to embrace arbitral awards generally.[130] It found no currency in United States law.

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118 *Bouttilier v Thick* (1822) 1 Dowl & Ry 366; RR 24 664; *Payne v Massey* (1824) 9 Moore 666; *Williams v Jones* (1829) 5 M&R 3.

119 *Stimpson v Emmerson* (1847) 9 LT (OS) 199; *Adams v Great North of Scotland Railway Co* [1891] AC 31 at 39 – 40 per Lord Halsbury LC; *In re King and Dunveen* [1913] 2 KB 32 at 36 per Channell J; *Government of Kelantan v Duff Development Company Limited* [1923] AC 395 at 417 – 418 per Lord Parmoor, at 421 per Lord Trevethin; cf., Viscount Cave LC at 411; *Melbourne Harbour* at 586 per Isaacs J, at 590 per Rich J, at 591 – 592 per Starke J; *Henry v Uralla Muncipal Council* (1934) 35 SR(NSW) 15 at 23 per Jordan CJ.

120 (1857) 3 CB (NS) 189; 140 ER 712.

121 (1858) 3 H&N 293; 157 ER 482 .

122 *Champsey Bhara and Company v Jivraj Balloo Spinning and Weaving Company Limited* [1923] AC 480 at 487.

123 *Henry v Uralla Muncipal Council* (1934) 35 SR(NSW) 15 at 24.

124 *Tuta Products Pty Limited v Hutcherson Bros Pty Limited (Receivers Appointed)* (1972) 127 CLR 253 (***Tuta v Hutcherson***) at 258; see also Windeyer J at 266.

125 *Burchell v Marsh* 58 US (17 How) 344 (1854).

126 *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 743 – 744 per Lord Diplock.

127 See eg., *Commercial Arbitration Act 1984* (NSW), s 38; *Westport v Gordian* at [37] – [41] per French CJ, Gummow, Crennan and Bell JJ.

128 *Arbitration Act 1996* (UK), s 68; *Lesotho Highland Development Authority v Impregilo SpA* [2005] UKHL 43; [2006] 1 AC 221 at [26] – [34] per Lord Steyn. A discretionary power, excludable by the parties' agreement, to review awards for error of law remains: *Arbitration Act 1996* (UK), s 69.

129 *Max Cooper & Sons Pty Limited v University of New South Wales* [1979] 2 NSWLR 257 (***Max Cooper***) at 261 – 262 per Lord Diplock (PC); *Bremer Vulkan* at 978 per Lord Diplock.

130 New South Wales Law Reform Commission, *Report on Commercial Arbitration* (LRC 27, 1976) (**NSWLRC Report**) at [9.6.1] – [9.6.7].

Second, as Isaacs and Rich JJ and Menzies J observed, a juridical basis of the jurisdiction rests on an implied or imputed contractual intention, derived from the delivery of reasons forming part of the award, that the award is only effective if it is legally correct.[131] It followed from this that the common law's power to review arbitral awards for error of law on the face of the award could be excluded by express agreement of the parties.[132] Third, the jurisdiction could be avoided even without a specific contractual term through an arbitrator delivering no reasons or reasons expressly stated not to be part of the award; there was no obligation to provide any reasons.[133] Lord Mustill observed that whether it arose was "often a matter of chance".[134] Equally, it was avoided when the nature of the agreement to arbitrate manifested an intention to accept the arbitrator's decision as final whether afflicted by error of law or not, for example, a reference of a question of law. There was not, contrary to the plaintiff's submission, an invariable implication that arbitral awards should not be binding if infected with error of law on their face.[135]

61. Fourth, following from the first three matters, the jurisdiction of the common law courts to set aside an arbitral award for error of law does not evidence a general "historical function" of courts of "super-intending arbitrations" truly analogous with the jurisdiction to issue certiorari to inferior courts and tribunals for jurisdictional error which has been recognised as a defining constitutional characteristic of the State Supreme Courts.[136] Even in its broadest conception, certiorari does not run to private arbitral tribunals.[137] Unlike certiorari,[138] the common law's power to set aside arbitral awards for error of law on their face was not concerned to vindicate any principle of legality in the exercise of power. Further, unlike the power to grant remedies for jurisdictional error by bodies exercising public (governmental) power, the power at common law to set aside arbitral awards for error of law on their face is not a structural aspect of the Federal judicature established or recognised by Ch III of the Constitution to prevent the development of "islands of power immune from supervision or restraint".[139] It was, rather, an anomaly of legal history and, such foundation as it enjoyed, was based on an imputed, but defeasible, contractual intention concerning the circumstances in which the award would be effective. In any event, the jurisdiction to issue certiorari for non-jurisdictional error of law on the face of the record enjoys no constitutional protection even in supervision of public (governmental) power.[140] And most, if not all, of the matters which might be assimilated to "jurisdictional errors" of an arbitrator find expression

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131 *Melbourne Harbour* at 585 per Isaacs J, at 590 per Rich J; *Tuta v Hutcherson* at 262 per Menzies J. See also, *Racecourse Betting* at 125 per McKinnon LJ.

132 *Sinai Mining Company Ltd v Compania Naviera Sota y Anzar* (1927) 28 Ll L Reps 364 at 365 per Bankes and Scrutton LJJ; *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 (***CBI v Badger***) where a five member bench of the New Zealand Court of Appeal held that such an exclusion was not contrary to public policy.

133 *Tuta v Hutcherson* at 267 per Windeyer J; *Max Cooper* at 262.

134 *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* (Privy Council, 16 November 1995), reported as an appendix to *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318.

135 Plaintiff's submissions at [50] – [51], [91].

136 *Kirk v Industrial Court of New South Wales* [2010] HCA 1; 239 CLR 531 (***Kirk***) at [91] – [100]. Cf., Plaintiff's submissions at [77]. In *CBI v Badger* (at 674) Cooke P described the "relationship with certiorari ... [as] a degree of affinity rather than an identity".

137 *R v Panel on Takeovers & Mergers; Ex parte Datafin* [1987] 1 QB 815 at 847 per Lloyd LJ. See also, *Regina v National Joint Council for the Craft of Dental Technicians; Ex parte Neate* [1953] 1 QB 704 at 707 – 708 per Lord Goddard CJ, at 709 per Croom-Johnson J; *Bremer Vulkan* at 978 – 979 per Lord Diplock; *Chase Oyster Bar Pty Limited v Hamo Industries Pty Limited* [2010] NSWCA 190; 78 NSWLR 393 at [5] – [10] per Spigelman CJ, at [73] per Basten JA.

138 *Ex parte Shaw* at 351 per Denning LJ. *Reg v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 at 884 per Diplock LJ. *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; 209 CLR at [86] – [90], [98] – [101] per McHugh J, [255] – [260] per Hayne J.

139 *Kirk* at [98] – [99] per French, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

140 *Kirk* at [99] – [100] per French, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

in the grounds on which a court can refuse to recognise or enforce an award under Art 36 of the Model Law.

Stated case procedure

62. The ability of the arbitrator to state a question of law for the consideration of the court was introduced in the *Common Law Procedure Act 1854* (UK) and was carried over into Australian colonial arbitration legislation. Later, the court was given power to require an arbitrator to state a case.[141] The jurisdiction was not supervisory, but advisory and could not be exercised as an aspect of federal jurisdiction.[142] By the 1950s there was discontent, particularly in England, with the delays and costs caused by the stated case procedure and it was abolished there in 1979 and shortly after in Australia by the uniform *Commercial Arbitration Acts*.[143] For over a generation, it has played no role in Anglo-Australian arbitration law.

X. Conclusion

63. For these reasons, the plaintiff's challenge to the validity of the IA Act must fail and its application for a writ of prohibition against the first defendant should be dismissed.

PART VI ESTIMATED HOURS

64. It is estimated that 45 minutes will be required for the presentation of the Attorney-General's oral argument.

Date of filing: 26 October 2012

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141 *Max Cooper* at 261 per Lord Diplock. *Westport v Gordian* at [33] per French, Gummow, Crennan and Bell JJ.

142 *The Minister for Works for the Government of Western Australia v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 279 – 280 per Barwick CJ, at 283 – 284 per Kitto J, at 288 – 289 per Taylor J, at 292 per Owen J.

143 Mustill & Boyd at p452 – 458. *Promenade Investments Pty Limited v State of New South Wales* (1992) 26 NSWLR 203 at 216 – 217 per Sheller JA (Meagher JA agreeing).

Annexure A

International Arbitration Amendment Act 2010

No. 97, 2010

An Act to amend the law in relation to international arbitration, and for related purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

Contents

International Arbitration Amendment Act 2010

No. 97, 2010

An Act to amend the law in relation to international arbitration, and for related purposes

[*Assented to 6 July 2010*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *International Arbitration Amendment Act 2010*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	6 July 2010
2. Schedule 1, items 1 to 5	The day this Act receives the Royal Assent.	6 July 2010
3. Schedule 1, item 6	Immediately after the commencement of Schedule 2 to the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009*.	7 December 2009
4. Schedule 1, item 7	The day this Act receives the Royal Assent.	6 July 2010
5. Schedule 1, item 8	The earlier of: (a) the commencement of Schedule 2 to the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009*; and (b) the day this Act receives the Royal Assent.	7 December 2009 (paragraph (a) applies)
6. Schedule 1, items 9 to 12	The day this Act receives the Royal Assent.	6 July 2010
7. Schedule 1, item 13	The later of: (a) the day after the commencement of Schedule 2 to the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009*; and (b) the day this Act receives the Royal Assent.	6 July 2010 (paragraph (b) applies)
8. Schedule 1,	The day this Act receives the Royal Assent.	6 July 2010

Commencement information		
Column 1	**Column 2**	**Column 3**
Provision(s)	**Commencement**	**Date/Details**
items 14 to 24		
9. Schedule 1, item 25	Immediately after the commencement of Schedule 2 to the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009*.	7 December 2009
10. Schedule 1, items 26 to 35	The day this Act receives the Royal Assent.	6 July 2010

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Encouraging international arbitration

Part 1—Amendments

International Arbitration Act 1974

1 At the end of Part I

Add:

2D Objects of this Act

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

(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.

2 Subsection 3(1)

Insert:

data message means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), email, telegram, telex or telecopy.

3 Subsection 3(1)

Insert:

electronic communication means any communication made by means of data messages.

4 At the end of section 3

Add:

(4) For the avoidance of doubt and without limiting subsection (1), an agreement is in writing if:

(a) its content is recorded in any form whether or not the agreement or the contract to which it relates has been concluded orally, by conduct, or by other means; or

(b) it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference; or

(c) 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.

(5) For the avoidance of doubt and without limiting subsection (1), a reference in a contract to any document containing an arbitration clause is an arbitration agreement, provided that the reference is such as to make the clause part of the contract.

5 Subsection 8(2)

Repeal the subsection, substitute:

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.

6 Subsection 8(3)

Repeal the subsection, substitute:

(3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.

7 Before subsection 8(4)

Insert:

(3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).

8 Subsection 8(4)

Omit "subsections (1) and (2) do", substitute "this section does".

9 After subsection 8(7)

Insert:

(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.

10 At the end of section 8

Add:

(9) A court may, if satisfied of any of the matters mentioned in subsection (10), make an order for one or more of the following:

(a) for proceedings that have been adjourned, or that part of the proceedings that has been adjourned, under subsection (8) to be resumed;

(b) for costs against the person who made the application for the setting aside or suspension of the foreign award;

(c) for any other order appropriate in the circumstances.

(10) The matters are:

(a) the application for the setting aside or suspension of the award is not being pursued in good faith; and

(b) the application for the setting aside or suspension of the award is not being pursued with reasonable diligence; and

(c) the application for the setting aside or suspension of the award has been withdrawn or dismissed; and

(d) the continued adjournment of the proceedings is, for any reason, not justified.

(11) An order under subsection (9) may only be made on the application of a party to the proceedings that have, or a part of which has, been adjourned.

11 Subsection 15(1)

Repeal the subsection, substitute:

(1) In this Part:

confidential information, in relation to arbitral proceedings, means information that relates to the proceedings or to an award made in the proceedings and includes:

(a) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party to the proceedings; and

(b) any evidence (whether documentary or other) supplied to the arbitral tribunal; and

(c) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal; and

(d) any transcript of oral evidence or submissions given before the arbitral tribunal; and

(e) any rulings of the arbitral tribunal; and

(f) any award of the arbitral tribunal.

disclose, in relation to confidential information, includes giving or communicating the confidential information in any way.

Model Law means 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, the English text of which is set out in Schedule 2.

12 Subsection 16(2)

Insert:

arbitration agreement has the meaning given in Option 1 of Article 7 of the Model Law.

13 Section 18

Repeal the section, substitute:

18 Court or authority taken to have been specified in Article 6 of the Model Law

(1) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(3) of the Model Law.

(2) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(4) of the Model Law.

(3) The following courts are taken to have been specified in Article 6 of the Model Law as courts competent to perform the functions referred to in Articles 13(3), 14, 16(3) and 34(2) of the Model Law:

(a) if the place of arbitration is, or is to be, in a State—the Supreme Court of that State;

(b) if the place of arbitration is, or is to be, in a Territory:

(i) the Supreme Court of that Territory; or

(ii) if there is no Supreme Court established in that Territory—the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory;

(c) in any case—the Federal Court of Australia.

14 After section 18

Insert:

18A Article 12—justifiable doubts as to the impartiality or independence of an arbitrator

(1) For the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator

only if there is a real danger of bias on the part of that person in conducting the arbitration.

(2) For the purposes of Article 12(2) of the Model Law, 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 arbitrator in conducting the arbitration.

18B Article 17B—preliminary orders

Despite Article 17B of the Model Law:

(a) no party to an arbitration agreement may make an application for a preliminary order directing another party not to frustrate the purpose of an interim measure requested; and

(b) no arbitral tribunal may grant such a preliminary order.

18C Article 18—reasonable opportunity to present case

For the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.

15 Section 19

Repeal the section, substitute:

19 Articles 17I, 34 and 36 of Model Law—public policy

Without limiting the generality of Articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of any doubt, that, for the purposes of those Articles, an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if:

(a) the making of the interim measure or 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 interim measure or award.

16 Section 21

Repeal the section, substitute:

21 Model Law covers the field

If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.

16A Division 3 of Part III (heading)

Repeal the heading, substitute:

Division 3—Additional provisions

16B Section 22

Repeal the section, substitute:

22 Application of additional provisions

Application to arbitration under Model Law

(1) This Division applies to any arbitration to which the Model Law applies.

Application of sections 23, 23A, 23B, 23J, 23K, 25, 26 and 27

(2) Each of the following sections applies to arbitral proceedings commenced in reliance on an arbitration agreement unless the parties to the agreement agree (whether in the agreement or otherwise in writing) that it will not apply:
  (a) section 23;
  (b) section 23A;
  (c) section 23B;
  (d) section 23J;
  (e) section 23K;
  (f) section 25;
  (g) section 26;
  (h) section 27.

Application of sections 23C, 23D, 23E, 23F and 23G

(3) The following sections apply to arbitral proceedings commenced in reliance on an arbitration agreement if the parties to the agreement agree (whether in the agreement or otherwise in writing) that they will apply:

(a) section 23C;
(b) section 23D;
(c) section 23E;
(d) section 23F;
(e) section 23G.

Application of section 23H

(4) Section 23H applies on the death of a party to an arbitration agreement unless the parties to the agreement agree (whether in the agreement or otherwise in writing) that it will not apply.

Application of section 24

(5) Section 24 applies to arbitral proceedings commenced in reliance on an arbitration agreement if the parties to the agreement agree (whether in the agreement or otherwise in writing) that it will apply.

17 After section 22

Insert:

22A Interpretation

In this Division:

court means:

(a) in relation to arbitral proceedings that are, or are to be, conducted in a State—the Supreme Court of that State; and
(b) in relation to arbitral proceedings that are, or are to be, conducted in a Territory:
  (i) the Supreme Court of the Territory; or
  (ii) if there is no Supreme Court established in that Territory—the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory; and
(c) in any case—the Federal Court of Australia.

18 Section 23

Repeal the section, substitute:

23 Parties may obtain subpoenas

(1) A party to arbitral proceedings commenced in reliance on an arbitration agreement may apply to a court to issue a subpoena under subsection (3).

(2) However, this may only be done with the permission of the arbitral tribunal conducting the arbitral proceedings.

(3) The court may, for the purposes of the arbitral proceedings, issue a subpoena requiring a person to do either or both of the following:
  (a) to attend for examination before the arbitral tribunal;
  (b) to produce to the arbitral tribunal the documents specified in the subpoena.

(4) A person must not be compelled under a subpoena issued under subsection (3) to answer any question or produce any document which that person could not be compelled to answer or produce in a proceeding before that court.

(5) The court must not issue a subpoena under subsection (3) to a person who is not a party to the arbitral proceedings unless the court is satisfied that it is reasonable in all the circumstances to issue it to the person.

(6) Nothing in this section limits Article 27 of the Model Law.

23A Failure to assist arbitral tribunal

(1) A party to arbitral proceedings commenced in reliance on an arbitration agreement may apply to a court for an order under subsection (3) if a person:
  (a) refuses or fails to attend before the arbitral tribunal conducting the arbitral proceedings for examination when required to do so under a subpoena issued under subsection 23(3); or
  (b) refuses or fails to attend before the arbitral tribunal when required to do so by the arbitral tribunal; or
  (c) refuses or fails to produce a document that the person is required to produce under a subpoena issued under subsection 23(3); or
  (d) refuses or fails to produce a document that the person is required to produce by the arbitral tribunal; or

(e) appearing as a witness before the arbitral tribunal:
(i) refuses or fails to take an oath or to make an affirmation or affidavit when required by the arbitral tribunal to do so; or
(ii) refuses or fails to answer a question that the witness is required by the arbitral tribunal to answer; or
(f) refuses or fails to do any other thing which the arbitral tribunal may require to assist the arbitral tribunal in the performance of its functions.

(2) However, an application may only be made under paragraph (1)(b), (d), (e) or (f) with the permission of the arbitral tribunal.

(3) The court may, for the purposes of the arbitral proceedings, order:
(a) the person to attend before the court for examination or to produce to the court the relevant document or to do the relevant thing; and
(b) the person, or any other person, to transmit to the arbitral tribunal one or more of the following:
(i) a record of any evidence given in compliance with the order;
(ii) any document produced in compliance with the order, or a copy of the document;
(iii) particulars of any other thing done in compliance with the order.

(4) A person must not be compelled under an order made under subsection (3) to answer any question or produce any document which that person could not be compelled to answer or produce in a proceeding before that court.

(5) The court must not make an order under subsection (3) in relation to a person who is not a party to the arbitral proceedings unless:
(a) before the order is made, the person is given an opportunity to make representations to the court; and
(b) the court is satisfied that it is reasonable in all the circumstances to make the order in relation to the person.

(6) Nothing in this section limits Article 27 of the Model Law.

23B Default by party to an arbitration agreement

(1) This section applies if a party to arbitral proceedings commenced in reliance on an arbitration agreement:

(a) refuses or fails to attend before an arbitral tribunal for examination when required to do so under a subpoena issued under subsection 23(3) (regardless of whether an application is made for an order under subsection 23A(3)); or

(b) refuses or fails to produce a document to an arbitral tribunal when required to do so under a subpoena issued under subsection 23(3) (regardless of whether an application is made for an order under subsection 23A(3)); or

(c) refuses or fails to comply with an order made by a court under subsection 23A(3); or

(d) fails within the time specified by an arbitral tribunal, or if no time is specified within a reasonable time, to comply with any other requirement made by the arbitral tribunal to assist it in the performance of its functions.

(2) The arbitral tribunal may continue with the arbitration proceedings in default of appearance or of the other act and make an award on the evidence before it.

(3) Nothing in this provision affects any other power which the arbitral tribunal or a court may have in relation to the refusal or failure.

23C Disclosure of confidential information

(1) The parties to arbitral proceedings commenced in reliance on an arbitration agreement must not disclose confidential information in relation to the arbitral proceedings unless:

(a) the disclosure is allowed under section 23D; or

(b) the disclosure is allowed under an order made under section 23E and no order is in force under section 23F prohibiting that disclosure; or

(c) the disclosure is allowed under an order made under section 23G.

(2) An arbitral tribunal must not disclose confidential information in relation to arbitral proceedings commenced in reliance on an arbitration agreement unless:

(a) the disclosure is allowed under section 23D; or

(b) the disclosure is allowed under an order made under section 23E and no order is in force under section 23F prohibiting that disclosure; or

(c) the disclosure is allowed under an order made under section 23G.

23D Circumstances in which confidential information may be disclosed

(1) This section sets out the circumstances in which confidential information in relation to arbitral proceedings may be disclosed by:

(a) a party to the arbitral proceedings; or

(b) an arbitral tribunal.

(2) The information may be disclosed with the consent of all of the parties to the arbitral proceedings.

(3) The information may be disclosed to a professional or other adviser of any of the parties to the arbitral proceedings.

(4) The information may be disclosed if it is necessary to ensure that a party to the arbitral proceedings has a full opportunity to present the party's case and the disclosure is no more than reasonable for that purpose.

(5) The information may be disclosed if it is necessary for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party and the disclosure is no more than reasonable for that purpose.

(6) The information may be disclosed if it is necessary for the purpose of enforcing an arbitral award and the disclosure is no more than reasonable for that purpose.

(7) The information may be disclosed if it is necessary for the purposes of this Act, or the Model Law as in force under subsection 16(1) of this Act, and the disclosure is no more than reasonable for that purpose.

(8) The information may be disclosed if the disclosure is in accordance with an order made or a subpoena issued by a court.

(9) The information may be disclosed if the disclosure is authorised or required by another relevant law, or required by a competent

regulatory body, and the person making the disclosure gives written details of the disclosure including an explanation of reasons for the disclosure to:

(a) if the person is a party to the arbitral proceedings—the other parties to the proceedings and the arbitral tribunal; and

(b) if the arbitral tribunal is making the disclosure—all the parties to the proceedings.

(10) In subsection (9):

another relevant law means:

(a) a law of the Commonwealth, other than this Act; and

(b) a law of a State or Territory; and

(c) a law of a foreign country, or of a part of a foreign country:

(i) in which a party to the arbitration agreement has its principal place of business; or

(ii) in which a substantial part of the obligations of the commercial relationship are to be performed; or

(iii) to which the subject matter of the dispute is most commonly connected.

23E Arbitral tribunal may allow disclosure in certain circumstances

(1) An arbitral tribunal may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the proceedings in circumstances other than those mentioned in section 23D.

(2) An order under subsection (1) may only be made at the request of one of the parties to the arbitral proceedings and after giving each of the parties to the arbitral proceedings the opportunity to be heard.

23F Court may prohibit disclosure in certain circumstances

(1) A court may make an order prohibiting a party to arbitral proceedings from disclosing confidential information in relation to the arbitral proceedings if:

(a) the court is satisfied in the circumstances of the particular case that the public interest in preserving the confidentiality of arbitral proceedings is not outweighed by other

considerations that render it desirable in the public interest for the information to be disclosed; or

(b) the disclosure is more than is reasonable for that purpose.

(2) An order under subsection (1) may only be made on the application of a party to the arbitral proceedings and after giving each of the parties to the arbitral proceedings the opportunity to be heard.

(3) A party to arbitral proceedings may only apply for an order under subsection (1) if the arbitral tribunal has made an order under subsection 23E(1) allowing the disclosure of the information.

(4) The court may order that the confidential information not be disclosed pending the outcome of the application under subsection (2).

(5) An order under this section is final.

23G Court may allow disclosure in certain circumstances

(1) A court may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the arbitral proceedings in circumstances other than those mentioned in section 23D if:

(a) the court is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the information to be disclosed; and

(b) the disclosure is not more than is reasonable for that purpose.

(2) An order under subsection (1) may only be made on the application of a person who is or was a party to the arbitral proceedings and after giving each person who is or was a party to the arbitral proceedings the opportunity to be heard.

(3) A party to arbitral proceedings may only apply for an order under subsection (1) if:

(a) the mandate of the arbitral tribunal has been terminated under Article 32 of the Model Law; or

(b) a request by the party to the arbitral tribunal to make an order under subsection 23E(1) allowing the disclosure has been refused.

(4) An order under this section is final.

23H Death of a party to an arbitration agreement

(1) If a party to an arbitration agreement dies:
  (a) the agreement is not discharged (either in respect of the deceased or any other party); and
  (b) the authority of an arbitral tribunal is not revoked; and
  (c) the arbitration agreement is enforceable by or against the personal representative of the deceased.

(2) Nothing in subsection (1) is taken to affect the operation of any enactment or rule of law by virtue of which a right of action is extinguished by the death of a person.

23J Evidence

(1) An arbitral tribunal may, at any time before the award is issued by which a dispute that is arbitrated by the tribunal is finally decided, make an order:
  (a) allowing the tribunal or a person specified in the order to inspect, photograph, observe or conduct experiments on evidence that is in the possession of a party to the arbitral proceedings and that may be relevant to those proceedings (the ***relevant evidence***); and
  (b) allowing a sample of the relevant evidence to be taken by the tribunal or a person specified in the order.

(2) The tribunal may only specify a person in the order if the person is:
  (a) a party to the proceedings; or
  (b) an expert appointed by the tribunal under Article 26 of the Model Law; or
  (c) an expert appointed by a party to the proceedings with the permission of the tribunal.

(3) The provisions of the Model Law apply in relation to an order under this section in the same way as they would apply to an interim measure under the Model Law.

23K Security for costs

(1) An arbitral tribunal may, at any time before the award is issued by which a dispute that is arbitrated by the tribunal is finally decided, order a party to the arbitral proceedings to pay security for costs.

(2) However, the tribunal must not make such an order solely on the basis that:

(a) the party is not ordinarily resident in Australia; or

(b) the party is a corporation incorporated or an association formed under the law of a foreign country; or

(c) the party is a corporation or association the central management or control of which is exercised in a foreign country.

(3) The provisions of the Model Law apply in relation to an order under this section in the same way as they would apply to an interim measure under the Model Law.

19 Subsection 25(1)

Omit "Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, where", substitute "Where".

20 Section 26

Repeal the section, substitute:

26 Interest on debt under award

(1) This section applies if:

(a) an arbitral tribunal makes an award for the payment of an amount of money; and

(b) under the award, the amount is to be paid by a particular day (the ***due date***).

(2) The arbitral tribunal may direct that interest, including compound interest, is payable if the amount is not paid on or before the due date.

(3) The arbitral tribunal may set a reasonable rate of interest.

(4) The interest is payable:

(a) from the day immediately following the due date; and
(b) on so much of the amount as remains unpaid.

(5) The direction is taken to form part of the award.

21 Subsection 27(1)

Omit "Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, the", substitute "The".

22 At the end of subsection 27(2)

Add:

; and (d) limit the amount of costs that a party is to pay to a specified amount.

23 After subsection 27(2)

Insert:

(2A) An arbitral tribunal must, if it intends to make a direction under paragraph (2)(d), give the parties to the arbitration agreement notice of that intention sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the arbitral proceedings which may be affected by it, for the limit to be taken into account.

23A Section 28

Repeal the section, substitute:

28 Immunity

(1) An arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator.

(2) An entity that appoints, or fails or refuses to appoint, a person as arbitrator is not liable in relation to the appointment, failure or refusal if it was done in good faith.

23B At the end of Division 4 of Part III

Add:

30A Severability

Without limiting its effect apart from this section, this Part also has the effect it would have if it were confined, by express provision, to arbitrations involving:

(a) places, persons, matters or things external to Australia; or

(b) disputes arising in the course of trade or commerce with another country, or between the States; or

(c) disputes between parties at least one of which is a corporation to which paragraph 51(xx) of the Constitution applies; or

(d) disputes arising in the course of trade or commerce in a Territory.

24 Subsection 35(2)

Repeal the subsection, substitute:

(2) An award may be enforced in the Supreme Court of a State or Territory with the leave of that court as if the award were a judgment or order of that court.

25 Subsection 35(4)

Repeal the subsection, substitute:

(4) An award may be enforced in the Federal Court of Australia with the leave of that court as if the award were a judgment or order of that court.

26 After Part IV

Add:

Part V—General matters

39 Matters to which court must have regard

(1) This section applies where:

(a) a court is considering:

(i) exercising a power under section 8 to enforce a foreign award; or

(ii) exercising the power under section 8 to refuse to enforce a foreign award, including a refusal because the enforcement of the award would be contrary to public policy; or

(iii) exercising a power under Article 35 of the Model Law, as in force under subsection 16(1) of this Act, to recognise or enforce an arbitral award; or

(iv) exercising a power under Article 36 of the Model Law, as in force under subsection 16(1) of this Act, to refuse to recognise or enforce an arbitral award, including a refusal under Article 36(1)(b)(ii) because the recognition or enforcement of the arbitral award would be contrary to the public policy of Australia; or

(v) if, under section 18, the court is taken to have been specified in Article 6 of the Model Law as a court competent to perform the functions referred to in that article—performing one or more of those functions; or

(vi) performing any other functions or exercising any other powers under this Act, or the Model Law as in force under subsection 16(1) of this Act; or

(vii) performing any function or exercising any power under an agreement or award to which this Act applies; or

(b) a court is interpreting this Act, or the Model Law as in force under subsection 16(1) of this Act; or

(c) a court is interpreting an agreement or award to which this Act applies; or

(d) if, under section 18, an authority is taken to have been specified in Article 6 of the Model Law as an authority competent to perform the functions referred to in Articles 11(3) or 11(4) of the Model Law—the authority is considering performing one or more of those functions.

(2) The court or authority must, in doing so, have regard to:

(a) the objects of the Act; and

(b) the fact that:

(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and

(ii) awards are intended to provide certainty and finality.

(3) In this section:

arbitral award has the same meaning as in the Model Law.

foreign award has the same meaning as in Part II.

Model Law has the same meaning as in Part III.

40 Regulations

The Governor-General may make regulations prescribing matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

27 Schedule 2

Repeal the Schedule, substitute:

Schedule 2—UNCITRAL Model Law on International Commercial Arbitration (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)

Note: See subsection 15(1).

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application[1]

(1) This Law applies to international commercial[2] arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25*(a)* and 32(2) *(a)*, refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 2 A. International origin and general principles

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law 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 his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Option I

Article 7. Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) "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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telexor telecopy.

(5) Furthermore, 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.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

"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.

Article 8. Arbitration agreement and substantive claim before court

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

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the

termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is 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 by which the dispute is finally decided, 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.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)*(a)*, *(b)* and *(c)* shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such 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. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)*(d)*, the requirements in paragraphs (1)*(a)* and *(b)* of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)*(a)*, is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

(1) 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.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon

application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)*(a)*(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)*(b)*(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

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.

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

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

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

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

Article 29. Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall 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 article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)*(a)* of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty 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. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

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

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

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his 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 Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; 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.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside 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.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.[4]

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country 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 competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country 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 his 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 recognized 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 country 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 country 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.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)*(a)*(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

[1]Article headings are for reference purposes only and are not to be used for purposes of interpretation.

[2]The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

[3]The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization

sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

[4]The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

Part 2—Application

28 Application of items 2 to 4

The amendments made by items 2 to 4 of this Schedule apply in relation to agreements entered into on or after the commencement of those items.

29 Application of items 5 to 9

(1) The amendments made by items 5, 7 and 9 of this Schedule apply in relation to proceedings to enforce a foreign award brought on or after the commencement of those items.

(2) The amendment made by item 6 of this Schedule applies in relation to proceedings to enforce a foreign award brought on or after the commencement of that item.

(3) The amendment made by item 8 of this Schedule applies in relation to proceedings to enforce a foreign award brought on or after the commencement of that item.

30 Application of item 10

The amendment made by item 10 of this Schedule applies whether the proceedings are adjourned before or after the commencement of that item.

31 Application of item 14

(1) The amendment made by item 14 of this Schedule, to the extent that it relates to Article 12(1) of the Model Law, applies in relation to an approach on or after the commencement of that item in connection with a possible appointment of a person as arbitrator.

(2) The amendment made by item 14 of this Schedule, to the extent that it relates to Article 12(2) of the Model Law, applies in relation to a person acting as arbitrator on or after the commencement of that item.

32 Application of items 18 to 23

(1) The amendments made by items 18 to 23 of this Schedule apply in relation to arbitration agreements entered into on or after the commencement of those items.

(2) To avoid doubt, subitem (1) does not prevent the parties to an arbitration agreement entered into before the commencement of those items from making an agreement, after that commencement, in accordance with section 22 of the *International Arbitration Act 1974*, in relation to any provision inserted or amended by items 18 to 23 of this Schedule.

33 Application of items 24 and 25

(1) The amendment made by item 24 of this Schedule applies in relation to proceedings to enforce an award brought on or after the commencement of that item.

(2) The amendment made by item 25 of this Schedule applies in relation to proceedings to enforce an award brought on or after the commencement of that item.

34 Application of item 26

The amendment made by item 26 of this Schedule applies in relation to:

(a) the exercise of a power; or
(b) the performance of a function; or
(c) the interpretation of this Act; or
(d) the interpretation of the Model Law; or
(e) the interpretation of an agreement or award;

on or after the commencement of that item.

35 Definitions

In this Part:

foreign award has the same meaning as in Part II of the *International Arbitration Act 1974*.

Model Law has the same meaning as in Part III of that Act.

[*Minister's second reading speech made in—*
House of Representatives on 25 November 2009
Senate on 15 June 2010]

(243/09)

Annexure B

International Arbitration Act 1974

Act No. 136 of 1974 as amended

This compilation was prepared on 15 December 2009
taking into account amendments up to Act No. 122 of 2009

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

19 Articles 34 and 36 of Model Law—public policy

Without limiting the generality of subparagraphs 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is hereby declared, for the avoidance of any doubt, that, for the purposes of those subparagraphs, an award is in conflict with the public policy of Australia 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.

20 Chapter VIII of Model Law not to apply in certain cases

Where, but for this section, both Chapter VIII of the Model Law and Part II of this Act would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award.

21 Settlement of dispute otherwise than in accordance with Model Law

If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.