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# International arbitration in Australia – 2010/2011 in review

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*The past 15 months mark a historic period for the reinvigoration of arbitration in Australia. The avowed objective of the federal government is to position Australia as a hub for dispute resolution in the Asia-Pacific region. This article considers legislative, policy, case law and institutional developments in international arbitration in Australia since 1 July 2010.*

## INTRODUCTION

International arbitration is the preferred method of dispute resolution for transnational disputes. It continues to grow, especially in the Asia-Pacific region. Singapore has emerged as the leading arbitration seat in the region, overtaking Hong Kong,<sup>1</sup> and Australia is seeking to position itself as a regional hub for dispute resolution. However, it has many competitors who are seeking to do likewise.<sup>2</sup> Since 1 July 2010, there have been important arbitration-related developments in Australia. The purpose of this article is to survey these developments. In turn, it will consider: (a) legislative developments which update the arbitral legislative regime in Australia, regulating both international and domestic arbitration; (b) some policy developments in the area of investor-state arbitration; (c) case law developments; and (d) institutional developments.

## LEGISLATIVE AND POLICY DEVELOPMENTS

Since 1 July 2010, there has been wide-reaching reform of arbitration legislation in Australia. Amendments have been made to federal legislation and the States and Territories are in the process of adopting a new uniform law for domestic arbitration. This process of modernisation and harmonisation is part of a concerted effort to increase Australia's appeal as a venue for arbitration in the Asia-Pacific region. The reforms have been welcomed by commentators and practitioners.<sup>3</sup>

### Commonwealth legislation

Following a review of the *International Arbitration Act 1974* (Cth) (IAA) (which commenced in November 2008 with the release by the Federal Attorney-General of a Discussion Paper),<sup>4</sup> the IAA was amended, with the amendments coming into force on 6 July 2010. The reforms retain the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law) as the backbone of Australia's arbitral law, but include important changes to reverse the effect of some unfortunate Australian case law and to take into account the revision of the Model Law by UNCITRAL in 2006. Below is a brief outline of some of the most important changes to the IAA.<sup>5</sup>

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<sup>1</sup> See School of International Arbitration of Queen Mary College, University of London, *International Arbitration Survey* (2010), <http://www.arbitrationonline.org/research/2010/index.html> viewed 29 September 2011.

<sup>2</sup> Aside from Singapore and Hong Kong, Malaysia and South Korea are being heavily promoted as potential seats for international arbitration in the Asia-Pacific region.

<sup>3</sup> See Garnett R and Nottage L, "The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?" (2011) 7(1) *Asian Int'l Arb J* 29; Justice Clyde Croft, *The Development of Australia as an Arbitral Seat – A Victorian Supreme Court Perspective*, Paper presented at ICCA 50th Anniversary Conference (Geneva, Switzerland, 19-20 May 2011).

<sup>4</sup> See Attorney-General's Department, *Review of the International Arbitration Act 1974*, Discussion Paper (2008).

<sup>5</sup> For a more detailed account of the amendments to the IAA, see Monichino A, "Arbitration Reform in Australia: Striving for International Best Practice" (2010) 29 *The Arbitrator & Mediator* 29.

### **IAA as the exclusive law of international arbitration**

The amendments make it clear that the IAA is the exclusive law governing international arbitration in Australia.<sup>6</sup> Previously, parties were permitted to opt out of the IAA and choose a different arbitral law. This caused occasional confusion about overlap with State arbitration legislation, as well as parties' choice of procedural rules. The amendment to s 21 of the IAA overcomes the effect of the Supreme Court of Queensland's decision in *Eisenwerk v Australian Granites Pty Ltd*,<sup>7</sup> which controversially held that parties could (impliedly) opt out of the IAA by choosing arbitral procedural rules, such as the International Chamber of Commerce (ICC) Rules of Arbitration (ICC Rules), to govern their arbitration.<sup>8</sup> *Eisenwerk* will be discussed later in this article.

### **New interpretation provisions**

The amendments provide Australian superior courts with guidance in interpreting the IAA.<sup>9</sup> They aim to encourage courts to become more arbitration friendly and to limit the circumstances in which courts refuse to stay proceedings in the face of an arbitration agreement, or set aside or refuse to enforce a foreign award.<sup>10</sup> Arguably, these provisions require Australian courts to adopt an international approach in interpreting the IAA – that is, to have regard to the arbitration jurisprudence in other countries, which, like Australia, have adopted the Model Law and have acceded to the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention).<sup>11</sup> In the Asia-Pacific region, this would notably include Singapore and Hong Kong.

### **Concurrent jurisdiction for the Federal Court and State Supreme Courts**

Despite a proposal in the Discussion Paper that exclusive jurisdiction be conferred on the Federal Court in matters under the IAA, the amendments confer concurrent jurisdiction on the Federal Court and the State and Territory Supreme Courts.<sup>12</sup>

### **State and Territory legislation**

After many years of review, the Standing Committee of Attorneys-General (SCAG)<sup>13</sup> resolved on 7 April 2010 to adopt a Model Bill to replace the then uniform Commercial Arbitration Acts (CAAs). This represented a major overhaul of domestic arbitration law in Australia, which was long overdue.

At the time of writing, the new legislation has been adopted in New South Wales, Tasmania and the Northern Territory (collectively, the "revised CAAs").<sup>14</sup> South Australia, Victoria and Western Australia have introduced similar Bills into their parliaments, which are likely to come into force by the end of the 2011 calendar year. Only Queensland and the Australian Capital Territory are yet to introduce such legislation. Below is a brief outline of some of the most important changes brought about by the introduction of the revised CAAs.<sup>15</sup>

### **Adoption of the Model Law**

The most important aspect of the new domestic arbitration legislation is that it is based on the UNCITRAL Model Law. Although the Model Law was designed for international arbitration, many

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<sup>6</sup> *International Arbitration Act 1974* (Cth), s 21.

<sup>7</sup> *Eisenwerk v Australian Granites Pty Ltd* [2001] 1 Qd R 461.

<sup>8</sup> The displacement is said to occur only if the arbitral procedural rules are inconsistent with the Model Law.

<sup>9</sup> *International Arbitration Act 1974* (Cth), s 39.

<sup>10</sup> See Revised Explanatory Memorandum, *International Arbitration Amendment Bill 2010* (Cth) pp 1-2.

<sup>11</sup> Croft, n 3, pp 25-29.

<sup>12</sup> *International Arbitration Act 1974* (Cth), s 18. See also Monichino, n 5 at 33-34.

<sup>13</sup> Now the Standing Council on Law and Justice (SCLJ).

<sup>14</sup> *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT). For a more detailed account of the revised CAAs, see generally Jones D, *Commercial Arbitration in Australia* (Thomson Reuters, 2011).

<sup>15</sup> For a more detailed account of the changes to the domestic arbitration legislative regime, see Monichino, n 5 at 41-46.

countries have used it as the basis for their domestic arbitration legislation.<sup>16</sup> Therefore, the Model Law will underpin both the IAA and the revised CAAs. The revised CAAs also make a number of notable additions to the Model Law.

### ***Uniform interpretation of the Model Law***

Importantly for the harmonisation of arbitration law, the revised CAAs emphasise the need to promote uniformity in application of the Model Law in domestic and international arbitrations.<sup>17</sup>

### ***Limited grounds to challenge an award***

The revised CAAs remove the ability of a party to set aside an award on the grounds of “error of law” and “misconduct”.<sup>18</sup> Under the new regime, judicial recourse against an award is only available on the limited, well-known grounds set out in Art 34 of the Model Law. In addition, parties may opt in to a greater level of judicial supervision – in particular, they may agree to judicial recourse against an award on the grounds of “error of law”.<sup>19</sup> The ability of courts to set a domestic arbitral award is therefore significantly diminished.

### ***Stay of court proceedings***

Another important facet of the reforms is that they bring the revised CAAs into line with the IAA in relation to when a stay of court proceedings may be ordered. Rather than the general discretion given to courts under the old legislation, the revised CAAs mandate courts to stay court proceedings upon the request of a party, where the parties have agreed to refer the relevant dispute to arbitration (subject to very limited exceptions).<sup>20</sup> The fact there may be an overlap of issues with claims between one or other of the parties to the arbitration agreement and third parties, with the consequent risk of inconsistent findings arising out of a multiplicity of proceedings, is no longer a relevant factor to be considered by a court in deciding whether or not to grant a stay.<sup>21</sup>

## **INVESTMENT ARBITRATION POLICY**

In something of a surprise move, the federal government announced in April 2011 that it would no longer seek to include investor-state dispute resolution clauses in its bilateral investment treaties (BITs). These clauses give foreign businesses the power to take direct legal action against a nation-state for breach of a BIT by way of arbitration.

The federal government decision follows a report by the Productivity Commission in 2009, which concluded that there was no economic justification for the inclusion of investor-state dispute resolution clauses in BITs. The report argued that there was little evidence that such dispute resolution mechanisms encourage investment. It noted a range of other concerns, including the risk posed to governments pursuing genuine welfare-enhancing reforms (such as limiting tobacco advertising), the considerable cost of investment arbitration, possible “pro-investor bias”, a lack of transparency, and apparently inconsistent arbitration decisions.<sup>22</sup> Arbitration stakeholders in Australia had little or no opportunity to comment on the Productivity Commission report before the federal government relied on it. The federal government’s decision is regrettable.

<sup>16</sup> Hong Kong is the most recent country to apply the Model Law to domestic arbitration. See the Hong Kong *Arbitration Ordinance 2010*, which came into effect on 1 June 2011; and D’Agostino J, Chapman S and Cartwright-Finch U, “New Hong Kong Arbitration Ordinance comes into effect” (2011) 16 *The Australian ADR Reporter* 61.

<sup>17</sup> *Commercial Arbitration Act 2010* (NSW), s 2A. See Croft, n 3, pp 29-30.

<sup>18</sup> See ss 38 and 42 respectively of the *Commercial Arbitration Act 1990* (Qld), for example.

<sup>19</sup> See *Commercial Arbitration Act 2010* (NSW), ss 34 and 34A.

<sup>20</sup> See s 53 of the *Commercial Arbitration Act 1990* (Qld), for example, compared to *Commercial Arbitration Act 2010* (NSW), s 8.

<sup>21</sup> Contrast this with the decision under s 53 of the old uniform Acts in *Lightsources Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63 at [191]-[192].

<sup>22</sup> Productivity Commission, *Bilateral and Regional Trade Agreements: Research Report* (13 December 2010), <http://www.pc.gov.au/projects/study/trade-agreements/report> viewed 24 September 2011.

## CASE LAW DEVELOPMENTS

Since 1 July 2010 there have been 14 international arbitration-related cases decided by Australian courts. Eleven have been decided at single instance,<sup>23</sup> while three have been decided at the intermediate appellate stage.<sup>24</sup> In addition, three decisions have been handed down by the New South Wales Supreme Court in relation to the revised CAA.<sup>25</sup> In recent times, the Chief Justice of the Federal Court has commented, extra-curially, that there is a shift underway in Australian courts (accompanying the legislative shift referred to above) towards greater judicial support and less judicial intervention in the arbitral process.<sup>26</sup> The judicial decisions handed down since 1 July 2010, however, do not bear this out. The decisions, with respect, have been uneven in their support for arbitration. It is beyond the scope of this article to consider more than a few of them.

### **Cargill International SA v Peabody Australia Mining Ltd [2010] NSWSC 887**

This case arose out of an international contract for the delivery of coal, which contained an arbitration clause referring future disputes to arbitration seated in Sydney and conducted according to ICC Rules. A dispute arose and the arbitrator rendered a partial award in favour of the claimant, Peabody.

This award was challenged by the respondent, Cargill, on two alternative bases. First, Cargill sought to set aside the award on the ground of error of law under s 38(4)(b) of the *Commercial Arbitration Act 1984* (NSW). Secondly, and in the alternative, Cargill argued that the award should be set aside on the ground that it violated public policy under the Model Law,<sup>27</sup> because the arbitrator failed to consider one of its arguments, which it contended amounted to a denial of natural justice.

These arguments raised the important question of whether the Model Law was the applicable arbitral law or whether the parties had opted out of it by adopting the ICC Rules. This required consideration of the so-called “*Eisenwerk* principle” according to which s 21 of the IAA (before its recent amendment) had been interpreted by the Queensland Court of Appeal to mean that parties opt out of the Model Law if they choose inconsistent arbitral procedural rules, such as the ICC Rules.<sup>28</sup>

### **Decision**

Ward J held that the adoption of arbitral procedural rules did not constitute an implied exclusion of the Model Law for the purposes of s 21 of the IAA. After referring to leading texts on international arbitration and the numerous policy criticisms made of *Eisenwerk*, her Honour held unequivocally that *Eisenwerk* was wrong in principle, stating:

I am not satisfied that there is any inability to reconcile the application of the Model Law with the adoption of the ICC Rules as the procedural rules to govern the conduct of the parties’ arbitration. Accordingly, insofar as *Eisenwerk* is authority for the proposition that the adoption by the parties of procedural rules (such as the ICC Rules) to govern the conduct of the arbitration of their disputes amounts of itself to an implied agreement to opt out of the Model Law (and while conscious of the

<sup>23</sup> *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887; *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] NSWSC 139; *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1; *Altain Khuder LLC v IMC Mining (No 2)* [2011] VSC 12; *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; *McConnell Dowell Constructors (Aust) Pty Ltd v Ship “Asian Atlas”* [2011] FCA 174; *AED Oil Ltd v Puffin FPSO Ltd (No 5)* [2011] VSC 60; *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 206; *AED Oil Ltd v Puffin FPSO Ltd (No 6)* [2011] VSC 115; *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63; *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905.

<sup>24</sup> *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219; *Nicholls v Michael Wilson & Partners Ltd* [2010] NSWCA 222; *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248.

<sup>25</sup> *Gilgandra Marketing Co-operative Ltd v Australian Commodities & Marketing Pty Ltd* [2010] NSWSC 1209; *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* [2011] NSWSC 195; *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268.

<sup>26</sup> Keane CJ, “Judicial Support for Arbitration in Australia” (2010) 34 *Australian Bar Review* 1 at 2.

<sup>27</sup> This ground appears in Art 34 of the Model Law, which has force of law by virtue of s 16 of the IAA, and is supplemented by s 19 of the IAA.

<sup>28</sup> The view that the ICC Rules are inconsistent with the Model Law is highly contentious, if not plainly wrong.

respect to be accorded to decisions of an intermediate appellate court such as this), I have formed the view that that decision is plainly wrong and is one which should not be followed by this Court.<sup>29</sup>

Her Honour also rejected Cargill's argument that because the parties should have been aware of the existence of *Eisenwerk*, their choice to adopt procedural rules reflected, as a matter of contractual interpretation, an objective intention to opt out of the Model Law. Her Honour thus rejected Cargill's application to set aside the award under legislation other than the Model Law and the IAA.

Her Honour then considered Cargill's natural justice argument, based on the public policy ground under Art 34(2)(b)(ii) of the Model Law (as supplemented by s 19 of the IAA). In particular, s 19(b) of the IAA relevantly provides that an award is in conflict with, or is contrary to, the public policy of Australia for the purposes of Art 34(2)(b)(ii) of the Model Law if "a breach of the rules of natural justice occurred in connection with the making of the ... award". Her Honour did not accept that the argument which Cargill contended the arbitrator ignored was ever clearly articulated to the arbitrator. Thus, it could not be said that the arbitrator's failure to consider it was a denial of natural justice.<sup>30</sup>

The decision in Cargill is to be applauded. It demonstrates a mature understanding of international commercial arbitration and is consistent with its key principles.

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

Nine days following the handing down of Cargill, the Queensland Court of Appeal had the opportunity to overrule *Eisenwerk* but declined to do so, stating that it was unnecessary to make a finding as to the correctness or otherwise of its earlier decision.

The case arose out of a contract which contained a dispute resolution clause providing for arbitration under the UNCITRAL Arbitration Rules (UNCITRAL Rules) to be seated in Brisbane. Although the judgment does not mention the domicile of the respective parties, it is quite apparent that at least one of them was domiciled outside of Australia and that therefore the IAA was engaged. Vale initiated arbitration proceedings. The parties were unable to agree on whether the Model Law was the applicable arbitral law. By agreement, the question of the applicable supervisory law of the arbitration was referred to the Queensland Court of Appeal for determination by way of a case stated.<sup>31</sup>

The claimant argued that by selecting the UNCITRAL Rules, the parties had opted out of the Model Law under s 21 of the IAA. It noted that the UNCITRAL Rules provided a comprehensive arbitral framework, from composition of the tribunal through to the award. It invited the court to follow its earlier decision in *Eisenwerk*. It also stressed the apparent differences between the UNCITRAL Rules and the Model Law (although the judgment does not mention any of these specifically).

On the other hand, the respondent argued that, as a matter of theory, procedural rules are distinct from an arbitral law such as the Model Law. It also argued that the UNCITRAL Rules were not inconsistent with the Model Law, noting that the UNCITRAL Rules were silent on important issues which are only dealt with by the Model Law, such as the role of the courts.

#### **Decision**

In answer to the question stated whether, by selecting the UNCITRAL Rules, the parties had opted out of the Model Law, the court's answer was "no": the parties' choice of the UNCITRAL Rules did not mean they had opted out of the Model Law. Muir JA, who delivered the leading judgment, emphasised the "wealth of commentary" available on how the Model Law operates alongside the UNCITRAL

<sup>29</sup> *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887 at [91]. See also at [69] and [80] for her Honour's references to various commentary on the issues.

<sup>30</sup> *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887 at [241].

<sup>31</sup> *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219 at [3], [17]. On application of the parties, a judge of the trial division ordered that the case be stated for the opinion of the Court of Appeal pursuant to the *Uniform Civil Procedure Rules 1999* (Qld), r 483.

Rules.<sup>32</sup> His Honour noted that there were significant differences between the ICC Rules (before the court in *Eisenwerk*) and the UNCITRAL Rules.<sup>33</sup> Accordingly, his Honour held that the decision in *Eisenwerk* was “plainly distinguishable”.<sup>34</sup>

However, the court expressly declined to consider whether *Eisenwerk* was correctly decided. It treated *Eisenwerk* as merely a particular factual ascertainment of the parties’ objective intentions in that case. Muir JA stated that the principle is “in truth, no principle at all”, but rather “a conclusion as to the contractual intention of particular parties in particular circumstances”.<sup>35</sup>

The decision in *Wagners* is disappointing. There was no need for the court to compare the ICC Rules and the UNCITRAL Rules. The court (with the exception of White JA),<sup>36</sup> with respect, failed to grasp the fundamental difference between procedural rules and the Model Law (or the *lex arbitri*). Unfortunately, it missed an opportunity to reinstate confidence in Queensland as a seat for international arbitration by overruling the discredited decision in *Eisenwerk*.

### **Gilgandra Marketing Co-Operative Ltd v Australian Commodities Marketing Pty Ltd [2010] NSWSC 2010**

This case represents the first judicial consideration of the *Commercial Arbitration Act 2010* (NSW).

Gilgandra Marketing Ltd entered into multiple contracts for the sale of wheat to Australian Commodities Marketing Pty Ltd (ACM). Both parties were based in New South Wales. The contracts contained arbitration clauses providing for arbitration according to grain trade industry-specific arbitration rules. ACM failed to pay moneys owing under the contracts. It then went into liquidation while the goods were in transit.

On 15 July 2010, Gilgandra commenced proceedings in the New South Wales Supreme Court seeking a final declaration of a lien over the wheat, or a right to take possession of it. Alternatively, Gilgandra argued that it had a right of stoppage in transitu under s 46 of the *Sales of Goods Act 1923* (NSW). On 22 July 2010, Gilgandra applied for an interim injunction preventing ACM from dealing with the wheat. ACM appeared (unsuccessfully) in court to resist the injunction. The trial of the proceeding was listed for hearing in November 2010. On 23 September 2010 (following the grant of the interim injunction), ACM filed its defence and simultaneously made application under s 8 of the revised CAA for a stay of the court proceedings in favour of arbitration. The stay application was heard on 15 October 2010 (the revised CAA having come into force on 1 October 2010).<sup>37</sup>

Gilgandra, in resisting the stay application, argued that ACM’s application did not satisfy the requirement in s 8 of the revised CAA that the request for a stay must be made “not later than when submitting the party’s first statement on the substance of the dispute”.<sup>38</sup> In other words, Gilgandra argued that ACM was too late in making an application for a stay.

#### **Decision**

Slattery J reviewed the New Zealand authorities on stays under the Model Law<sup>39</sup> and decided in favour of Gilgandra, refusing to stay the court proceedings. He held that by resisting Gilgandra’s application for an interim injunction in July 2010, ACM submitted its “first statement on the substance

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<sup>32</sup> *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219 at [33].

<sup>33</sup> In particular, that the ICC Rules provided for the supervisory role of the ICC.

<sup>34</sup> *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219 at [46].

<sup>35</sup> *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219 at [42].

<sup>36</sup> White JA, like McMurdo P, agreed with Muir JA, but did note in some brief additional observations that “it does seem ... that the court [in *Eisenwerk*] failed to grapple with the distinction between the *lex arbitri* – the law of the seat of the arbitration – and the procedural rules adopted by the parties for the arbitration proper. The Model Law can sit harmoniously with this dichotomy”: *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219 at [52].

<sup>37</sup> The revised CAA was applied by virtue of its transitional provisions.

<sup>38</sup> Section 8 is based on Art 8 of the Model Law.

<sup>39</sup> *Gilgandra Marketing Co-operative Ltd v Australian Commodities & Marketing Pty Ltd* [2010] NSWSC 1209 at [49]-[53]. New Zealand, like Australia, is a Model Law country. See the *Arbitration Act 1996* (NZ).

of the dispute”. Alternatively, his Honour held that ACM’s failure to make application for a stay immediately afterwards and its participation in various procedural steps in the two months prior to bringing its stay application on 23 September 2010 amounted to a “continuing adoption” of its position in respect of the interim injunction application.

The issue of when a party’s participation in court proceedings amounts to a waiver of the arbitration agreement has generated much debate.<sup>40</sup> The international jurisprudence on the meaning of “statement on the substance of the dispute” is varied and difficult to reconcile. In the United Kingdom, courts have held that in order to amount to waiver of the right to arbitrate, the participation in litigation “must be one which impliedly affirms the correctness of the proceedings and the willingness of the [party] to go along with the determination by the Courts of law instead of arbitration”.<sup>41</sup>

The idea that a party may lose its right to apply for a stay under Art 8 of the Model Law if it resists an urgent application made to a court for interim relief, is, with respect, questionable. It is to be remembered that Art 9 of the Model Law recognises that it is not incompatible with an arbitration agreement for a party to request an interim measure from a court before arbitral proceedings are commenced. Conversely, why should opposition<sup>42</sup> to an interim measure disqualify a party from making application for a stay of court proceedings? Article 8 should be read in the context of Art 5, which prohibits court intervention unless specifically allowed by the Model Law. One commentator has argued that in cases of doubt under Art 8, Art 5 means that the doubt should be resolved in favour of non-interference in the arbitration.<sup>43</sup> Courts need to strike a balance between providing assistance in support of arbitration (such as by granting interim measures) and recognising/enforcing parties’ agreements to have their disputes resolved by arbitration. With respect, this decision does not strike the appropriate balance.

### **Westport Insurance Corporation v Gordian Runoff Ltd [2011] HCA 37**

In early February 2011, the High Court heard an appeal concerning the standard of reasons required to be given by an arbitrator under s 29 of the CAA.<sup>44</sup> The New South Wales Court of Appeal had refused to follow the earlier Victorian Court of Appeal decision in *Oil Basins Ltd v BHP Billiton Ltd*,<sup>45</sup> which had suggested that an arbitrator’s duty to give reasons for an award is equivalent to a judge’s duty to give reasons.

Reflecting the importance of the decision for arbitration in Australia, five parties appeared as amici curiae: the Federal Attorney-General, the Australian Centre for International Commercial Arbitration (ACICA), the Australian International Dispute Centre (AIDC), the Institute of Arbitrators and Mediators Australia (IAMA) and the Chartered Institute of Arbitrators, Australia (CIArb). In their written submissions, the amici curiae all argued that an arbitrator’s duty to give reasons for an award is not equivalent to a judge’s duty to give reasons, as suggested by the judgment of the Victorian Court of Appeal.

While *Gordian* and *Oil Basins* concerned the interpretation of domestic arbitration legislation, it would do well to keep in mind that a similar requirement for an arbitrator to include a statement of reasons in an award is to be found in Art 31(2) of the Model Law. It does not necessarily follow that Art 31(2) should be interpreted in the same way as s 29(1)(c) of the CAA. However, the adoption of a conservative approach to the interpretation of s 29(1)(c),<sup>46</sup> coupled with lingering doubt that Australian courts may interpret Art 31(2) in like fashion, had the serious potential to undermine the

<sup>40</sup> See Born G, *International Commercial Arbitration* (Kluwer International, 2009) Vol I, p 739.

<sup>41</sup> *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* (1978) 1 Lloyd’s Rep 357 at 361.

<sup>42</sup> By opposition, the author means denying that there is a serious question to be tried and therefore revealing a substantive defence, as opposed to denying that the balance of convenience lies in favour of the grant of the injunction sought.

<sup>43</sup> Beraudo JP, “Case law on Articles 5, 8 and 16 of the UNCITRAL Model Arbitration Law” (2006) 23(1) *Journal of International Arbitration* 101 at 103.

<sup>44</sup> See *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.

<sup>45</sup> *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 345.

<sup>46</sup> That is, the *Oil Basins* approach.

aspiration of positioning Australia as a regional hub for dispute resolution. On 5 October 2011, the High Court handed down its keenly awaited decision. Relevantly, it held:

- (a) there was nothing in s 29(1)(c) of the CAA to suggest that an arbitrator's reasons should be of a judicial standard. The reference in *Oil Basins* to reasons of a "judicial standard" was an "unfortunate gloss";<sup>47</sup>
- (b) the statement by the English Court of Appeal in *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)*<sup>48</sup> to the effect that arbitrators are required to "explain succinctly why, in the light of what happened, they have reached their decision and what their decision is", is apt to describe the content of the obligation in s 29(1)(c);<sup>49</sup>
- (c) what is required by way of reasons in a given case will depend upon the circumstances;<sup>50</sup>
- (d) whether Art 31(2) of the Model Law is to be construed in a similar manner to s 29(1)(c) of the CAA alternatively requires something less in terms of the standard of reasons was left for determination on another day.

On the facts of the case, the High Court held that the arbitral tribunal had not met the test in *Bremer* because in the relevant respect the tribunal had merely stated its conclusion and not the reasons for arriving at that conclusion.<sup>51</sup> The award was therefore set aside on the grounds that there was a manifest error of law on the face of the award (under s 38(5)(b)(i)), as well as strong evidence that the arbitrators made an error of law, the determination of which may add substantially to the certainty of commercial law (under s 38(5)(b)(ii)).<sup>52</sup>

### **Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131**

Uganda Telecom, a Ugandan corporation, entered into a services contract with Hi-Tech, an Australian corporation, which contained an arbitration clause, though it did not specify the seat, the arbitral law, or the procedural rules to be followed in an arbitration. A dispute arose in which Uganda Telecom claimed that Hi-Tech, in breach of the services contract, failed to provide a guarantee or pay invoices.

Uganda Telecom commenced an arbitration in Uganda before a sole arbitrator. The arbitration appears to have been administered by the Centre for Arbitration and Dispute Resolution in Kampala. Hi-Tech did not participate. An award was made in Uganda Telecom's favour. It then made application in the Federal Court to seek enforcement of the award in Australia under the IAA. Hi-Tech raised several arguments in resisting enforcement of the award, all of which were rejected by Foster J.

#### **Decision**

The first argument raised by Hi-Tech concerned the precise wording of the arbitration agreement. Hi-Tech submitted that the arbitration agreement was void for uncertainty because it did not specify the seat of the arbitration, the number of arbitrators, the arbitral law or the procedural rules to apply. Foster J rejected this argument, noting that the contract was made in Uganda and was governed by Ugandan law.<sup>53</sup> The *Ugandan Arbitration and Conciliation Act 2000*, which is similar to the Model Law, provided a mechanism for resolving all of the omissions raised by Hi-Tech.

Hi-Tech also contended that the award was neither an "arbitral award" nor a "foreign award" within the meaning of the IAA. Foster J quickly dismissed this argument, noting that the award met

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<sup>47</sup> *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37 at [53] (French CJ, Gummow, Crennan and Bell JJ), [169] (Kiefel J).

<sup>48</sup> *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130 at 132-133.

<sup>49</sup> *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37 at [54], [169].

<sup>50</sup> *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37 at [53], [170]. In this respect, the observations of the Victorian Court of Appeal (at [57]-[58]) that what is required to satisfy s 29(1)(c) will depend upon "the nature of the dispute and the particular circumstances of the case" were accepted by the High Court as correct.

<sup>51</sup> As to whether the proviso in s 18B(1) of the *Insurance Act 1902* (NSW) applied; namely, on the facts of the present case, whether in all the circumstances it was reasonable for the reinsurer to indemnify the insured.

<sup>52</sup> *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37 at [57], [170]. It is worthwhile to bear in mind that under Art 34 of the Model Law, an award cannot be set aside on the grounds of error of law.

<sup>53</sup> *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [62]-[89].

the definition of an arbitral award under both the Ugandan Act and the IAA and that it, having been rendered in Uganda, was clearly a foreign award.<sup>54</sup>

Hi-Tech further submitted that the award should not be enforced because it contained errors of fact and law, in particular that the arbitrator had miscalculated the quantum of damages. Foster J rejected this argument, noting that no such ground to resist enforcement existed under the IAA. His Honour rejected Hi-Tech's submission that errors of fact and law could fall under the public policy ground in s 8(7)(b) of the IAA. His Honour stated that erroneous legal reasoning or misapplication of law is not a violation of public policy; rather, Australia's public policy is to enforce arbitral awards "wherever possible".<sup>55</sup> Importantly, Foster J held that under the revised IAA the grounds for resisting enforcement of a foreign award were set out exhaustively in s 8(5) and (7) and that the court had no residual discretion to refuse enforcement.

The decision of Foster J in *Uganda Telecom* is another welcome decision which supports Keane CJ's hypothesis. It gives effect to the new objects of the IAA found in s 2D and, particularly, the pro-enforcement bias that is sought to be introduced by the recent amendments. In particular, it circumscribes the "public policy" exception to enforcement of foreign arbitral awards and represents a move away from past Australian decisions which held that courts had a general discretion to refuse enforcement.<sup>56</sup>

### **Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB (2011) 250 FLR 63**

This case arose out of a non-exclusive distributorship agreement between Swedish and Australian software companies to develop products for the Australian Department of Defence. The agreement contained an arbitration clause referring disputes to arbitration under the expedited arbitration rules of the Stockholm Chamber of Commerce (SCC). It provided that "arbitration shall take place in Stockholm, Sweden". Swedish law was nominated as the governing law of the agreement. The agreement also contained a time-bar clause in the following form:

No action or claim of any type relating to this Agreement may be brought or made by [either party] more than six months after [the relevant party] first knew or should have known of the basis of the action or claim.

A dispute arose and Lightsource initiated proceedings against the Swedish company, Pointsec, in the Supreme Court of the Australian Capital Territory for, inter alia, unconscionable conduct contrary to ss 51AA and 51AC of the *Trade Practices Act 1974* (Cth). Pointsec made application for the proceedings to be permanently stayed in favour of arbitration as contemplated by the parties' agreement. The application was heard by the court in May 2008, but judgment was not handed down until April 2011.<sup>57</sup>

#### **Decision**

Refshauge J accepted that s 7 of the IAA applied after considering the four pre-conditions to its application. However, he held that the stay should not be granted due to s 7(5), which prevents a stay where the arbitration agreement is "null and void, inoperative or incapable of being performed". In particular, his Honour relied on the time-bar clause in the agreement. The learned judge concluded that the Swedish defendant failed to bring proceedings within six months of becoming aware of the dispute under the agreement and that therefore the time-bar clause was engaged. Based on this, his Honour held that the arbitration agreement was essentially "waived" and thus was "inoperative or incapable of being performed".<sup>58</sup> In particular, the learned judge found that on its proper interpretation, the

<sup>54</sup> *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [90]-[91].

<sup>55</sup> *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [126], [132]-[133].

<sup>56</sup> See, for example, *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428-432.

<sup>57</sup> The case was decided without any reference to the 2010 amendments to the IAA, which came into force between the date of hearing and the date of judgment.

<sup>58</sup> *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63 at [168]-[169].

time-bar clause precluded arbitration proceedings, but did not bar the substantive claim (or at least his Honour was not persuaded without full argument that the time-bar clause barred the substantive claim).<sup>59</sup> Therefore, the arbitration agreement was rendered inoperative but the plaintiff was able to continue with its proceeding in the Supreme Court.

His Honour rejected Pointsec's separate argument for a stay under Art 8 of the Model Law,<sup>60</sup> concluding that the parties had opted out of the Model Law. In doing so, his Honour applied *Eisenwerk* (without referring to either *Cargill* or *Wagner*), holding that by agreeing to arbitrate in accordance with the arbitration rules of the SCC, the parties had impliedly opted out of the Model Law under s 21 of the IAA.<sup>61</sup>

Finally, his Honour considered whether the proceeding should be stayed under s 53 of the CAA. He refused a stay under s 53 on the basis that there was "sufficient reason" for the purposes of s 53 why the matter should not be referred to arbitration.<sup>62</sup> One of the matters relied upon in this regard was that the proceedings under the *Trade Practices Act 1974* (Cth) may not be susceptible to determination in Sweden under Swedish law.

Aside from the three-year delay in determining the stay application, there are, with respect, seriously worrying aspects of this decision.<sup>63</sup>

First, the learned judge did not accept that Swedish law governed the procedure of the arbitration for the purposes of s 7(1)(a) of the IAA.<sup>64</sup> He concluded that there was insufficient evidence to establish that the procedure in relation to the arbitration was governed by the laws of Sweden. His Honour said that there was no evidence before him to establish that the arbitration rules of the SCC were part of the law of Sweden.<sup>65</sup> With respect, his Honour failed to properly understand the reference in the arbitration clause to the words "arbitration shall take place in Stockholm, Sweden". This was not merely a reference to the venue – rather it was a reference to the seat of the arbitration, and therefore the law governing the procedure in relation to the arbitration (or the *lex arbitri*).<sup>66</sup> Accordingly, Swedish law governed the procedure in relation to the arbitration and s 7(1)(a) was engaged. It was not necessary to consider whether the SCC arbitral rules formed part of Swedish law. In the event, this error did not matter because the learned judge was satisfied that s 7(1)(d) was engaged, due to Sweden being a New York Convention country.

Secondly, and most significantly, the court, in the author's respectful view, erred in its consideration of the time-bar clause. It was for the arbitrator, not the court, to determine the proper interpretation and operation of the time-bar clause.<sup>67</sup> The court's determination of the factual matters

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<sup>59</sup> *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63 at [170], his Honour noted that he had not heard full argument on the matter and that, in any case, it was for the defendant to invoke the time-bar to prevent the court from hearing the claim.

<sup>60</sup> Article 8 of the Model Law (which has force of law by virtue of s 16 of the IAA) provides a separate source of power to stay a proceeding in favour of arbitration, in addition to s 7 of the IAA.

<sup>61</sup> *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63 at [172]-[179].

<sup>62</sup> *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63 at [193].

<sup>63</sup> The author understands that the decision is under appeal.

<sup>64</sup> Section 7(1)(a) provides that s 7 applies to an arbitration agreement where "the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country".

<sup>65</sup> *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63 at [110]-[111].

<sup>66</sup> The "seat theory" – the principle that the arbitration is governed by the law of the place where it is held – is well established in international arbitration. See, for example, Blackaby N, Partasides C, Redfern A and Hunter M, *Redfern and Hunter on International Commercial Arbitration* (5th ed, Oxford University Press, 2009) at [3.51]-[3.59].

<sup>67</sup> See, for example, the United States Court of Appeals for the Second Circuit in *Bechtel do Brasil Construções Ltda v UEG Araucária Ltda*, 638 F 3d 150 (2011), which held that the question whether a claim subject to arbitration was time-barred was for the arbitrator, not the court, to decide, notwithstanding a New York State law that permitted an arbitral party to assert a limitations defence in court.

necessary to determine the proper application of the time-bar was, with respect, cursory.<sup>68</sup> The time-bar clause was, in the author's view, a provision that could be prayed in aid by the Swedish defendant in answer to the claim brought by the plaintiff who, after all, was the agitator of the relevant claims. Indeed, the defendant could arguably have waived reliance on the time-bar clause. One might ask what sort of pre-emptive claim the Swedish party could have brought by arbitration anyway. To enable the plaintiff, who was agitating the claim, to rely on the time-bar clause to circumvent the arbitration agreement, was a perverse result.

Thirdly, the learned judge's treatment of the discretion to stay under Art 8 of the Model Law was similarly flawed. His Honour followed *Eisenwerk*,<sup>69</sup> which had been disapproved of in *Cargill* and was the subject of adverse comment in the Federal Attorney-General's discussion paper circulated in November 2008.

Fourthly, the learned judge erred in his consideration of the possibility of a stay under s 53 of the CAA. One of the factors that the learned judge considered in the context of the application for a stay under s 53 was that the Australian party's claims under the *Trade Practices Act 1974* may not be susceptible to determination in Sweden under Swedish law.<sup>70</sup> This ignored the fact that the parties had agreed to Swedish law as the law governing their dispute. Therefore, this was not a relevant factor militating against a stay of the court proceedings. Rather, it was for the Australian party to identify equivalent remedies under Swedish law.<sup>71</sup>

Ultimately, the plain agreement between the parties to arbitrate their disputes according to Swedish arbitral law and the rules of procedure of a Swedish arbitral institution, with the merits determined by Swedish substantive law, was defeated.

### **IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248**

This case arose out of a mining operations contract between Altain Khuder, a Mongolian company, and IMC Mining, a company registered in the British Virgin Islands. The contract contained a clause referring future disputes to arbitration in Mongolia. A dispute arose concerning the provision of engineering services under the contract. Altain Khuder commenced an arbitration in Mongolia pursuant to the arbitration agreement.

The arbitral tribunal rendered an award in Altain Khuder's favour against IMC Mining, requiring it to pay Altain Khuder over US\$6 million. The tribunal also ordered that an Australian company, IMC Mining Solutions Pty Ltd (IMC Solutions), pay these damages on behalf of IMC Mining. The two companies were related, but IMC Solutions had not participated in the arbitration. The award did not explain how the arbitral tribunal had jurisdiction to make any order against IMC Solutions.<sup>72</sup>

Altain Khuder sought to enforce the award in Australia against both companies. IMC Mining did not appear in the enforcement proceedings, but IMC Solutions did, objecting to the award's enforcement against it. In a judgment handed down in January 2011, Croft J dismissed IMC Solutions' objections and ordered enforcement of the foreign award.<sup>73</sup> IMC Solutions appealed to the Victorian Court of Appeal.

<sup>68</sup> *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63 at [159]-[160], [167].

<sup>69</sup> *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63 at [177]-[179].

<sup>70</sup> Indeed, s 53 of the CAA arguably had no application in that s 7 of the IAA is arguably inconsistent with s 53 of the CAA, and that therefore by operation of s 109 of the Australian Constitution, s 53 is rendered inoperative. Contrast *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110, where the Full Court of the Supreme Court of Western Australia entertained an application to stay court proceedings under both s 7 of the IAA and s 53 of the CAA, without considering this constitutional point. Similarly, in *AED Oil Ltd v Puffin FPSO Ltd* [2010] VSCA 37, the Victorian Court of Appeal noted that the application for a stay had been made under the CAA as well as the IAA (at [9]), and then proceeded to deal with the stay application under the IAA only.

<sup>71</sup> See *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC 175 at [68]-[73] (Hollingworth J).

<sup>72</sup> Mongolia is a Model Law country. The arbitrators were required to state reasons for their award under s 37.3.2 of the *Arbitration Law 2003* (Mongolia).

<sup>73</sup> *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1.

### **Decision**

The Court of Appeal overturned Croft J's decision and refused to enforce the foreign award on the basis that IMC Solutions was not a party to the arbitration agreement. It held that on the proper interpretation of s 9 of the IAA, the evidential onus was cast on the party seeking to enforce the award to establish that the party against whom the award is sought to be enforced is a party to the arbitration agreement.<sup>74</sup>

Irrespective of the onus question, the Court of Appeal held (reversing the trial judge) that the award debtor had established a ground for refusal of the foreign award under s 8(5)(b) of the IAA, on the basis that IMC Solutions was not privy to the arbitration agreement and that therefore the arbitral tribunal had no jurisdiction over it. The Court of Appeal considered that it was not bound by the arbitral tribunal's conclusions as to its jurisdiction. In this regard, it endorsed the recent views expressed by the English Supreme Court.<sup>75</sup>

The Court of Appeal departed from the approach taken by courts in other leading arbitration jurisdictions to the enforcement of foreign arbitral awards under Arts IV and V of the New York Convention.<sup>76</sup> The conventional position is that the applicant for enforcement need only provide evidence of the arbitral award and the arbitration agreement pursuant to which the award is purportedly made. The onus is then cast on the respondent to prove a defence in Art V of the Convention, such as lack of a valid arbitration agreement.

The leading authority on the New York Convention, Professor Albert Jan van den Berg of Hanotiau & Van den Berg in Brussels, has been quoted as saying that the Victorian Court of Appeal "got it wrong".<sup>77</sup> Another leading authority, Gary Born, stated in his authoritative work:

Article IV should not be interpreted as requiring the award-creditor to demonstrate the existence of a valid arbitration agreement, applicable to the parties' claims. Rather, Article IV is concerned merely with the presentation by the award-creditor of the instrument purporting to be the agreement to arbitrate, with issues of validity and scope of the arbitration agreement being subject to the exceptions permitting non-recognition under Article V.<sup>78</sup>

### **INSTITUTIONAL DEVELOPMENTS**

The past year has also seen major progress to promote institution-administered arbitration in Australia, primarily through ACICA.

#### **ACICA as the sole appointing authority**

Regulations came into force in March 2011 which make ACICA the sole authority competent to perform arbitrator appointment functions under the IAA.<sup>79</sup> Thus, where the procedure contemplated by the parties to appoint an arbitrator or arbitral tribunal fails, a party can apply to ACICA to make the relevant appointment. To carry out this new function, ACICA has adopted new appointment rules which set out the procedure it will follow in appointing an arbitrator.<sup>80</sup> Importantly, the decision is made by a specialist appointment committee, which ensures that the appointment is informed by all the necessary expertise.

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<sup>74</sup> *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 at [134] (Hansen JA and Kyrrou AJA). In a separate judgment, Warren CJ appeared to go even further, stating that the applicant has the full legal onus of proving, on the balance of probabilities, that the respondent was a party to the arbitration agreement (at [62]).

<sup>75</sup> *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 at 812-813 (Mance JSC), 850 (Saville JSC).

<sup>76</sup> Sections 8 and 9 of the IAA reflect (respectively) Arts V and IV of the New York Convention.

<sup>77</sup> Ross A and Epstein M, "Australian Court Forges Own Path on Enforcement", *Global Arbitration Review* (31 August 2011), <http://www.globalarbitrationreview.com/news/article/29792/australian-court-forges-own-path-enforcement> viewed 25 September 2011. See also van den Berg AJ, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation, 1981), which is still considered the most important work on the New York Convention.

<sup>78</sup> Born, n 44, Vol II, p 2705.

<sup>79</sup> *International Arbitration Regulations 2011* (Cth), reg 4.

<sup>80</sup> See ACICA, *Appointment of Arbitrator Rules 2011*, [http://www.acica.org.au/assets/media/ACICA\\_Appointment\\_of\\_Arbitrator\\_Rules\\_2.3.11.pdf](http://www.acica.org.au/assets/media/ACICA_Appointment_of_Arbitrator_Rules_2.3.11.pdf), viewed 18 September 2011.

### **Updated ACICA rules**

In August 2011, ACICA released an updated version of its arbitration rules (ACICA Rules). Notably, the new ACICA Rules incorporate new provisions on emergency arbitrators to grant urgent interim measures – even before an arbitral tribunal has been constituted.<sup>81</sup> An emergency arbitrator is to be appointed within one business day. Any decision to grant an urgent interim measure must be made by the emergency arbitrator within five business days.<sup>82</sup>

ACICA is one of several arbitral institutions to update its arbitration rules in recent times. As well as SIAC, the ICC (the most influential global arbitral institution) released a major revision of its rules in September 2011, its first update since 1998. Like ACICA, the ICC has introduced provisions to allow for emergency arbitrators. The new ICC rules also contain a number of new case management procedures to reduce costs and delays, as well as new provisions to deal with multi-party disputes.

### **Australian international disputes centre**

In August 2010, Australia's first international dispute resolution centre opened in Sydney with custom-built facilities for arbitration hearings and training sessions. The Centre is home to Australia's major providers of alternative dispute resolution, including ACICA, CI Arb, the Australian Maritime and Transport Arbitration Committee (AMTAC) and the Australian Commercial Disputes Centre (ACDC). There is hope for establishment of a similar facility in Melbourne, with support from the Victorian Bar and the Law Institute of Victoria (who have requested seed funding), as well as various MPs. At the time of writing, however, neither the federal nor Victorian governments have made any firm commitment.

### **ACICA Judicial Liaison Committee**

ACICA was also the driving force behind the establishment of a Judicial Liaison Committee in October 2010.<sup>83</sup> The Committee will be chaired by former High Court Chief Justice Murray Gleeson AC QC. By promoting dialogue on international arbitration within the Australian judiciary, it aims to improve uniformity in rules and procedures across the country in matters such as interim measures and the enforcement of awards and agreements. The Committee will be comprised of representatives from the State and Territory Supreme Courts, the Federal Court and ACICA.

### **CONCLUSION**

Substantial progress has been made since 1 July 2010 in modernising the arbitral law in Australia by way of improving institutional arrangements and infrastructure supporting arbitration. The case law, however, remains somewhat inconsistent in terms of judicial support for arbitration. One hopes that next year will build upon the progress achieved thus far.

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<sup>81</sup> See ACICA *Arbitration Rules 2011*, Sch 2.

<sup>82</sup> ACICA's emergency arbitrator provisions closely reflect similar rules introduced by the Singapore International Arbitration Centre (SIAC) last year and earlier by the SCC and the United States-based International Centre for Dispute Resolution.

<sup>83</sup> "Gleeson to Head Arbitration Judicial Committee", *Lawyers Weekly* (20 October 2010), [http://www.lawyersweekly.com.au/blogs/top\\_stories/archive/2010/10/20/gleeson-to-head-arbitration-judicial-committee.aspx](http://www.lawyersweekly.com.au/blogs/top_stories/archive/2010/10/20/gleeson-to-head-arbitration-judicial-committee.aspx) viewed 18 September 2011.