Ius Gentium: Comparative Perspectives on Law and Justice 43

Gabriël A. Moens
Philip Evans *Editors*

Arbitration and Dispute Resolution in the Resources Sector

An Australian Perspective

Springer

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Foreword

The publication of this important work focusing upon arbitration and the resolution of disputes in the resources sector from an Australian perspective is most timely for a number of reasons.

First, Australia has consolidated its position as a significant supplier of natural resources, both minerals and energy, into the international market, particularly in the market for resources in the Asia-Pacific region, in which the fastest developing economies of the world are located. Australian companies are also significant participants in the global resources market and are significant investors in natural resource projects on all continents of the globe (other than Antarctica).

Second, after decades of fragmentation the Australian law governing commercial arbitration, both domestic and international, can now be described as uniform and consistent across the various Australian State and Federal jurisdictions. The schism between the law governing international arbitration and domestic arbitration in Australia is now largely a relic of Australian legal history, as a result of State, Territory, and Commonwealth legislation enacted over the last five years. It is difficult to overstate the significance of those reforms to the resolution of disputes in the resources sector, given that the distinction between domestic and international disputes within that sector often turns upon the corporate vehicle through which the parties to the dispute have chosen to contract. If foreign investors in an Australian resource project choose to contract through wholly owned Australian subsidiaries, with the consequence that their disputes are characterised as domestic rather than international, no longer will this make a significant difference to the legal regime governing the resolution of that dispute. All disputes, whether domestic or international, to the extent that they are governed by Australian law at all, will be governed by a legal regime which adopts the UNCITRAL Model Law, in common with many other significant trading jurisdictions in the Asia-Pacific region including New Zealand, Singapore, Malaysia, Thailand, Vietnam, the Philippines, Japan, South Korea, India, Sri Lanka and (effectively) Hong Kong.

The alignment of Australia's laws with the dominant international legal regime for the resolution of disputes in the Asia-Pacific region, and the significance of Australia's participation in the international resources market is not merely

serendipitous. The familiarity, predictability, consistency and neutrality of legal regimes governing the resolution of commercial disputes are as important to foreign companies investing in Australian resource projects or trading with Australian resource suppliers as they are to Australian companies investing in resource projects elsewhere. The combination of these factors suggests that the minor role previously played by Australia in the resolution of international commercial disputes may be about to change, particularly in the natural resources sector.

This book stems from a successful conference organised by the Australian Centre for International Commercial Arbitration (ACICA) on the subject of arbitration and the resources sector which was held in Perth in May 2013. Perth was an obvious choice as a venue for the conference, given the volume of minerals and energy produced and exported from Western Australia and the consequent location of many producers and their legal advisers in Perth, coupled with Perth's proximity to the significant Asian markets. Since that conference, the focus of attention has been expanded to include mediation and adjudication, and contributions on those topics have been included in this book even though they were not addressed at the conference, and the range of contributors expanded accordingly.

The quality of the contributions contained within this book is evident from the qualifications and experience of the contributors, all of whom are significant participants in discourse and commentary in the fields of commercial arbitration and dispute resolution within Australia, and many of whom are well recognised internationally in those fields.

The topics addressed in the 12 substantive chapters are succinctly reviewed in the first chapter. Rather than repeat that exercise, it is sufficient for me to note the breadth of the topics essayed. They include the role of mediation in the resolution of disputes in the natural resources sector which will, no doubt, become increasingly significant in the years to come—a significance which has been recognised in other jurisdictions, notably by the recent creation of the Singapore International Mediation Centre. Another topic addressed in this book which is of particular significance not only to foreign companies investing in Australia, but also to Australian companies investing elsewhere, concerns the rights conferred upon investors by bilateral investment treaties, including the capacity to enforce those rights against a State party by way of arbitration pursuant to the terms of the relevant treaty. Those rights have given rise to significant contention in both political and legal circles in Australia in recent years. The topics addressed in this book are of interest not only to those engaged in the resolution of disputes, but also to those interested in the formulation of contractual provisions which will not only reduce the risk of dispute, but enhance the timely and efficient resolution of disputes should they arise.

Another topic addressed in this important work, and which is of particular interest to me, concerns the appropriate role of the courts in facilitating the achievement of the objective evident in the parties' agreement to endeavour to resolve their disputes through some means other than litigation. The various Australian cases reviewed in different portions of the book (and in which I have played some small part) justify the view that contemporary Australian courts, both

State and Federal, have willingly followed the lead of the Australian legislatures and have embraced an international perspective on the governance of commercial arbitration and dispute resolution generally. Consistently with the approach taken by courts in other comparable legal regimes, it is now clear that Australian courts will actively promote and support the attainment of the objectives embodied by the parties in their agreement. With well-drafted contracts, Australian courts are limiting the exercise of their jurisdiction to providing assistance in the gathering and presentation of evidence and to the enforcement of awards; they are not otherwise intervening unless the process has departed from public policies at a most fundamental level and is inconsistent with internationally accepted principles of fairness and justice, including the denial of natural justice.

The authors and editors of this important work are to be congratulated upon their significant contribution to this rapidly developing field. I am pleased to recommend this book to anyone with an interest in the resolution of disputes in the natural resources sector.

Wayne Martin
Chief Justice's Chambers
Supreme Court of Western Australia

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Editors and Contributors

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Prof. Gabriël A. Moens JD, LLM, Ph.D., GCEd, MBA, FCIArb, FAIM, is professor of law and director of research, Curtin Law School, and emeritus professor of law at the University of Queensland. Prior to his current position, he served as provice chancellor (Law, Business and Information Technology) and as a long-serving dean and professor of law at Murdoch University. He also served as professor of law and head, Graduate School of Law, University of Notre Dame Australia and as Garrick professor of law and director, The Australian Institute of Foreign and Comparative Law, The University of Queensland. He is editor-in-chief of *International Trade and Business Law Review*. In 2003, the Prime Minister of Australia awarded him the Australian Centenary Medal for services to education. He is a fellow (FCIArb) and chartered arbitrator (CArb) of the Chartered Institute of Arbitrators, London, and fellow and deputy secretary general of the Australian Centre for International Commercial Arbitration (ACICA). He is the editor-in-chief of the *ACICA Review*. He co-authored a commentary to the ACICA Arbitration Rules. Professor Moens is also a *Membre Titulaire*, International Academy of Comparative Law, Paris, and a fellow of the Australian Institute of Management (AIM WA). He has taught extensively in the UK, Germany, Belgium, Italy, Austria, Australia, Indonesia, Thailand, Singapore, Hong Kong, Japan and the USA. He is co-author of *The Constitution of the Commonwealth of Australia Annotated* (8th ed., 2012), *Jurisprudence of Liberty* (2nd ed., 2011), *Commercial Law of the European Union* (2010) and *International Trade and Business: Law, Policy and Ethics* (2nd ed., 2006).

Prof. Philip Evans is professor of law at Curtin Law School, Curtin University. He is also the principal of PJ Evans and Associates; Lawyers, Arbitrators, Mediators and Adjudicators. He is a graded arbitrator, accredited mediator and registered adjudicator under the *Construction Contracts Act 2004* (WA). He holds a current legal practice certificate. In addition to his university teaching and research roles, Professor Evans conducts regular continuing professional development

programs and in-house training in the areas of contract law, trade practices law, administrative law, statute law, dispute resolution, construction law, and arbitration. In 2013, he was appointed by the Western Australian government as a sessional arbitrator to resolve workers compensation disputes. Prior to commencing his legal studies, Professor Evans practiced as a civil and structural engineer for 20 years. Before leaving to practice law full time with a national law firm in 1998, Dr. Evans was the head of the Department of Construction Management at Curtin University. In 2001, he joined the College of Law at the University of Notre Dame Australia, where he was professor and associate dean of the School of Law, director of Graduate Law Programs, and the course coordinator of the Graduate Certificate in Building and Construction Law. In 2009, he joined Murdoch University and was subsequently appointed professor of law, deputy dean and dean of law before leaving to take up the professorial appointment at Curtin University in July 2013. He has lectured extensively in contract law, torts law, trade practices law, intellectual property law, evidence, project management, construction contracts, construction claims and dispute resolution in the construction industry. His contribution to construction law education and dispute resolution has been acknowledged through the awarding of fellowships by the Institution of Engineers (Australia), the Australian Institute of Building, the Australian Institute of Management and the Australian Centre for International Commercial Arbitration.

Contributors

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Jeremy Coggins is a senior lecturer in construction law and contract administration at the School of Natural and Built Environments, University of South Australia. In 2012, Jeremy completed a Ph.D. in law at the University of Adelaide on the topic of harmonisation of construction industry payment and adjudication legislation in Australia, and he has published several journal articles on the topic of the legislation. Jeremy is a member of the Australian Legislative Reform Subcommittee of the Society of Construction Law Australia, which recently published a report on security of payment and adjudication in the Australian construction industry. He is also a member of the Royal Institution of Chartered Surveyors and an associate of the Australian Institute of Quantity Surveyors.

Prof. Richard Garnett is professor of Private International Law at the University of Melbourne and a consultant to Herbert Smith Freehills. Professor Garnett holds degrees in arts and law from the University of New South Wales and an LLM from Harvard University where he was a Fulbright scholar. He regularly advises on cross-border litigation and arbitration matters and has appeared as advocate before a

number of tribunals, including the High Court of Australia. Professor Garnett has written extensively in the fields of private international law and international commercial arbitration, with his work cited by leading tribunals around the world, including the European Court of Human Rights, United States federal district courts, the Singapore Court of Appeal and Australian superior courts. In 2012, Professor Garnett published the book *Substance and Procedure in Private International Law* in the prestigious Oxford Private International Law Series, which is the first major work on the subject in English. From 2004 to 2005, Professor Garnett served as expert member of the Australian government delegation to the Hague Conference on Private International Law to negotiate the Hague Convention on Choice of Court Agreements. Professor Garnett has also been an adviser to the American Law Institute in its project on transnational intellectual property adjudication, co-rapporteur on the International Law Association project on transnational group actions and a director of the Australian Centre for International Commercial Arbitration.

Michael Hales is a dispute resolution partner at Minter Ellison, based in their Perth office. Before moving to Western Australia, he was a partner in a major commercial law firm in London for 16 years. He has significant experience of international disputes and has conducted arbitrations under most of the leading arbitral institutions and rules. He is admitted in Australia, England and Wales and the British Virgin Islands and is a past co-chair of the IBA's Litigation Committee.

Michael Hollingdale is an accredited mediator and a partner of Allens in the energy resources & infrastructure practice. His specialty area of practice is construction and engineering law in the energy and resources sectors and government transport sector. Resources sector matters that Michael has advised on include power stations, gas pipelines, refineries, underground and surface mine developments, along with development of port and rail-related mining infrastructure. He has practised as a mediator for over 20 years. He also advises on commercial claims management and dispute resolution strategies. Michael is chair of the Law Council of Australia's Construction and Infrastructure Committee. Michael was a member of the Law Council of Australia's ADR Committee for over 10 years and assisted in drafting various mediation guidelines. He is a graduate member of the Australian Institute of Company Directors (GAICD).

Prof. Doug Jones AO graduated from the University of Queensland with a combined Bachelor of Arts and Laws degree in 1974, followed by a Master of Laws in 1977. Doug has held appointments to professional bodies including past president of the Australian Centre for International Commercial Arbitration ('ACICA') (2008–2014) and fellow, chartered arbitrator and past president of the Chartered Institute of Arbitrators, London ('CIArb') (2011). He holds professorial appointments at the Queen Mary University of London and University of Melbourne. He practices as an international arbitrator based in London, Sydney and Toronto. Doug is acknowledged as a leading arbitrator and is highly ranked in a number of leading publications such as Chambers Asia-Pacific where he has been recognised as a star

individual in the Australian legal community for three successive years. In 2013, Doug was recognised as one of the most in-demand arbitrators and received a band one ranking in the international arbitration category. He was also ranked band one in the projects category and band two for dispute resolution/arbitration in Australia. At the Global Arbitration Review Awards 2013, Doug was joint runner-up in the category of the Best Prepared and Most Responsive Arbitrator of the Year Award. Most recently, he was awarded the Michael Kirby Lifetime Achievement Award at the 2014 Lawyers Weekly Law Awards in Sydney in recognition of his leadership and substantial contributions to the Australian legal profession. Doug is an officer of the Order of Australia, having received the award in June 2012 in the Queen's Birthday Honours List for distinguished service to the law as a leader in the areas of arbitration and alternative dispute resolution, to policy reform, and to national and international professional organisations.

Dr. Sam Luttrell is counsel in the International Arbitration Group of Clifford Chance, based in Perth, Western Australia. His practice covers both international commercial arbitration and investor-state arbitration, with a focus on high-value energy and resources disputes in the Asia-Pacific. In addition to his work as counsel, Sam is a member of the International Chamber of Commerce arbitrator nominations committee for Australia and a regular contributor to international arbitration journals. He published his first book (on bias challenges to arbitrators) in 2009 and is currently working on a new book on interim measures. Prior to joining Clifford Chance, Sam was with Freshfields in Paris.

Peter Megens LLB (First Class Hons), BComm Grad Dip Financial Law, University of Melbourne, is a partner in the Singapore office of King & Spalding where he specialises in litigation, arbitration and mediation, and in particular international arbitration. He was previously the immediate past vice-president of the Chartered Institute of Arbitrators in Australia. He is also a former adjunct professor in law at Murdoch University, a former national councillor and chapter chairman of the Institute of Arbitrators and Mediators Australia, former vice-president of the Australian Centre for International Commercial Arbitration, a chartered arbitrator and graded arbitrator and accredited mediator. Peter is a fellow of IAMA, ACICA, the Singapore Institute of Arbitrators, the Chartered Institute of Arbitrators, the Society of Construction Law and is active in ICC, LCIA and various other bodies. He is a former chair of the Construction and Infrastructure Law Committee of the BLS of the Law Council of Australia, a former member of the Victorian Supreme Court Technology Engineering and Construction Users Group. Peter is on the KLRCA and SIAC Panels of Arbitrators and the HKIAC List of Arbitrators. Peter has practised and published in arbitration, construction and resources matters in Australia and South-East Asia for over 30 years of which 25 years were as a partner with Australian firms practising in these areas. He is admitted to the Supreme Court of all Australian states and territories and to the Federal and High Courts of Australia.

Prof. Luke Nottage specialises in contract law, consumer product safety law and arbitration, with a particular interest in the Asia-Pacific. He is associate dean (International) and professor of comparative and transnational business law at Sydney Law School. Luke's many books include *International Arbitration in Australia* (Federation Press 2010) and *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge 2011). He is an ACICA special associate and founding member of the Rules Committee, and Japan Representative on the Australasian Forum for International Arbitration Council. Luke has consulted for law firms worldwide, the EU, OECD, UNDP and the Japanese government.

Andrea Stauber was admitted in South Australia and began her career in a boutique construction law firm. She then joined the building & construction dispute resolution team of King & Wood Mallesons (formerly Mallesons Stephen Jacques) in Melbourne in 2012, where she represented international clients in a number of domestic arbitrations. In 2013, Andrea moved to the Singapore office of King & Spalding to pursue her interest in international arbitration and help build the firm's construction and energy disputes practice in Asia. Andrea has advised and represented clients on a variety of large and complex matters, including infrastructure and power station projects as well as offshore oil & gas projects. She has a keen interest in providing practical and commercial advice, both during the life of a project with a view to avoiding disputes, as well as during the arbitration to achieve the best possible result for her clients.

Greg Steinepreis has been a partner of the firm now known as Squire Patton Boggs (AU) since 1983. He is a construction and services contracts lawyer who heads the Construction, Engineering and Infrastructure team in the firm's Perth office. His clients include principals, financiers, public sector authorities, contractors and consultants. Greg has been involved in many major resources, engineering and infrastructure projects in Western Australia. In his construction practice, he has negotiated, drafted, amended and reviewed the full range of construction and engineering contracts. Greg's specific project experience includes Australia's major liquefied natural gas (LNG) and iron ore mining projects. He has advised government authorities as well as leading contractors and consultants on the delivery of public infrastructure, including major roads and rail and on urban redevelopment. He also has assisted governmental entities and power producers regarding electricity supply contracts and electricity industry regulation. Greg's involvement in the construction and engineering industry is supported by more than 25 years of experience in dispute resolution. Not only does he advise parties in litigation, arbitration (international and domestic), adjudication and mediation, he also is a fellow of ACICA, a Grade 1 arbitrator with IAMA and an accredited mediator. Greg is active in several major legal and industry bodies including the Construction and Infrastructure Forum of the Chamber of Commerce & Industry Western Australia.

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Chapter 1
An Australian Perspective on Arbitration and Dispute Resolution in the Resources Sector

Gabriël A. Moens and Philip Evans

Abstract The resources sector, in general, but in particular in Australia, contributes substantially to the national economy. This introductory chapter discusses the origins of this collection of essays and provides readers with the context in which dispute resolution in the resources sector takes place. It also provides an overview of the themes discussed in each chapter of this book. These chapters deal with arbitration, mediation and adjudication in the resources sector.

1.1 The Origins of This Collection of Essays

The Australian Centre for International Commercial Arbitration (ACICA) held a successful conference on arbitration and the resources sector on 16 May 2013. The conference brought together law firm partners, arbitrators, academics, business people, and representatives of the resources industry. The conference concluded with a spirited address by the Hon. Michael Mischin, Attorney-General of Western Australia. In his address, the Attorney-General announced that the *Commercial Arbitration Act 2012* (WA) would soon come into effect; this much anticipated event happened on 7 August 2013. The new Act is expected to facilitate the resolution of disputes in the resources sector, which is of utmost importance to the Western Australian economy and the resources sector. ACICA expressed the hope that the contributions made during the conference might be published to raise awareness of the importance of arbitration to resolve disputes in the resources sector. In order to provide a comprehensive Australian perspective on the resolution of resources disputes, the editors decided to extend the discussion to mediation and

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adjudication. To that end, they invited a number of contributors who, although they did not participate in the conference, were able to provide an Australian perspective on the resolution of disputes in the resources sector.

1.2 Overview of the Themes Discussed in This Book

One of the invited contributors, Professor Richard Garnett of the University of Melbourne, prepared a concise, but comprehensive, overview of the legal regime for arbitration in Australia. This regime, discussed in Chap. 2, has undergone dramatic changes in the past five years. International arbitration matters are now governed exclusively by the *International Arbitration Act* 1974 (Cth) (at least for arbitration agreements entered into on or after 6 July 2010) and domestic arbitration is regulated by new uniform State and Territory legislation (except in the ACT). His chapter examines key aspects of the Commonwealth legislation, including the enforcement of arbitration agreements and arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the scope and application of the UNCITRAL Model Law on International Commercial Arbitration in Australia (including the status of pre-6 July 2010 agreements) (Model Law) and the amendments introduced in 2010. He concludes his chapter with a discussion of the new principles applying to domestic arbitration.

Professor Doug Jones argues in Chap. 3 that, in the resources sector, arbitration has retained its position as a permanent feature of dispute resolution. Disputes in the resources sector involve various types of agreements, technical subject matters, and are often trans-national in nature: these are features that make arbitration an attractive dispute resolution method. To set the context for addressing the benefits that arbitration provides to the resources sector, his chapter focuses on these features and outlines the arbitration framework in Australia. His chapter also focuses on the features of the arbitration process itself that make it well suited to the resolution of disputes in the resources sector.

Chapter 4 discusses a range of issues that should be taken into account when drafting arbitration clauses for projects in the resources sector. These include the importance of understanding whether the arbitration comes within the scope of the international or domestic arbitration legislation and some key issues which parties and arbitrators should consider when selecting the applicable arbitration rules. Michael Hales also considers the questions of proportionate liability and consolidation, both of which are relevant to resources projects.

In Chap. 5, Professor Philip Evans discusses the enforcement of arbitral awards in the resources sector through a discussion of three recent cases decided in Western Australia and Queensland. These decisions uphold the principle that parties will be required to conform to the dispute resolution clauses in agreements and courts will not be reluctant to imply terms into the dispute resolution clause where there are claims of unenforceability due to uncertainty. Additionally, these decisions hold

that claims of futility arising from difficulties or failures with respect to compliance with either the mandatory negotiation or meditation procedures required as a condition precedent to arbitration will generally be unsuccessful. At the same time, tiered alternative dispute resolution clauses need to be drafted carefully in order to prevent lengthy and costly delays to the resolution of the dispute on the basis of the clause being deemed pathogenic and thus, unenforceable.

Peter Megens and Andrea Stauber argue in Chap. 6 that arbitration is an essential tool for enforcing resources and commodities contracts. Without it, Australia's international trade in resources would be vastly more complex and less efficient. They point out that, with the revised domestic Commercial Arbitration Acts, and the updated International Arbitration Act, Australia now has a newly enhanced arbitration legislative regime which accords with international best practice. They fathom that, whether it will actually deliver significant benefits to the resources industry largely depends on how it is interpreted by the courts. In their view, the early signs are promising, even if there is much work to be done. In their chapter, they also briefly survey some recent judicial trends in a number of South East Asian countries.

In addition to arbitration, mediation plays an important role in the resolution of resources disputes. Although arbitration is the preferred method to resolve disputes, a number of disputes are mediated following an unsuccessful negotiation or once arbitration has commenced. This issue is discussed in Chap. 7 by Michael Hollingdale. He usefully discusses the European Union's recognition of the value of mediation of cross border disputes through the adoption of its Mediation Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008. Other institutions and influential intermediaries, such as international arbitration centres and the ICC, have rules that facilitate and govern commercial mediation. He asks the question as to why disputants in the resources sector are not more predisposed to mediation as a first step in the dispute resolution process before resorting to arbitral or litigation proceedings. In his chapter, he advocates the case for the greater use of mediation by trans-national parties in the resources sector. He outlines some of the positive factors that ought to encourage parties to turn to mediation as their preferred dispute resolution process in this sector or indeed have it as the default dispute resolution process. He considers some potential negative factors that might dissuade parties from adopting a 'mediate first' approach. He also reviews different mediation processes and styles to demonstrate how mediation could be used to enhance its flexibility and suitability to the resources sector.

Over the course of the past seventeen years, construction industry payment and adjudication legislation, in one form or another, has been enacted in the United Kingdom (UK) and throughout Australia, as well as in several other international jurisdictions. This legislation has had a significant impact upon payment culture and dispute resolution within the construction industry. Whilst the UK, Australian and New Zealand Acts provide 'mining exclusions', the courts have generally narrowly interpreted these provisions. Jeremy Coggins argues in Chap. 8 that therefore, many types of construction works carried out at mining sites will still be covered by the legislation and subject to statutory adjudication. This chapter provides the reader

with a background to statutory adjudication, discusses the statutory adjudication process, and considers the key legislative differences between the jurisdictions which have adopted statutory adjudication. Finally, he also analyses the legislative provisions concerning the mining exclusions, and reviews the relevant judicial decisions concerning statutory adjudication in the resources sector.

In Chap. 9, Professor Luke Nottage and Associate Professor Simon Butt from the University of Sydney, identify two significant developments relating to international arbitration in the resources sector for businesspeople, legal advisors and policy-makers, particularly from an Australian perspective. In Part 2 of their chapter, they urge further reform of the *International Arbitration Act* 1974 (Cth) to address a 'legislative black hole' arising for certain international commercial arbitration agreements concluded prior to 6 July 2010 with the seat in Australia. In Part 3, the contributors deal with treaty-based investor-state arbitration (ISA), especially as it impacts on outbound investors from Australia. It reiterates opposition to the 'Gillard Government Trade Policy Statement' (April 2011–September 2013), which changed over two decades of treaty practice by insisting that Australia would no longer countenance any form of investor-state arbitration in future treaties, even with developing countries. They highlight problems that arise from such a stance, also proposed in a 2014 Bill in the Australian Senate, by discussing two recent Indonesian law issues affecting two existing treaties with Australia.

Professor Gabriël Moens and Dr John Trone argue in Chap. 10 that international commercial arbitrations often give rise to related proceedings in domestic courts. Their chapter examines some recent examples of domestic court cases relating to international commercial arbitrations in the resources sector. These cases have raised issues concerning the interpretation of the Model Law, arbitration under bilateral investment treaties, stay of proceedings, discovery under United States federal law and the enforcement of awards under the New York Convention. These cases were decided by courts in Australia, Canada, the United States, the United Kingdom and Singapore.

In his insightful Chap. 11, Dr. Samuel Luttrell explains how the investment treaty system works, where it came from, and what energy and resources companies need to do to obtain the benefits it provides. He argues that energy and resources companies are adventurous investors who explore and invest in countries that many other businesses might consider unattractive due to the risk of nationalisation, expropriation and other forms of governmental interference. In the past, when faced with such adverse measures, energy and resources companies usually had limited options: they could either sue in the courts of their host state (and run the risk of "home town justice") or ask their home state to intervene on their behalf. In the contributor's opinion, both remedies were defective for different reasons. Dr. Luttrell describes how, in response, over the last fifty years, a system of international investment law and arbitration has developed that gives aggrieved foreign investors the right to bring claims against their host state in their own name, in a neutral international forum that the host state does not control. But to have these rights of recourse, the investor and its assets must first be covered by an investment treaty.

Chapter 12 addresses the importance of engaging with the Organization for the Harmonization of African Business Law (OHADA) group of nations with a view to invest in mining projects. Professor Bruno Zeller argues that the question of risk and protection of the investment are important issues and, hence, knowledge of the legal landscape is important. OHADA, formally created in 1993, introduced nine uniform acts which override domestic legislation. Three documents govern any arbitration in the OHADA group of nations: first the OHADA Treaty, secondly the Uniform Act on Arbitration adopted in 1999 which deals with ad hoc arbitrations (UAA), and thirdly, the Arbitration Rules of the Common Court of Justice and Arbitration (CCJA) (Arbitration Rules) which are institutional rules. Furthermore, in some States but not all, the New York Convention is also applicable. He concludes that OHADA offers a moderately predictable legal system and that an institutional arbitration under the CCJA offers the least problems and ought to be the preferred option when writing a contract with an OHADA business partner.

In the final Chap. 13, Greg Steinepreis and Eu-Min Teng explore the benefits of international arbitration from the viewpoint of the client who is involved in the resources, energy and construction sectors. They argue that any dispute resolution process can be considered both objectively and based on perception. This issue is examined by taking into account a number of recent international arbitration surveys and reflecting on recent procedural initiatives aimed at improving the efficiency and effectiveness of the arbitration process. They make some suggestions regarding how international arbitration might better satisfy the client's expectations.

1.3 Conclusion

In concentrating on arbitration and other methods of dispute resolution, including mediation and adjudication, the contributors to the book hope to excite readers about the different dispute resolution methods used to resolve resources disputes. In particular, in offering a detailed Australian perspective, the book elucidates the different approaches that could be taken in the resources sector to resolve disputes expeditiously.

Acknowledgments Professor Moens and Professor Evans acknowledge the assistance of the contributors in the writing of this introductory chapter. The summaries of the chapters are based on Abstracts provided by the contributors to the editors of this volume.

Chapter 2
Australia's International and Domestic Arbitration Framework

Richard Garnett

Abstract The legal regime for arbitration in Australia has undergone dramatic changes in the past five years. International arbitration matters are now governed exclusively by the *International Arbitration Act* 1974 (Cth) (at least for arbitration agreements entered into on or after 6 July 2010) and domestic arbitration is regulated by new uniform State and Territory legislation (except in the ACT). This paper examines key aspects of the Commonwealth legislation including the enforcement of arbitral agreements and awards under the New York Convention, the scope and application of the UNCITRAL Model Law in Australia (including the status of pre-6 July 2010 agreements) and the amendments introduced in 2010. The paper concludes with a discussion of the new principles applying to domestic arbitration.

2.1 Introduction

The object of this paper is to examine the legal framework in Australia with respect to commercial arbitration, both international and domestic. International arbitration in Australia is now regulated exclusively by the Commonwealth *International Arbitration Act* 1974 ('the IAA') at least for arbitration agreements entered into on or after 6 July 2010. The new state arbitration legislation, for example in Western Australia the *Commercial Arbitration Act* 2012 ('the CAA'), now only applies to *domestic* arbitration agreements and is in force in all States and Territories except the ACT. This legislation applies retrospectively to agreements entered into before the CAA's coming into operation. The last three years have therefore been a time of great change and reform to the arbitration landscape in Australia.

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2.2 The New York Convention

In considering the Commonwealth legislation, some legislative history is important. The IAA was first enacted in 1974 to give effect to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the Convention'). The Convention had 149 state parties as of 10 January 2014 and has effectively become a universal global law. The Convention is attached to Schedule 1 of the IAA and enacted in two important provisions: section 7 which provides for the mandatory staying of judicial proceedings brought in breach of an arbitration clause or agreement (implementing article II of the Convention) and section 8, which provides for the enforcement of foreign arbitral awards in Australia (implementing article V).

2.2.1 Arbitration Agreements

Broadly speaking, section 7 imposes an obligation on an Australian court to stay local court proceedings brought in breach of an arbitration agreement[1] where the place of arbitration is a member state of the New York Convention or a party to the arbitration agreement is incorporated or has its principal place of business in such a country.[2] The term 'arbitration agreement' is broadly defined under the Convention to include both an arbitral clause in a written contract and an arbitration agreement signed by both parties or contained in an exchange of letters or telegrams.[3] This last phrase has been amended or interpreted in most countries to embrace more contemporary forms of electronic communication such as email and text message.[4]

Section 7 creates a mandatory stay procedure: generally speaking, a party cannot rely on mere arguments of convenience to avoid its obligation to arbitrate, which is in contrast to a foreign jurisdiction or choice of court clause where a court has a discretionary power not to enforce the clause.[5] Hence, the aim of this provision is to reinforce the arbitral process by limiting the scope for parties to escape their contractual obligations to arbitrate.

In practice, a party has only three real arguments to prevent enforcement of an arbitration clause which falls within the scope of the New York Convention. First, it may argue that the subject matter of the dispute is not 'capable of settlement by arbitration'[6] because the public interest requires it to be heard in a court. Originally

[1]IAA s 7(2).

[2]IAA s 7(1).

[3]IAA s 3(1), Convention art II(1).

[4]IAA s 3(4).

[5]See, e.g. *Global Partners Fund Limited v Babcock & Brown Limited* (*in liq*) *and Ors* [2010] NSWCA 196.

[6]IAA s 7(2).

this category of exclusion was quite broad but recently consumer protection,[7] competition[8] and most intellectual property disputes[9] have all been considered 'arbitrable' subject matter. The result is that there are now few disputes between private commercial entities which cannot be arbitrated on public policy grounds, at least where the interests of third parties, not bound by the arbitration clause, are not affected.[10]

The second argument a party may make to resist referral to arbitration is that the arbitration clause does not encompass the parties' claims as a matter of contractual construction. For example, assume a party brings actions in court for breach of section 18 of the *Australian Consumer Law* 2010 (Cth) ('ACL') [formerly section 52 of the *Trade Practices Act* 1974 (Cth)] and breach of contract. If the wording of the arbitration clause is narrowly construed, then perhaps only the breach of contract claim will be referred to arbitration with the result that the parties may have to contest claims arising from the one dispute in two different forums, a national court and the arbitration tribunal, which is expensive and inconvenient. This issue burdened the Australian courts on a number of occasions over the years[11] with divergent attitudes taken as to the proper scope of an arbitration clause.

Fortunately, in 2006 the Full Court of the Federal Court of Australia, in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,[12] decided that courts must strive to give a broad and flexible interpretation to arbitration agreements with the aim of referring as many of the parties' claims to arbitration as possible. This approach is justified by both party autonomy and the needs of international commerce which require certainty and efficiency in dispute resolution. So, where parties use generous wording in their arbitration clause (for example, submitting 'any dispute arising out of' or 'in connection with' this agreement to arbitration), then

[7] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; *Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177; *Casaceli v Natuzzi SpA* (2012) 292 ALR 143 (also franchising claims).

[8] *Mitsubishi Motors Corp v Soler-Chrysler-Plymouth Inc*, 473 US 614 (1985); *Casaceli v Natuzzi SpA* (2012) 292 ALR 143 (exclusive dealing), but compare *Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177 [56].

[9] An exception would be where an issue as to the validity or grant of a registered right such as a patent or trademark is involved: N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* (OUP 5th ed 2009) 125. In *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772 a dispute concerning the rights and obligations of parties to a contractual licence of a patent was held to be arbitrable.

[10] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 [192] (an application to wind up a company is likely not to be arbitrable because of its impact on third party creditors); *Parharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110. In *AED Oil Ltd v Puffin FPSO Ltd (No. 2)* [2009] VSC 534 the status of taxation claims was left open.

[11] For an earlier study of this problem, see R. Garnett, 'The Current Status of International Arbitration Agreements in Australia' (1999) 15 *Journal of Contract Law* 29.

[12] (2006) 157 FCR 45.

the parties' entire dispute will be much more likely to be referred to the parties' stipulated method of dispute resolution.[13]

Yet, Australian courts have not gone so far as to adopt the English approach whereby an arbitration clause is to be construed, irrespective of the language used, in accordance with a presumption that all disputes will be decided by the arbitral tribunal.[14] So, where the parties use restrictive words of reference in their arbitration clause, a stay of the parties' entire dispute will not be granted.[15] A possible exception to this result would be where the parties included foreign choice of law and arbitration clauses in their contract and a party, on an application to stay Australian court proceedings, relied on such foreign law principles to determine the scope of the arbitration clause. Such principles would apply as the law governing the arbitration agreement and may yield a different outcome to the above position under Australian law.[16]

In the *Comandate* case, the court also made the very important finding that where parties agree on foreign choice of law and arbitration clauses they should be held to the consequences of their bargain even if this means that they may be denied rights under Australian statutory law such as the *Australian Consumer Law* because, for example, the foreign arbitrator may refuse to apply the statute.[17] If a party wants access to the ACL they should include a provision in their contract expressly preserving such rights. This reasoning is to be welcomed: it plainly does nothing for the reputation of Australia as a centre of international arbitration if parties are allowed to circumvent arbitration agreements by post-contract appeals to novel Australian statutory rights.

The third argument that may be made to avoid arbitration is that the arbitration clause is invalid because it infringes an overriding mandatory statute of the forum prohibiting arbitration of certain disputes, such as section 11(2) of the *Carriage of Goods by Sea Act* 1991 (Cth) (COGSA) or section 43 of the *Insurance Contracts Act* 1984 (Cth). Clearly in such a case no stay can be granted because there is no arbitration agreement left to enforce. Note in this regard that section 7(5) of the IAA provides that a court is not required to stay its proceedings where the arbitration clause is 'null and void, inoperative or incapable of being performed'. Yet, even in the context of section 11(2) of the COGSA, which invalidates a foreign arbitration clause contained in a 'sea carriage document', courts in recent decisions have held that the prohibition does not apply to an arbitration provision in a voyage charter

[13]Note the following recent cases where a stay of court proceedings in favour of arbitration was ordered: *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894; *Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177; *Casaceli v Natuzzi SpA* (2012) 292 ALR 143; *Cape Lambert Resources Pty Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WSACA 66.

[14]*Fiona Trust Holding Corp v Privalov* [2007] 4 All ER 951 (UKHL).

[15]*Rinehart v Welker* [2012] NSWCA 95.

[16]Two examples of cases where foreign law was relied upon were *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 and *Casaceli v Natuzzi SpA* (2012) 292 ALR 143.

[17]*Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [241].

party,[18] as opposed to a clause in a bill of lading. The pro-arbitration trend is unmistakeable.

Also on the issue of validity, it should be noted that Australian courts have accepted that the arbitration clause is 'separable' from the principal contract in which such clause is contained.[19] The consequence of this view is that the arbitral tribunal has the capacity to adjudicate a question as to the validity of such contract and so a party cannot avoid a stay of court proceedings simply on the basis that the principal contract was null and void. The arbitration clause *itself* must be shown to be invalid.

In relation to the 'inoperative' defence in section 7(5) of the IAA, parties have sought on occasion to argue that an arbitration clause cannot be enforced because it has been waived by one of the parties. Australian courts have, however, very sensibly required strong and unequivocal evidence of an intention by a party to abandon arbitration (usually in the form of gross delay or other conduct indicating a willingness to litigate) before accepting such an argument.[20]

2.2.2 Awards

Under section 8 of the IAA, a foreign arbitral award is enforceable in Australia if it was made in a New York Convention Country or any other country if the party seeking enforcement is incorporated in or has its principal place of business in a Convention country (including Australia).[21] Section 8(2) of the IAA provides that a foreign award may be enforced in a court of a State or Territory as if it were a judgment of that court. Alternatively, the plaintiff can apply to enforce the award under the *Foreign Judgments Act* 1991 (Cth). This last option may be useful where the defendant is resident outside Australia and the rules for service out of the jurisdiction will need to be employed to secure jurisdiction over the defendant.[22]

Note that section 8 of the IAA also restricts the range of available defences to enforcement to ensure that awards circulate freely throughout the world with minimal obstruction by national courts or laws. Generally it will only be where the tribunal exceeded its jurisdiction, the arbitration agreement was invalid, there was a serious irregularity in the arbitral process (for example, a party lacked notice of the

[18] *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2013] FCAFC 107; *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (2011) 112 SASR 297.

[19] *Ferris v Plaister* (1994) 34 NSWLR 474; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [229].

[20] *Zhang v Shanghai Wool and Jute Textile Co Ltd* (2006) 201 FLR 178; *Australian Granites Ltd v Eisenwerk* [2001] 1 Qd R 461; *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 [69].

[21] IAA ss 3(3), 8(1), (4).

[22] *ML Ubase Holdings Co Ltd v Trigem Computer Inc* [2005] NSWSC 224.

arbitration proceedings, was unable to present its case[23] or the tribunal departed from the agreed procedural rules) or a breach of public policy that enforcement will be denied.[24] Significantly, there is no defence to the effect that the tribunal made an error of law or fact in the award; the enforcing court must not retry the merits or act as an appellate court.[25] Also, the defences in the Convention cannot be supplemented by further defences under a country's domestic law that would be available to block enforcement of a domestic award. The defences in section 8 are therefore exclusive and exhaustive.[26]

A comment should be made about the public policy defence in section 8. Its use in the Convention does not have the broad catch-all meaning that it sometimes receives in domestic law: it refers to conduct which would be considered seriously opprobrious according to international standards, such as fraud, corruption or criminal conduct. For example, in an English decision,[27] an award was not enforced where the tribunal had granted damages for breach of a contract to smuggle carpets out of Iran in breach of Iranian law. The court felt that it would offend public policy to lend support to such conduct.

In one rogue Australian decision, however, a court refused to enforce an award made in the United States on the basis of public policy where the court found that many of the orders made by the arbitrator could not have been made by a Queensland court applying Queensland law.[28] Acceptance of such a view would open the way to a general review of arbitrators' decisions based on whether they mirrored the law and practice in the enforcing country. This approach is clearly inconsistent with the Convention and fortunately has not been followed in later Australian cases. Recent authority has now clearly established that a violation of public policy will only exist where enforcement of the award would constitute 'an offence to fundamental norms of fairness or justice'.[29] The public policy defence should therefore be only 'sparingly' applied.[30]

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[23]Such an argument was recently rejected in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109. Further, in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, it was stated that this defence will not be available unless there is demonstrated 'real unfairness' or 'real practical injustice' in how the dispute resolution was conducted.

[24]The defences are set out in IAA ss 8(5) and (7).

[25]An error of law objection also cannot be framed as a violation of public policy: *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 [133].

[26]IAA s 8(3A).

[27]*Soleimany v Soleimany* [1999] QB 785.

[28]*Resort Condominiums International v Bolwell* (1993) 118 ALR 655.

[29]*Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 1214 [33], [177]; *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 [132]; *Traxys Europe SA v Balaji C Industry Pvt Ltd (No. 2)* (2012) 201 FCR 535 [96].

[30]*Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 1214 [34].

Section 8 also contains a provision[31] which allows an Australian court to stay enforcement proceedings where an application has been made to set aside the award in the courts of the country where the award was made. Australian courts have been generally receptive to such a request, provided that the application to set aside the award has a reasonable chance of success, security for payment of the award is pledged by the defendant and no prejudice will be suffered by the plaintiff if the stay is granted. Amendments to the IAA in 2010 also have given courts the power to order proceedings that have been stayed under section 8(8) to be resumed and costs to be awarded against the party seeking the stay in cases where the application to set aside is not being pursued in good faith or with reasonable diligence.[32] Such new provisions aim to prevent parties frustrating enforcement through vexatious applications to set aside the award.

Hence, the overall object of the Convention's provisions on recognition and enforcement of awards is to limit judicial review of awards so that finality of dispute resolution is achieved, delays in enforcement are minimised and parties are held to the process which they have chosen.

Note that the Convention has proven to be generally very successful in this respect; it has created an effective global regime for enforcement of awards which is something that is very unlikely ever to be achieved with foreign judgments. While the Hague Choice of Court Convention (which was intended to be a 'litigation' version of the New York Convention) was created in 2005, it has only been ratified by one nation state and has not entered into force. It is also the case today in a number of countries (for example Indonesia and the Netherlands) that no judgment of a foreign court can be enforced; it is necessary for the judgment creditor to re-litigate the matter from the beginning in the place of enforcement. While this unattractive situation exists in cross-border litigation, there will be a strong incentive for parties to choose arbitration in international trade.

2.3 The UNCITRAL Model Law on International Commercial Arbitration

In 1989 the Australian Federal Parliament amended the IAA by enacting the 1985 UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') in section 16 and Schedule 2 of the Act. The Model Law was developed by UNCITRAL (the United Nations Commission on International Trade Law) as a law of arbitral procedure to be adopted by member States for the conduct of arbitrations within their territories. The Law was intended to be a vehicle for global harmonisation of arbitration law on the basis of the principles of party autonomy and

[31]IAA s 8(8) implementing Convention art VI; *Toyo Engineering Corp v John Holland Pty Ltd* [2000] VSC 553; *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905.

[32]IAA s 8(9), (10).

reduced judicial interference in the arbitral process. In this way the Model Law would complement the New York Convention by supplying the 'middle procedural part' between enforcement of the agreement and the award.

The Model Law now has wide acceptance, having been adopted in over 65 countries, including Australia, Canada, Germany, Hong Kong, India, Iran, Ireland, Japan, Malaysia, Mexico, New Zealand, the Philippines, Russian Federation, Singapore, Sri Lanka, Scotland and seven states of the United States (including California). A number of other countries' laws (for example the 1996 English *Arbitration Act*), while not adopting its principles directly, nevertheless show strong signs of its influence. Moreover, a number of the leading global arbitral institutions (for example the ICC in Paris, the LCIA in London and the AAA in the United States) have amended their procedural rules to be closer to the Model Law framework.

Australia enacted the Model Law because it was felt that this would assist the country in becoming a centre for international arbitration as foreign parties would be attracted to arbitrating under an internationally agreed framework with no parochial or peculiar provisions of domestic law to trap or deter them.

As mentioned, the Model Law embodies the progressive continental European tradition of arbitration, which is to minimise judicial intervention and maximise party autonomy. Its provisions are framed to allow parties great freedom in their choice of arbitral rules and procedures. For example, article 19 enables parties to choose the rules of an arbitral institution to govern the arbitration which may be very useful in an expensive and complex dispute requiring significant administrative support to resolve. There are only a few mandatory requirements in the Model Law which the parties cannot avoid in their arbitration agreement: such as the obligation that both parties be treated equally in the arbitral process and that each be given a reasonable opportunity to present its case[33] and the requirement that each party supply the other with all information provided to the tribunal.[34]

The grounds for court challenge of arbitrators and setting aside of awards are also significantly reduced under the Model Law. For example, the only real bases for removal are where the arbitrator is found not to be impartial,[35] which requires a showing of a 'real danger' of bias,[36] where the arbitrator lacks his or her stated qualifications[37] or where he or she is unable to perform their functions.[38] A party may also, before it has filed its defence, judicially challenge a preliminary decision of the tribunal that it has jurisdiction over an issue.[39] The bases for setting aside an

[33]Model Law, art 18, IAA s 18C.

[34]Model Law, art 24(3).

[35]Model Law art 12(2).

[36]IAA s 18A.

[37]Model Law art 12(2).

[38]Model Law art 14(1).

[39]Model Law art 16(3); *teleMates* (*previously Better Telecom*) *Pty Ltd v Standard SoftTel Solutions Pvt Ltd* (2011) 257 FLR 75.

award are also limited with parties to a Model Law arbitration having only the New York Convention grounds to attack an award.[40] As mentioned above, these grounds focus on serious irregularity in the process rather than the merits of the dispute and have been generally narrowly construed in favour of upholding the tribunal's decision where possible.[41]

The Model Law also contains provisions for enforcement of arbitration agreements[42] and awards[43] again closely modelled on the terms of the New York Convention, although in the case of awards, enforcement is not limited to foreign awards but would encompass an award made in Australia in a Model Law arbitration.[44]

In the 2010 amendments to the IAA the Australian Federal Parliament also adopted many of the 2006 revisions to the Model Law made by UNCITRAL. For example, the arbitral tribunal now has the same power to order interim measures of protection as the court at the seat of arbitration[45] and also there is clear authority given to courts to award interim measures in respect of foreign arbitrations.[46] Australia did not however adopt the 2006 amendment to the Model Law which allows an arbitral tribunal to issue *ex parte* interlocutory orders.[47] This omission was apparently due to strong opposition from some Australian practitioners.[48]

2.4 The Scope of Application of the Model Law in Australia

An important issue to consider is when the provisions of the Model Law apply to an international commercial arbitration in Australia. Note first that the Model Law only applies to 'international commercial arbitration' as defined in article 1 para 3 of the Law. An arbitration is defined as 'international' where:

(a) the parties to an arbitration agreement have, at the time of the conclusion of their agreement, their places of business in different countries;
(b) one of the following places is situated outside the country in which the parties have their place of business:

[40]Model Law art 34.

[41]*Corporacion Transnacional de Inversiones v STET International* (1999) 45 OR (3d) 183.

[42]Model Law art 8.

[43]Model Law arts 35–36.

[44]*Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21.

[45]Model Law art 17.

[46]Model Law art 17J; *ENRC Metallurgical Marketing AG v OJSC 'Magnitogorsk Kombinat'* (2011) 285 ALR 444.

[47]Model Law arts 17B, 17C.

[48]For a criticism of this view see L. Nottage and R. Garnett, 'Introduction' in L. Nottage and R. Garnett (eds), *International Arbitration in Australia* (Federation Press 2010) 1, 23.

(i) the place of arbitration
(ii) any place where a substantial part of the contractual obligations is to be performed or the place most closely connected with the subject matter of the dispute; or

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

The drafters of the Model Law therefore provided a broad definition of the term 'international' and court decisions have similarly taken an expansive view.

As well as being 'international', for an arbitration to come within the scope of article 1, it must also be 'commercial'. There is included in article 1 a footnote that provides a large list of relationships considered commercial. The list includes supply contracts for goods and services, agreements for distribution, agency, leasing, construction, financial services, joint ventures, mineral concessions and transport contracts. The use of the word 'commercial' was therefore also intended to be a broad concept, covering almost all situations in international trade. The use of the word 'commercial' was also not intended to exclude state parties from the coverage of the Law and allow them to plead sovereign immunity from arbitration proceedings.

In a Canadian case involving an arbitration conducted under Chapter XI of the NAFTA treaty, *Mexico v Metalclad Corp*[49] the court found a dispute between the Mexican Government and a United States company over a permit to operate a waste dump to be 'commercial'. While the matter did involve issues of government regulation and policy, the essence of the dispute was an investment and the treatment of investors under the NAFTA treaty.

In practice, therefore, given the wide breadth of the terms 'international' and 'commercial' in article 1 there will be few arbitration agreements with a foreign element that will not fall within the terms of the Model Law. Where, however, an agreement to arbitrate in Australia is not considered 'international' under article 1, then the provisions of the CAA will govern the arbitration as it will be domestic. While the provisions of the CAA are much closer in content and effect to the *International Arbitration Act* than the old 1984 *Commercial Arbitration Act,* a few important differences still exist between the statutes which will be highlighted later.

2.4.1 Can the Model Law Be Excluded?

Once the parties' agreement is found to fall within article 1, the Model Law will apply to govern the procedure of the arbitration. Before the 2010 amendments to the *International Arbitration Act*, section 21 of the IAA allowed parties to exclude the Model Law by agreement in favour of the 1984 State *Commercial Arbitration Act*

[49]2001 BCTC 664.

for arbitrations taking place in Australia. However, in the 2010 amendments, section 21 was changed to give the Model Law exclusive operation in the case of international arbitration agreements with an Australian seat.

While it is clear that the new section 21 applies to arbitration agreements entered into on or after 6 July 2010, a much more difficult question arises in the case of agreements concluded before that date. In *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*,[50] Murphy J of the Federal Court held that section 21 has retrospective effect with the result that every international arbitration agreement with an Australian seat, whenever entered into, is subject to the Model Law. By contrast, the Western Australian Court of Appeal in *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*[51] suggested that the Model Law will not apply retrospectively to an arbitration agreement entered into before 6 July 2010, in particular, where the dispute between the parties has crystallized and arbitral proceedings have been commenced before that date.

The Western Australian court's analysis, which is very persuasive, is that parties have vested rights in the application of a particular arbitration regime which they may have consciously chosen and which would be adversely affected by retrospective application of a new law. Such rights should be recognised and so the new section 21 should only be applied to arbitration agreements entered into on or after 6 July 2010. The result therefore, is that for earlier agreements, parties would retain the right to exclude the Model Law in favour of the *Commercial Arbitration Act* 1984 (WA). This approach has been recently adopted by Pritchard J. of the Supreme Court of Western Australia and applied to a case where the arbitral proceedings were commenced *after* 6 July 2010.[52]

2.4.2 The 'Black Hole'

This conclusion however poses a serious problem given that all States and Territories bar the ACT have now enacted the new CAA. Luke Nottage and I have described this as the '**black hole**' problem.[53] What is the black hole? If the parties, according to the *Rizhao* case, are able to choose the CAA for pre-6 July 2010 agreements, the problem is that the 2012 version of the statute cannot apply. While the 2012 legislation is expressed to apply retrospectively and so would pick up pre-6 July 2010 agreements, it is confined to *domestic* arbitration agreements only. The

[50][2012] FCA 21.

[51](2012) 287 ALR 315.

[52]*Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290.

[53]For a detailed discussion, see R. Garnett and L. Nottage, 'What Law (If Any) Now Applies to International Commercial Arbitration in Australia?' (2012) 35 *University of New South Wales Law Journal* 953, 969–971 cited in *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290 [219] n 98.

1984 *Commercial Arbitration Act* also cannot apply because it no longer has any operation apart from in the ACT.

The result, therefore, is that there may now be a category of international arbitration agreements with their seat in Australia to which *no* arbitration statute applies: an absurd and incredible outcome! Obviously, legislative clarification is critical with the best solution being one that supports party autonomy and expectations as far as possible. In this regard, the aim should be to preserve the status quo prior to the 2010 amendments for arbitration agreements entered into pre-6 July 2010. Such an approach would require an amendment to the IAA to provide that it only applies to agreements entered into on or after 6 July 2010 and amendments to the uniform state CAAs to provide that for pre-6 July 2010 agreements, the former CAA which existed at the date of the agreement applies. Note that in November 2014 the Civil Law and Legislation Amendment Bill was introduced into the Federal Parliament. Schedule 2 of the Bill includes a new section 21(2), which provides that section 21(1) applies to 'an arbitration arising from arbitral proceedings that commence on or after the commencement of this sub-section, whether the arbitration agreement giving rise to the arbitration was made before, on or after 6 July 2010'. The effect of the new section 21(2) is that section 21 will be made retrospective, at least as far as arbitration proceedings commencing on or after the coming into force of the new section 21(2) is concerned.

2.5 Other Provisions of the IAA

Apart from the New York Convention and the Model Law, the IAA also contains other important provisions. First, there are the provisions contained in Part III of the Act which govern matters such as the power of a tribunal to consolidate two or more arbitration proceedings[54] and the power to award costs and interest.[55] In the 2010 amendments new provisions were introduced in the IAA on interim measures which go beyond the express Model Law provisions, for example section 23 which gives a party to an arbitral proceeding the right to apply to a court to issue a subpoena against a person to attend for examination or produce documents to the arbitrator and section 23K which gives the tribunal the power to award security for costs. The IAA also contains provisions governing the liability of arbitrators and appointing authorities (only for breach of the duty of good faith and not merely negligence)[56] and rights of representation in arbitrations (not limited to lawyers).[57]

[54]IAA s 24.

[55]IAA ss 25–27.

[56]IAA s 28.

[57]IAA s 29.

2.6 Confidentiality

A comment should also be made about confidentiality and privacy in international arbitrations in Australia, an issue which is not addressed in the Model Law. The concept of 'privacy' means that the proceedings are closed to all persons except the parties and those persons essential for the conduct of the arbitration such as witnesses and lawyers. The main exception to this principle is where a party approaches a court to seek interim relief during the reference (such as to remove an arbitrator) or where it applies to a court to set aside the award. The High Court in the case of *Esso Australia Resources Ltd v Plowman*[58] recognised the existence of a right to privacy.

The principle of confidentiality in arbitration is different: under this principle all documents and information revealed in the arbitration remain confidential and cannot be disclosed by either party. The High Court in *Esso* held that there is no implied obligation of confidentiality in respect of matters revealed in an arbitral proceeding and, even where an express provision exists in the arbitration agreement, material may be disclosed where required by a statutory obligation or when it is in the public interest. (In the *Esso* case a number of companies were forced to disclose valuable commercial information to a government minister).

Unfortunately, the federal government in its 2010 amendments chose to retain the existing law on this issue which means that confidentiality will only apply to an international arbitration in Australia where the parties expressly agree such a term[59] and there is no public interest reason for compelling disclosure.[60] Many observers see this as a missed opportunity to align Australian law with best international practice.

2.7 Domestic Arbitrations

So, that is a brief survey of the Australian regime for international commercial arbitration which, as was seen, is based closely on international instruments. What is the legislative framework for domestic arbitrations conducted in Australia? It is first important to note that the regime established under the 1984 uniform *Commercial Arbitration Acts* was very different to the IAA and provided much greater scope for judicial intervention in the arbitral process than is permitted under the Model Law. The new uniform CAAs which have been implemented in all States and Territories except the ACT much more closely follow the Model Law provisions with a few important additions and departures of which practitioners need to be aware.

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[58](1995) 183 CLR 10.

[59]IAA ss 22(3), 23C.

[60]IAA s 23G(1)(a).

On the topic of arbitration agreements, the principles mentioned above in the case of the New York Convention now also apply, including a very wide definition of arbitration agreement[61] and a strict obligation on Australian courts to stay proceedings[62] brought in breach of an obligation to arbitrate. The same principles regarding the conduct of arbitrations[63] and the appointment and disqualification of arbitrators[64] now apply under the new CAAs as under the federal IAA. The departure from the 1984 legislation here is significant: the strict Model Law grounds for removal of arbitrators have replaced the much wider former test which allowed an arbitrator to be removed for misconduct or incompetence.[65] The grounds for challenge to awards[66] under the new CAAs are also much more restricted compared to the 1984 legislation. These new provisions will undoubtedly have the effect of reducing challenges to both the tribunal and its decisions and will help to minimise obstructions to the arbitral process.

In some respects, however, the new CAAs depart from the Model Law and the federal IAA. For example, on the issue of confidentiality, the new legislation provides that confidentiality will be imposed as an obligation in domestic arbitrations in Australia, absent exceptional circumstances such as where all the parties agree otherwise.[67] This approach is a significant improvement to the position under the IAA which provides that the right to confidentiality only exists in an international arbitration seated in Australia where the parties expressly provide for it in their agreement.

Another departure from the federal IAA and the Model Law concerns the preservation in the new CAAs of a right of appeal on a question of law. While under the Model Law the grounds for challenge to an award are limited to the due process issues such as an inability to present one's case in the arbitration and excess of jurisdiction by the tribunal, section 34A of the CAA preserves an error of law appeal, a right which also existed in the 1984 legislation. It is important to note, however, that the right to appeal under the CAA is very circumscribed compared to the earlier version: it will only be available with the consent of all the parties and the leave of the court, with the court having to be persuaded that the tribunal's decision is obviously wrong or of general public importance. In practice, the requirement for the agreement of all the parties to such a right will mean that it will only be rarely available, a result which would be consistent with the Model Law traditions of party autonomy and finality of dispute resolution.

Finally the new CAAs, unlike the Model Law and the federal IAA, have an 'arb-med' provision whereby an arbitrator may act as a mediator in order to try to

[61]CAA s 7.
[62]CAA s 8.
[63]CAA ss 18–24, 25–27.
[64]CAA ss 11–12.
[65]CAA (1984) s 44.
[66]CAA s 34.
[67]Sections 27E, 27F.

resolve the dispute.[68] Arb-med may occur if the parties have expressly agreed to it but the legislation provides that an arbitrator who has acted as mediator in mediation proceedings that have been terminated may not conduct subsequent arbitration proceedings in relation to the dispute unless the parties agree. Such a balanced approach is justified given the greater dangers posed to the integrity of the arbitral process by a mediator moving to arbitration mode compared to when an arbitrator shifts to mediation.[69] It was unfortunate that an arb-med provision was not included in the federal IAA in the 2010 amendments but apparently this was due to some concern that some foreign countries' courts may hesitate at enforcing an Australian award in which arb-med had been employed, on public policy grounds.

So, it can be seen that since 2010 there have been substantial changes to the legal regime of commercial arbitration in Australia, all aimed at reducing judicial intervention in the process and giving greater autonomy to the parties. Arguably the reforms could have gone further, particularly in the federal legislation, and the black hole problem needs to be addressed. It remains to be seen, however, whether the new reforms will lead to a significant increase in arbitrations being conducted in Australia; certainly Australian practitioners would hope so!

[68]Section 27D.

[69]The Hon M Gleeson AC QC, 'Some Practical Aspects of International Arbitration' in N Perram (ed), *International Commercial Law and Arbitration: Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law 2014) 297, 299.

Chapter 3
The Importance of Arbitration to the Resources Sector

Doug Jones

Abstract In the resources sector, arbitration has retained its position as a permanent feature of dispute resolution. Disputes in the resources sector involve various types of agreements, technical subject matters, and are often trans-national in nature—all of which are features that make arbitration an attractive dispute resolution method. To set the context for addressing the benefits provided by arbitration to the resources sector, this chapter will examine these features in detail and outline the arbitration framework in Australia. The chapter also discusses features of the arbitration process itself that make it well suited to the resolution of disputes in the resources sector.

3.1 Introduction

The importance of arbitration to the resources sector is revealed when contractual disputes occur in the resources sector. Dispute resolution is certainly not at the very centre of the resources industry because most of the projects and contracts in the resources sector proceed to conclusion without any dispute. Nevertheless, it is important to provide a relief valve in the event that commercial disagreements emerge between parties during the resources process. It is in this context that the contribution of arbitration to the resolution of commercial disputes must be examined.

As a process that might appear to be in constant competition with litigation, which is often perceived as the more traditional method of dispute resolution, arbitration has proven itself to be an effective and reliable means of solving commercial disagreements. This has been the case even more so in the context of disputes within a few particular and technical subject matter areas, namely the

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technology, construction, and resources sectors, where arbitration has retained its position alongside litigation as a permanent feature of dispute resolution.

Litigation in the resources sector when presided over by a judge who is unfamiliar with the subject matter is likely to be costly and quite slow. Critics of arbitration have sometimes contended that it may, in a worst case scenario, imitate court processes and exhibit similar symptoms of inefficiency. Such critics also suggest that arbitration may cost even more than its litigation counterpart, adding the costs of the hearing (such as venue hire and the arbitrators' fees) to the final bill.

There are nevertheless various features of the arbitration process, both in the domestic and international contexts that give it an advantage over its litigation counterpart in resolving disputes in the resources sector. Beginning with a discussion on the nature of the disputes that arise in the resources sector, this chapter will examine the arbitration framework in Australia as setting a context for the Australian contribution to the resolution of disputes. It will then address the benefits that arbitration provides to the resolution of differences of opinion in the resources sector and the implications for the future of dispute resolution in the resources industry.

3.2 The Nature of Resource Disputes

To put a context around the types of disputes that can emerge between commercial parties in the resources industry, it is necessary to first understand the nature of resource contracts. There is a wide ambit of disputes that may arise in the resources sector, and there are many characteristics of resource disputes that make arbitration an attractive option for resolving commercial differences.

3.2.1 Types of Agreements in the Resources Sector

One of the difficulties with addressing the issue of disputes within the resources sector is the wide ambit of disputes that arise in the industry—from relatively simple disputes between two parties, to complex, multi-party disputes involving extremely valuable projects that can potentially take years to finally determine. Often, these disputes involve complex questions of law and fact, including issues around national boundaries, environmental claims, insurance and reinsurance, sanctions, bribery and anti-corruption.

The types of agreements which parties involved in resource projects enter into are certainly diverse, ranging from development agreements before any ground is broken or well drilled, to feasibility studies which will predict the economic viability or otherwise of projects, through to initial and then detailed design of the resource projects themselves. There are also agreements that relate to the protection, exploitation, process design and other issues of intellectual property.

Once the commitment has been made to conduct the resource development, parties need to deal with the construction of on and offshore infrastructure, involving its own unique range of agreements. Then, the exploitation of the resource itself, which is at the heart of the resources industry, involves commodity sales agreements, many of which are long-term and in respect of a variety of potential resource products. There are also commercial agreements regarding the transportation of resource commodities both on land and, in the case of island countries such as Australia, on sea. The inter-relationship between the transportation of resource products, shipping, and other transportation issues involved in the sale of resource products, is a whole area of commercial endeavour in itself.

There are also agreements relating to the insurance at all the different stages of a resource project, from design, construction, sale, and through to the performance of the product. In addition, long-term gas and oil pricing agreements, which can be intended to last for a very long time, are commercial arrangements which often need relief valves when the commercial assumptions underlying the initial agreements turn out to be different to what was originally envisaged.

Finally, many parties in the resources sector are involved in changes in shareholding, which can be broadly described as merger and acquisition or M&A activity.

3.2.2 Resource Disputes and Arbitration

These various agreements represent a vast array of contract structures, providing fertile grounds for commercial differences of opinion to emerge in many ways. The contracts which are entered into are often high-value, high-risk and long-term, and consequently the structuring of relief valves in these contracts to deal with commercial differences of opinion is absolutely critical. As a result, a wide range of dispute resolution measures have been implemented over the years, with varying measures of success. Other than arbitration and litigation, such measures include various forms of mediation and conciliation. There are, however, some features of resource disputes that make arbitration a particularly suitable method for resource disputes.

3.2.2.1 Technicality of Resource Disputes

The technical nature of the disputes that arise in the resources sector often requires a degree of expertise and technical skill that is not guaranteed when a judge is appointed through court processes. With its ability to be customised for any particular dispute and still produce binding results, arbitration has outshone many of the other dispute resolution processes. As resource disputes often involve complex factual situations requiring voluminous document discovery, the flexibility available to arbitral tribunals in tailoring the arbitral process can streamline the dispute

resolution process. To provide some examples, the process might be tailored to include limited time procedures and limited document discovery to provide for a more expeditious procedure.

3.2.2.2 International Nature of Resource Disputes

Many resource projects, if not all, are transnational in nature, that is, the contracting parties are from different countries and the contract is performed, as the product moves, the design is fulfilled, or the construction occurs, in different jurisdictions. The international nature of the operations of multinational oil and gas companies and cross-border oil and gas fields result in a number of issues that make arbitration an appealing alternative to litigation. In particular, enforcing arbitral awards in different jurisdictions, as explained in further detail at Sect. 3.4.1, is generally much easier than attempting to enforce a court judgement in another jurisdiction.

3.2.2.3 Overlapping Commercial Interests in Resource Disputes

In resource projects, the players involved in the various forms of contract fulfil a variety of roles, such as service provision, provision of capital, provision of debt, and the like. These overlapping commercial interests and long term contractual relationships between oil and gas companies militate against litigation, which is often expensive, time consuming, adversarial and destructive of good working relationships.

The proliferation of sophisticated contracts in the resources sector means that disputes are anticipated, and that well planned dispute resolution procedures are able to be put into place much ahead of time. By foreseeing the potential for disputes, and implementing appropriate processes and procedures for their resolution ahead of time, uncertainty and risk can be minimised, even once a dispute has arisen. This is of vital importance to parties in the resources sector given the inherently high levels of uncertainty and risk already associated with their ventures. When dealing with these sophisticated contracts with overlapping commercial interests, arbitration is an appropriate mechanism for dispute resolution.

That is not to say, however, that arbitration is the only means of resolution of commercial differences and disputes in the resources sector. It is very important to remember that there are a variety of tools in the dispute resolution tool kit. Of course, in the context of binding dispute resolution, of which arbitration is one such option, courts in the various States where work is performed or goods are delivered also provide very effective commercial dispute resolution services. As an example in Western Australian, the centre of natural resources activity, oil and gas industries in Australia, the Supreme Court has the capacity to provide very effective commercial dispute resolution services to those who wish to bring their disputes to it.

In addition to court dispute resolution processes, there are binding determinations by experts, dispute boards, and other means of issue resolution which are

available to be considered as options in the process of the resolution of commercial differences of opinion in the resources sector. It is a matter of appropriately choosing a combination of these tools in the dispute resolution tool kit that is the challenge for those engaged in this wide variety of commercial activities.

Having set the scene of the variety of needs which the resources sector has for issue resolution, the next section will deal with the context of arbitration in Australia and the important characteristics to keep in mind when considering arbitration as an option for dispute resolution for the resources industry.

3.3 The Australian Arbitration Framework

There are two types of arbitration that need to be considered in the Australian context—domestic and international. Although their legal characteristics are identical, their capacity to contribute to dispute resolution can be quite different.

Over the last few years, Australia's domestic arbitration regime has undergone significant reform in order to bring it into line with international standards.[1] Similarly, Australia's international arbitration regime has been brought into line with international best practice under the *International Arbitration Act 1974* ("**IAA**"). As discussed below, both of these developments have significant implications for the resources sector.

3.3.1 Domestic Arbitration

Prior to 2010, Australia's arbitration system distinguished between a federally regulated international regime based on the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), and the domestic regimes governed by the States and Territories that had been implemented in the mid-1980s. In the domestic context, arbitration has been an option for many years. Indeed, arbitration as a method of dispute resolution goes back thousands of years where parties in civilised societies have almost always had an alternative to established court structures which business people in particular have used.

In recent times, however, there has been adopted for domestic arbitration in Australia a wholly new legal framework that is now uniform between the States. It is "uniform" in the sense that the constitutional responsibility for legislation in relation to domestic arbitration lies with the States, and the States have enacted

[1]With the exception of the ACT, all States and Territories in Australia have now adopted domestic arbitration legislation based on the Model Law as amended in 2006. See *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2012* (WA).

uniform legislation completely different to that which previously existed. It is in all respects, except for some areas of detail, identical to the legislative structure for international arbitration in Australia, which previously had a completely different legal structure.

Turning now to how the legal framework operates in practice, the term 'domestic arbitration' refers to disputes between parties who are purely Australian,[2] that is, two Australian companies who have a difference of opinion and who have the capacity to choose what form of binding dispute resolution will be adopted by them in the event of differences of commercial opinion.

For there to be arbitration between two such domestic entities, there needs to be an agreement to arbitrate. The usual way in which an agreement to arbitrate is established is via a clause in the main contract dealing with the particular commercial activity in question to the effect that, in the event of differences of opinion arising between the parties to that agreement, the parties agree that they will refer those differences of opinion to arbitration. It is of course possible after a dispute has arisen, in the absence of such a clause in a contract, for parties to agree to refer a ripe dispute that then exists to arbitration. However, it is often difficult for parties in dispute to reach agreement on anything, and as a result agreements to refer existing disputes to arbitration in the absence of a prior agreement to arbitrate are relatively rare compared to the pre-written arbitration clauses contained in contracts.

When two domestic parties decide to arbitrate, they have decided, for better or for worse, to oust the jurisdiction of the court. However, courts do present, in Australia and in Western Australia in particular as an important centre for the resources sector, a very real option for the resolution of commercial disputes. As previously mentioned, the Western Australian Supreme Court has now established a very effective commercial dispute resolution process that provides expeditious, flexible and expert determination of commercial disputes. Domestic arbitration is different from international arbitration in this respect because there are fewer alternative choices available in the international context.

The parties who choose the court option, who are domestic Australian parties, also choose the publicity which comes with court proceedings. It is very rare indeed for court proceedings to be other than public, whereas arbitration is almost always private and confidential. Leaving aside some other characteristics of domestic arbitration, the privacy and confidentiality attributed to arbitration can be a major influence in parties' choice of process.

With the new reformed legislative structure, arbitration is now a truly different and alternative method of dispute resolution to the courts. That is, not just in providing confidentiality and privacy, but also in providing procedures tailored to the particular dispute and designed to get the dispute done and dusted quickly. We have yet to fully realise the potential of that in Australia, with domestic arbitration having in the recent past failed to provide a true effective commercial alternative to dispute resolution to the courts. The author is hopeful, however, that legislative

[2]As provided in section 1(3) of the uniform Commercial Arbitration Acts.

change will present a real opportunity for commercial parties in the domestic context and provide a real choice between domestic court proceedings and arbitration.

3.3.2 International Arbitration

In the Australian context, an arbitration proceeding is international if the parties to the dispute and the agreement from which the dispute arose are from different countries.[3] Under the IAA, an arbitration will also be international if it involves two Australian parties performing a contract outside Australia, or two Australian parties choosing to have their commercial relationship governed by a law other than the law of one of the Australian States.[4] From these definitions, it is seen that there is a concept of international arbitration in Australia, as is the case under the UNCITRAL Model Law, that is broader than one which involves parties from different countries.

With respect to the legislative framework of international arbitration, the UNCITRAL Model Law, which was initially drafted in 1985, has formed part of the IAA since 1989, in an effort to support the practice of international arbitration in Australia. This commitment to international arbitration has been maintained over successive governments, with a number of steps taken over the years to continually improve Australia's international arbitration infrastructure.

In July 2010, the IAA underwent significant reform with the enactment of the federal *International Arbitration Amendment Act 2010*. The most important modifications made by this amending act were the incorporation of the 2006 UNCITRAL amendments to the Model Law and the repeal of provisions that allowed parties to opt out of the Model Law. These amendments, among others, ensured that the IAA remained in line with international best practice. This has had a positive effect in further advancing Australia as a centre for international arbitration, encouraging parties to seriously consider it as a potential arbitration venue. These legislative changes also sought to increase the quality of international arbitration in Australia by creating consistency and certainty in the application of Australian international arbitration law.

It is not just legislation which makes arbitration relevant as a dispute resolution technique. There must also be the appropriate infrastructure available, both in terms of professional services and other things, to make arbitration work in any place. In Australia, there has been in recent years a significant growth in the expertise of Australian lawyers and those who service the dispute resolution industry in international arbitration. Together with the government's commitment to international arbitration, there has been the involvement of various professionals and industry

[3] *International Arbitration Act 1974* (Cth), Schedule 2, Art 1(3)(a).

[4] *International Arbitration Act 1974* (Cth), Schedule 2, Art 1(3)(b)(ii).

bodies such as the Australian Centre for International Commercial Arbitration (ACICA), the Australian Commercial Dispute Centre (ACDC), the Institute of Arbitrators and Mediators Australia (IAMA), the Chartered Institute of Arbitrators (Australia) (CIArb Australia) and the National Alternative Dispute Resolution Advisory Council (NADRAC), which have all contributed to the development of the international arbitration industry in Australia.

Australian lawyers are also in demand around the world and many of them practise in North America and in Europe. Many of these Australian lawyers eventually return, contributing to the enrichment of international arbitration expertise in the Australian legal community. It can thus be said, with confidence, that in Australia there are practitioners able to provide commercial parties with highly sophisticated international arbitration services.

As a result, international parties contemplating the use of international arbitration in Australia can be confident that there is both a legal framework which is state-of-the-art and practitioners who can service the needs of commercial parties looking to use international arbitration at a standard second to none. Given the large amount of foreign investment in the resources sector, it is indeed essential that international parties feel confident in Australia's dispute resolution framework.

3.4 Benefits of Arbitration in Resource Disputes

As has been mentioned, arbitration has retained its position of prominence in the resources sector even amongst the various methods of dispute resolution which have been implemented in the industry over the years. There are a variety of reasons why this is the case. In addition to the aforementioned characteristics of resources sector disputes that are likely to render them more easily resolved by arbitration, there are a number of features of the arbitration process itself that make it well suited to resource disputes.

3.4.1 Enforceability

The most important benefit of arbitration is in relation to enforceability. Unlike domestic arbitration where parties may pursue dispute resolution through either arbitration or the courts, there is no such choice in the international context. This is because there is a fundamental difference between domestic and international arbitration when it comes to enforceability. Once an arbitration proceedings is concluded and the tribunal renders an award, that award is available for enforcement within Australia as if it is a court judgment. Where assets are contained within companies existing in Australia, there is no problem of enforcement of the award.

However, many of the transactions involved in the resources sector, in the wide variety of agreements identified above, are with parties who are offshore, who have

no assets in Australia, and therefore decisions made by arbitrators in the awards need to be enforced against assets outside the jurisdiction. Though it is not impossible, it is very difficult to take a judgment, for example, from the Western Australian Supreme Court and have it enforced in China against assets in China. However, an international arbitral award, as a consequence of a very successful international convention, namely the New York Convention,[5] is enforceable in China even if delivered in Australia. It will be treated as if it is a judgment of the Chinese courts.

Over one hundred and fifty countries are parties to the New York Convention, and consequently international arbitral awards can be taken around the world and enforced in ways in which domestic court decisions cannot. In contrast, international conventions on the recognition and enforcement of foreign judgments have had very limited success. Whether a foreign judgment will be recognised in another country will depend on the laws in that country and, in extreme cases, it may be necessary to start the proceedings from scratch.

When one considers the enforceability of the outcome, international arbitration has a virtual monopoly on international commercial dispute resolution. It would only be for very particular reasons that well-informed and advised parties would choose in an international transnational contract to adopt court proceedings in a local court.

3.4.2 Other Advantages

There are other advantages of international arbitration in the resources sector, such as neutrality. Choosing a court usually involves choosing a home town advantage for one of the parties. Arbitration in contrast has, as its very essence, the ability to allow for the determination of a dispute in a neutral geographic environment, by neutral parties. This is a beneficial feature of arbitration for those who trade transnationally, as neither party gets a perceived or real home town advantage.

Then there is, as previously mentioned, the advantage of confidentiality and privacy. The opportunity to keep confidential any disputes arising from resources projects can be of critical strategic importance to parties.

There is also the advantage of flexibility that an arbitral process can and should be designed to suit the particular dispute and be just as short and efficient as it needs to be to satisfy the parties' necessary requirement for a fair process. Through the flexibility that arbitration can provide, disputes can be resolved by a process that is tailored to the circumstances and conducted in a streamlined manner so as to allow the project or venture to continue smoothly.

On a final note, in many of the sectors in which resource contracts are entered into, such as development agreements, construction contracts, pricing arrangements,

[5] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1958.

and shipping and insurance, there is a long tradition of arbitration as a means of resolving those disputes. For this reason, the resources sector may pick up, in relation to those contracts, the more traditional approach to dispute resolution which arbitration represents. However, it is worth taking a more holistic view of dispute resolution in the context of the resources sector by conceptualising arbitration in its many forms as a means for effective dispute resolution.

In the context of Australia, we now have the legal and actual expertise structures which enable international arbitrations to be successfully conducted, providing in Australia an effective means of resolving the disputes that emerge in the resources sector. In appropriate circumstances, Australia is a place where arbitration should be considered as the preferred method of dispute resolution, particularly in the international context.

3.5 The Future of Resource Disputes

To conclude, arbitration is already widely used in the resources sector, and the whole panoply of commercial transactions is likely to continue to use arbitration. It will continue growing as the preferred method of international dispute resolution, as the nature of disputes in the resources sector become ever more technically complicated. It has been and is able to deliver the flexibility required in the long-term agreements which many resources contracts involve. Further, arbitration is and should remain more streamlined and more flexible than domestic court processes.

The sustained commitment by arbitrators, practitioners and parties to ensure that arbitral processes do not mimic court procedures has assisted in providing for such increased efficiency. Regular communication between the service providers and the purchasers of services in the resources sector, are of enormous value, and all interested parties are encouraged to continue the dialogue regarding the effectiveness of international arbitration and how it can best provide dispute resolution services in the resources sector.

Chapter 4
Drafting Arbitration Clauses for the Resources Sector

Michael Hales

Abstract This chapter discusses a range of issues that should be taken into account when drafting arbitration clauses for projects in the resources sector. These include the importance of understanding whether the arbitration falls within the scope of the international or domestic arbitration legislation and some key issues to consider when selecting the rules to apply to the arbitration. The chapter also considers the questions of proportionate liability and consolidation, both of which are relevant to resources projects.

4.1 Introduction

Dispute resolution lawyers often comment that insufficient attention is paid to the dispute resolution clauses in agreements.

On one level, this is understandable. Parties rarely want to focus on disputes at the time that the agreement is being put together. Dispute resolution clauses are therefore normally only discussed at the end of the negotiations. By then, "battle fatigue" may have set in, it may be late at night or the parties might simply not believe that disputes are a serious risk. And so a boilerplate precedent is inserted into the agreement without any real focus on the central issues of how and where any disputes will be resolved.

This may not be a problem if there is no international element to the contract in question. However, the increase in international involvement in the Australian resources sector and the limitations on enforcing Australian judgments overseas in comparison to arbitration awards mean that arbitration is now becoming much more popular as a means of resolving disputes.

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This is where problems can arise. Few transactional lawyers have fingertip knowledge of all of the issues that need to be considered when confronted by the freedom of choice and flexibility that arbitration offers. This includes knowledge of the legislative framework in Australia for arbitration and of the various arbitral institutions and their rules. These issues need to be addressed at the outset while the contract is being drafted. It is difficult, if not impossible, to fix them once a dispute has arisen.

This chapter explains the main issues that can arise and the choices to be made. It is illustrative rather than comprehensive, but it should be sufficient to demonstrate the need for careful thought when drafting an arbitration agreement and highlight the key issues to consider.

4.2 Australian Arbitration Legislation

Whilst arbitration provides great flexibility, it is always subject to the mandatory requirements of the legislation that governs arbitration in the jurisdiction concerned. Indeed, there can be many different laws which could govern an arbitration. By way of example, in *Cape Lambert Resource Ltd v MCC Australia Sanjin Mining Pty Ltd*,[1] the Court of Appeal of the Supreme Court of Western Australia noted that five legal regimes might apply to the arbitration in that case at varying points in time. The contract was between Australian and Chinese parties. Any dispute was to be referred to the Singapore International Arbitration Centre (**SIAC**) and governed by the UNCITRAL arbitration rules. The five regimes that might apply were:

(a) the law governing the arbitration agreement, which was the law of Western Australia;
(b) the law governing the existence and proceedings of SIAC (lex arbitri), which was the law of Singapore;
(c) subject to the lex arbitri, the UNCITRAL Rules would govern the procedure of the arbitration;
(d) the substantive law of the dispute was the law of Western Australia; and
(e) the law governing the recognition and enforcement of any arbitral award would depend upon the jurisdiction in which the parties sought recognition, which in the circumstances, might have been expected to be Australia and/or China.

As far as Australian arbitration legislation is concerned, Australia's federal structure means there are a number of different regimes which govern arbitral proceedings. These are at the Federal level with the *International Arbitration Act 1974* (Cth) (**IAA**) and at State and Territory level, where each State and Territory

[1](2013) 298 ALR 666.

has its own arbitration legislation, for example, the *Commercial Arbitration Act 2012* (WA) (**CAA WA**).[2]

The State legislation has recently been updated and harmonised. The new State Acts are essentially identical and thus improve the consistency of arbitration legislation in Australia for domestic arbitrations.

Whilst the State Acts and the IAA are both based on the UNCITRAL Model Law,[3] there are important differences between them. These reflect the development of Australia's approach to arbitration since the IAA was introduced 40 years ago. The differences mean that it is essential to understand which regime will apply if there is a dispute under the contract.

For example, take a foreign investor investing in a mining project in Western Australia. The following permutations arise:

- if the foreign investor is a party to the contract, the IAA will apply to any arbitration (schedule 2 article 3(a) of the IAA);
- if the foreign investor incorporates a local subsidiary which then becomes the party to the contract:
  - one of the State Acts will apply if the parties agree that the arbitration should take place in Australia (schedule 2 article 3(a) of the IAA); but
  - if the arbitration is to take place overseas, the IAA applies even though the contract is between domestic parties (schedule 2 article 3(b) of the IAA).

Thus, what can often be last minute decisions about using a local subsidiary and the place of arbitration can affect the legislation that will govern the arbitration.

The IAA gave the UNCITRAL Model Law the force of law in Australia. Section 21 of the IAA states that where the Model Law applies to an arbitration, the law of a State or Territory does not apply to that arbitration. This gave the IAA precedence over the State Acts. It was an important provision before the recent amendments to the State Acts when they did not apply the Model Law. The section may have less practical effect now that the IAA and the State Acts are both based on the Model Law, but section 21 still means that the IAA cannot be excluded by specifying in an arbitration clause that the parties agree that a State Act should apply if the arbitration falls within the ambit of the Model Law.

The IAA does not appear to operate to the exclusion of all other legislation, Commonwealth or State, purporting to affect a party's right to refer a dispute to arbitration. In *HIH Casualty & General Insurance Ltd (In Liq) v Wallace*,[4] for

[2]The Western Australian CAA will be used as an example throughout this chapter. Equivalent legislation applies in all other States and Territories of Australia, except the Australian Capital Territory: *Commercial Arbitration Act 2010* (NSW), *Commercial Arbitration Act 2011* (SA), *Commercial Arbitration Act 2011* (Vic), *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), *Commercial Arbitration Act 2011* (Tas), *Commercial Arbitration Act 2013* (Qld). We refer to them together as the State Acts.

[3]The UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

[4](2006) 68 NSWLR 603.

example, Einstein J held that section 19 of the *Insurance Act 1902* (NSW), which allowed a party to choose between arbitration and litigation, rendered a contractual arbitration clause inoperative, and overrode the Court's power to order a stay of proceedings under section 7(2) of the IAA.

4.3 The Main Differences Between the IAA and the State Acts

4.3.1 Number of Arbitrators

While parties are free to determine the number of arbitrators, if they do not do so, the default number of arbitrators to be appointed under the IAA is three.[5] Under the State Acts, it is one.

These are default options. The parties are free to choose the numbers of arbitrators that they want. It is sensible for this to be dealt with in the arbitration clause.

One arbitrator might be a quicker and cheaper option, but if any dispute is likely to be large and complex, as they often are in the resources sector, then three might be a safer option. Some clauses stipulate different numbers of arbitrators depending on the value of the dispute. The wisdom of doing so is open to question as clauses of this type can simply provide the basis for a needless dispute over the size of the claim.

4.3.2 Imposing Conditions on the Grant of a Stay of Court Proceedings to Enforce the Arbitration Agreement

Under both section 7 of the IAA and the State Acts, (see for example section 8 of the CAA WA), the Court must stay Court proceedings commenced in breach of an arbitration agreement unless the arbitration agreement is null and void, inoperative or incapable of being performed. If the Court determines that one of those conditions exist, the Court has no discretion to refuse a stay.[6]

Under section 7 of the IAA, the Court has the ability to impose conditions upon the stay, such as, for example, the payment of security for the claim. The State Acts do not permit this.

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[5] *IAA* (*Schedule 2, art 10*).

[6] *Flakt Australia Ltd v Wilkens & Davies Construction Co Ltd* [1979] 2 NSWLR 243 (at 245, 250); *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 (at 350).

4.3.3 Right of Parties to Refer Preliminary Questions of Law to the Court

There is no right under the IAA for parties to refer preliminary questions of law to the Court.

The State Acts do permit referrals of questions of law but only in very limited circumstances. The parties must agree to the referral or the arbitrator must decide that it is necessary. Even then, the question cannot be referred without the Court also granting leave (see, for example, section 27J of the CAA WA).

4.3.4 Right to Appeal on a Point of Law

Under section 8 of the IAA, the Court can only refuse to enforce a foreign arbitral award on the limited grounds set out in that section. This follows Article 34 of the UNCITRAL Model Law. The grounds do not include a right to challenge an arbitration award on a point of law.

Under the State Acts (see, for example, section 34A of the CAA WA), there is a limited right of appeal on a point of law if the parties agree and the Court grants leave. The Court cannot grant leave unless it is satisfied that certain conditions have been met, including that the decision of the tribunal is obviously wrong, or the question is one of public importance and the decision is open to serious doubt. The Court must also determine whether, in all the circumstances, it is just and proper for the Court to hear the appeal.

In *Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd,*[7] the vendor to a contract of sale sought a declaration of the Court that the same section of the NSW State Act was beyond the legislative power of the Parliament. Stevenson J acknowledged that legislation could not remove the Court's jurisdiction to review the decision of a body exercising executive or judicial power for jurisdictional error. But His Honour held that, as the source of an arbitral tribunal's power is the arbitration agreement and the lex arbitri, tribunals are neither executive nor judicial bodies; reviews of their decisions do not form any part of the Court's supervisory jurisdiction. Accordingly, His Honour concluded that it had been within the NSW Parliament's power to remove the Court's inherent jurisdiction to review arbitral awards.

If a right of appeal is important, it is vital to agree this in the arbitration clause. Most arbitral rules do not permit an appeal. Indeed, the absence of an appeal is often one of the attractions of arbitration as a method of resolving disputes. It is highly unlikely that the parties will agree that there should be an appeal once a dispute has arisen and especially after the award has been made. The only realistic opportunity for agreeing a right of appeal is at the stage of drafting the arbitration clause.

[7] [2012] NSWSC 1306.

4.3.5 Opt Ins and Opt Outs

Both the IAA and the State Acts contain provisions which can apply to arbitrations depending on whether the parties opt in or out of them. Whilst these provisions are well intentioned and designed to try to produce a sensible framework for a typical arbitration, they are an unnecessary complication. This is because they may not be known to many of the lawyers who draft arbitration clauses.

The problem is exacerbated by the fact that the opt ins and opt outs are different under the IAA and the State Acts.

Confidentiality is an example of this. Many people assume that arbitrations are confidential. The true position is that they are private but not confidential. The position taken by the courts was that an arbitration agreement did not contain an implied term that the parties could not disclose documents exchanged in the process.[8] Under the IAA, the parties must opt in to make the arbitration confidential (section 23C to G). The default position introduced by the State Acts is more sensible, in that the arbitration is confidential unless the parties opt out of the relevant sections of the Acts (section 7E of the CAA WA).

Some of the opt ins in the IAA may be important in the resources sector. One in particular concerns consolidation of arbitrations. In a multi-faceted resources project, it is important to ensure that all of the contracts will work harmoniously if a dispute arises. This avoids the risk of inconsistent decisions and minimises the time and costs of dealing with multiple proceedings arising from the same facts.

Under the IAA, consolidation can only occur if the parties opt in to it (section 24). Under the State Acts, consolidation is provided for, without the requirement to opt in or out (section 27C of the CAA WA).

The effect of this is that whenever an arbitration agreement is being drafted, it is important to identify which Act will govern any arbitration and then make choices for each of the opt ins and outs provided in the relevant Act.

4.4 Choosing Rules and an Arbitral Institution

4.4.1 Arbitral Rules

It is important to differentiate between the procedural law of an arbitration and the procedural rules that govern it. Both the IAA and the State Acts set out elements of the procedure that would apply to arbitrations that fall within their ambit. It is not necessary for the parties to agree any more than this. They can agree other matters after a dispute has arisen. However, to avoid the difficulties and delay that this could cause, it is standard practice for an arbitration agreement to specify a set of more

[8] *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 128 ALR 391.

detailed rules that should apply. These rules are created and maintained by various arbitral institutions, such as ACICA, the ICC and SIAC. The institutions will also administer the arbitration and appoint arbitrators, if this is what the parties agree.

There is now significant competition between the various arbitral institutions. They all review their rules relatively regularly to ensure that they match their competitors. A recent example of this is the introduction by many of them of the ability of the institution to appoint an emergency arbitrator.[9]

Often an arbitral institution is nominated in the contract without sufficient thought being given to how it compares to its competitors. Again, this is something that should be considered. Some of the main issues to address in the resources context are as follows.

4.4.2 Language

The 'international' element of arbitration means that, will often, the parties speak different languages. Accordingly, it is advisable that the arbitration clause specifies the language of the arbitration. In choosing the language, the drafter should bear in mind the native languages of the parties and of the seat of arbitration, the language of any key documents and the language capabilities of the parties' legal representatives and the potential arbitrators. To avoid the risk that legal concepts or facts may be lost in translation, it is imperative that both arbitrator(s) and counsel speak the proposed language confidently.

4.4.3 Costs of Arbitration

The costs of the arbitration are a key issue to consider. For example, for arbitrations in the ICC, SIAC and HKIAC, the costs of the arbitration are calculated according to the amount in dispute, not by the time spent by the tribunal and the institution in dealing with the case. They can be substantial and may need to be paid at the outset of the dispute. This can come as a shock to some clients.

Whilst it might be said that the use of arbitral institutions gives rise to an additional layer of costs, the scale of the disputes that arise in the resources sector normally justifies the extra costs involved and the benefits that arise from using such institutions.

[9]See, for example, Article 29 and Appendix V of the ICC 2012 Arbitration Rules which permit a party in need of urgent interim measures that cannot await the constitution of an arbitral tribunal to apply for recourse to an emergency arbitrator.

4.4.4 How Arbitrators are to Be Appointed

The number of arbitrators and how they are to be appointed is another factor to consider. Will a dispute involve a significant amount of technical information? If so, would it be sensible to require one or more of the tribunal to have particular expertise or experience? Would the tribunal be better with an engineer or accountant on it?

Often, the range of disputes that could arise will be so wide that it is unwise to be too prescriptive when drafting the arbitration agreement, but it is something to consider.

The drafter should also consider the method by which the arbitral institution appoints arbitrators under the nominated rules. For example, the ACICA rules, provide that if three arbitrators are to be appointed, each party must choose one arbitrator. Those two arbitrators then choose the third who will chair the tribunal. The equivalent provisions in the ICC rules differ slightly. Under those provisions, unless the parties have agreed otherwise, it is the ICC which appoints the third arbitrator, not the two arbitrators appointed by the parties.

4.4.5 The Procedural Timetable

The rules generally set out a timetable for the initial stages of the arbitration and the exchange of written statements of case. There may also be target times within which the tribunal should deliver an award. Some institutions' websites include information about the average length of their arbitrations or the time within which they try to complete them.

For disputes in the resources sector, the differences between the various timetables and target times are unlikely to be significant. Target times are always subject to the circumstances of each case and it is common for time limits to be extended. The duration of an arbitration in the resources sector is more likely to depend on the scale and complexity of the matter and the availability of the parties and the tribunal.

4.4.6 Arbitral Procedure

The procedure provided by the various sets of rules is broadly similar. They all leave significant discretion to the parties and the tribunal to design a procedure that fits the needs of the case.

It is also possible to set out aspects of the procedure in the arbitration clause. This sometimes happens, for example, in relation to discovery where the parties set limits on how discovery is to proceed in order to try to control the costs that it might incur should a dispute arise.

4.4.7 Reviewing the Award Before It Is Issued

There can be differences between arbitral institutions over the extent to which they review draft awards before they are issued. There is an obvious benefit in any oversight of an award. This is therefore a factor to consider in choosing an institution. However, there will always be limits on the extent of the review given the institution's lack of detailed knowledge about the case in question.

4.5 Consolidation and Proportionate Liability

Most resource projects have multiple contracts with interlinked areas of work. When something goes wrong, it is possible for more than one party to be liable. It is inevitable that any respondent will look to blame others for what has happened.

However, arbitration is a private, contractual method of resolving disputes. It generally only involves the parties to the arbitration agreement. Other parties cannot be joined without their express agreement. This may not be easy to obtain once a dispute has arisen.

As already mentioned, it is important to ensure that the arbitration clauses in all of the relevant contracts in a resource project work well together. It is sensible to include an express power of consolidation to allow two or more arbitrations to be heard concurrently. As mentioned above, this power exists under the State Acts, but it is only an opt in under the IAA.

Proportionate liability is another crucial issue to consider in this context. State legislation such as the *Civil Liability Act 2002* (WA) (**CLA**) provides for proportionate liability. The Supreme Court of Western Australia held, in *Curtin University of Technology v Woods Bagot Pty Ltd*[10] (**Curtin University**), that the proportionate liability legislation does not automatically apply in arbitrations.

The Court reached this conclusion by following, with some reluctance, the judgment in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (**Leighton Contractors**).[11] In that case, the Full Court of the Supreme Court of South Australia was asked to determine whether an arbitrator had the jurisdiction to award the costs on a full indemnity basis pursuant to the previous domestic Act, the *Commercial Arbitration Act 1986* (SA) (**Superseded Act**). Section 22 of the Superseded Act provided that unless otherwise agreed in writing by the parties, "any question of law that arises for determination in the course of proceedings under the Agreement shall be determined *according to law*" [emphasis added]. The Full Court held that this meant according to the principles of the common law, rather than statute.

[10][2012] WASC 449.

[11](1996) 66 SASR 509.

In *Curtin University,* the defendant purported to rely on the proportionate liability provisions of Part 1F of the CLA to reduce its liability for the relevant losses to its proportionate share. His Honour Beech J noted that he would not depart from the precedent in *Leighton Contractors* unless he was convinced that the judgment was plainly wrong. The defendant had not made any submissions in support of that contention. His Honour said that, but for *Leighton Contractors*, he would not have interpreted "according to law" as referring solely to the common law, which would "appear to be a gloss on the words of the statute". However, in the absence of submissions demonstrating that the decision was plainly wrong, His Honour followed the approach taken in *Leighton Contractors*. His Honour also found that, as a matter of construction, the CLA's proportionate liability regime was intended to apply to court proceedings only.

On the basis of *Curtin University,* Part 1F only applies in an arbitration if the arbitration agreement expressly or impliedly allows for this. His Honour acknowledged that in many cases, it would not be difficult to imply such an agreement, no doubt recognising that many parties would be surprised to find the contrary.

This outcome may have been overridden by the introduction of the State Acts. In the new domestic arbitration legislation, the phrase "according to law" has been changed to "in accordance with such rules of law as are chosen by the parties as applicable to the substance of their dispute."

This puts the focus where it should be: on the arbitration agreement. However it also increases the importance of making it clear in the agreement that the tribunal can apply Australian statutory law in deciding the dispute.

4.6 Conclusion

We conclude by providing a short checklist of some of the important issues to consider when drafting an arbitration agreement in relation to a resources project:

(a) Take control of the arbitration legislation rather than becoming a victim of it. Know which Act applies and consider the opt outs and ins.
(b) Think carefully about the disputes that could arise in relation not just to the contract being drafted but the project as a whole. If there were a major incident, how many parties and contracts might it involve? Are consolidation and proportionate liability likely to be relevant?
(c) Make a conscious choice about the rules you select for the arbitration. Understand the fee structure of those rules.
(d) The number of arbitrators, place of arbitration and language of the arbitration are all important factors to consider. The latter two are particularly relevant if there is an international element to the contract or project.
(e) Decide on the extent that the court should be able to become involved in the arbitration. If you do want a right of appeal on a question of law, this should be in the arbitration agreement.

Chapter 5
The Enforcement of Dispute Resolution Agreements in the Resources Sector

Philip Evans

Abstract This chapter discusses the enforcement of arbitral awards in the resources sector through a discussion of three recent cases determined in Western Australia and Queensland. These decisions uphold the principle that parties will be required to conform to the dispute resolution clauses in agreements and courts will not be reluctant to imply terms into the dispute resolution clause where there are claims of unenforceability due to uncertainty. Additionally, these decisions hold that claims of futility arising from difficulties or failures with respect to compliance with either the mandatory negotiation or meditation procedures required as a condition precedent to arbitration, will generally be unsuccessful. At the same time tiered alternative dispute resolution clauses need to be drafted carefully in order to prevent lengthy and costly delays to the resolution of the dispute on the basis of the clause being deemed pathogenic and thus unenforceable.

5.1 Introduction

An arbitration agreement contained in a contract is a term like any other term and will be upheld by a court on the basis that, particularly with respect to commercial agreements, courts will enforce a freely agreed bargain and will not be subtle in finding reasons to set aside a bargain or to be seen as the destroyer of bargains.[1] As stated in *Travel Industries of Australia Pty Ltd v Effem Foods Pty Ltd*[2] it is trite to observe that parties ought to be bound by their freely negotiated contracts. Another unique feature of an arbitration clause in a contract is that it survives the breach, as

[1]See *Hillas v Arcos* (1932) LT 503. Similar statements relating to Australian resource sector agreements can be seen in the judgement of Ipp J in *Anaconda Nickel v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101 at 112–113.
[2](1992) 27 NSWLR 326. See also *Western Australia v Dimmer* (2000) 163 FLR 426.

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an alternate dispute resolution clause stands independent from the agreement in which it is found and future performance of the provisions of the clause will still be required by the parties as long as the wording of the clause is clear and unambiguous.[3] However, where the arbitration clauses are ambiguous, uncertain, or specify procedures, which prevent the handing down of an enforceable award or fails to give the arbitrator or tribunal the powers required to resolve the dispute the clause may be described as "pathological".[4] While the existence of an unclear, or at first sight uncertain clause, may not prevent ultimately the enforcement of the clause, as can be seen from the cases considered below, a determination by the courts on the application and enforceability of the clause may still result in costly delays.

Recently there have been three decisions in the Western Australian and Queensland Supreme Courts relating to disputes in resource sector contracts which uphold the principle that parties will be required to conform to the dispute resolution procedures in agreements and courts will now readily imply terms into the clauses where there are claims of uncertainty or futility with respect to negotiation or mediation procedures as conditions precedent to arbitration.

The cases to be considered are;

- *Cape Lambert Resources v MCC Australia Sanjin Mining Pty Ltd* [2012] WASC 228.
- *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* [2012] QSC 290
- *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10

5.2 Cape Lambert Resources v MCC Australia Sanjin Mining Pty Ltd [2012] WASC 228

Cape Lambert Resources Ltd (Cape Lambert) agreed to sell MCC Australia Sanjin Mining Pty Ltd (MCC), certain mining tenements and related assets. The sale agreement provided for payment of the assets by a deposit and three instalments with the final instalment being a payment of $80 million subject to specified conditions.[5]

A dispute arose between the parties over whether the final instalment was due and payable. Cape Lambert commenced proceedings by writ seeking both payment

[3]See *Heyman v Darwins* (1942) 1 ALL ER 337. Ferris v Palister (1994) 34 NSWLR 474; *Sanpine Pty Ltd v Koompahtoo Local Aboriginal Land Council & Anors* [2006] NSWCA 291 and *Codelfa Construction Pty. Ltd. v State Rail Authority of N.S.W.* (1982) 149 CLR 337.

[4]The term is attributed to Mr Frederick Eisemann a former secretary of the International Chamber of Commerce International Court of Arbitration. See "Avoid pathological Clauses. Be Consistent". http://blog.mylaw.net/avoid-pathological-arbitration-clauses-be-consistent (accessed on 5 May 2014).

[5]See paragraphs [1] and [2].

of the sum and a declaration that the amount was payable and an order enforcing payment. MCC responded by seeking a stay on Cape Lambert's action on the basis that the asset sale agreement (The ASA) and accompanying guarantee (The Guarantee) contained an arbitration agreement.[6] The dispute resolution provisions in the agreements were as follows;

"The Asset Sales Agreement (CL 16.2)

(a) Within ten business days, senior representatives from each party to meet in good faith, act reasonably and use best endeavours to resolve the dispute by joint discussions.
(b) Failing settlement by negotiation either party by notice may refer the dispute for resolution by mediation.
(c) Failing settlement by mediation either party may refer the dispute for final and binding resolution by arbitration."

The Guarantee ADR clause mirrored the procedures in the ASA. As can be seen, the above clauses were not time related and the failure of (b) & (c) to include reference to time was to subsequently become an issue in the application and enforcement of the ADR clause. The reference to acting in good faith in the context of negotiation is also contentious. In *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd.*[7] Giles J. noted;

> ... to adjourn or stay the proceedings so that Elizabeth Bay would be required to either sign an unknown agreement as an important step in the process of meditation or to commit itself to attempting in good faith to negotiate in good faith towards achieving a settlement of the dispute would require of Elizabeth Bay conduct of unacceptable uncertainty.[8]

The agreement required that the mediation was to be held at the Singapore Mediation Centre (SMC) under the SMC Mediation Centre Mediation Procedure.[9] The Arbitration was to be conducted at the Singapore Arbitration Centre (SAC) under the UNCITRAL Arbitration Rules.[10] The substantive law was to be the law of Western Australia.

5.2.1 Power to Stay Proceedings

MCC relied on section 53 of the *Commercial Arbitration Act 1985* (WA) (The CAA) to stay the proceedings that related to the issue of whether they were liable to pay

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[6]See section 53 of the *Commercial Arbitration Act* (WA) 1985 and section 7(1) of the *International Arbitration Amendment Act* (Cth) 2010.

[7](1995) 36 NSWLR 709.

[8]*Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*(1995) 36 NSWLR 709 at 716.

[9]Clause 16.2(c)(2).

[10]See www.uncitral.org/uncitral/en/uncitral_texts/…/2010Arbitration_rules.htm.

the disputed amount under the ASA. With respect to the supplication to stay the proceedings brought against MCC to enforce the Guarantee they relied on section 53 (CAA)[11] and section 7 of *the International Arbitration Act 2009* (Cth) (The IAA).[12]

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[11]**53. Power to stay court proceedings**

(1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied—

(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
(b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration,
(c) may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.

(2) An application under subsection (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance.
(3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court from another party to the agreement by reason that that other party takes proceedings in a court in respect of the matter agreed to be referred to arbitration by the arbitration agreement.

[12]INTERNATIONAL ARBITRATION ACT 1974—SECT 7

Enforcement of foreign arbitration agreements

(1) Where:

(a) 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;
(b) 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 country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;
(c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or
(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country; this section applies to the agreement.

(2) Subject to this Part, where:

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

With respect to the persuasive onus, Jacobs[13] comments, in part, that the defendant when applying for a stay under section 53(1) must prove:

(a) A valid and binding arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement;
(b) A dispute within the parameters of the arbitration agreement;
(c) An action in respect of the same dispute initiated by the plaintiff/respondent;.
(d) The criteria set out in section 51(b) have been satisfied; and
(e) All other preconditions to arbitration have been satisfied.

Jacobs comments further that these may be described as threshold issues and once these have been established, the burden shifts to the plaintiff/respondent to persuade the court that there are circumstances cogent enough to outweigh the *prima facie* case that has been made out by the applicant for a stay.[14]

5.2.2 The Issues with Respect to the Stay Application

The issues for the court with respect to the stay application may be summarised as follows;

(i) Were the dispute resolution procedures of the ASA and the Guarantee mandatory?
(ii) Was there a sufficient reason why the disputes between the parties should not be referred to arbitration?
(iii) Were the defendants ready, willing and able to do all things necessary to the proper conduct of an arbitration under both the ASA and the Guarantee?

There were a number of other issues arising from MCC's refusal to pay the disputed amount into an escrow account and whether the requirements of section 7 1AA were satisfied. One interesting issue was whether the legal relationship

(Footnote 12 continued)
on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.
(4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.
(5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

[13]See Jacobs Commercial Arbitration Law and Practice; Law Book Co Australia (2008) (50.130).

[14]See Jacobs*; Commercial Arbitration Law and Practice.* Law Book Co Australia (2008) (50.140).

between Cape Lambert and MCC constituted by the Guarantee, was considered commercial under Chinese national law. However for the purposes of this paper, only issues (i)–(iii) above will be discussed.

5.2.3 Were the Dispute Resolution Procedures Mandatory?

The issue was discussed in some detail in paragraphs [47] to [64] of the judgement in response to the plaintiff's contention that the use of the word "may" in the dispute resolution clauses in both the ASA and the Guarantee indicated that the dispute resolution clauses were facilitative and not mandatory. Put simply, the use of the word "may" merely created an option to arbitrate and a binding arbitration agreement for the purposes of section 53 of the CAA only took effect when either party exercised the option by electing to refer a dispute to arbitration.[15]

After an exhaustive consideration of the authorities, Corboy J determined that the dispute resolution clauses in the documents created a mandatory dispute resolution regime rather than an optional procedure that may be invoked by one or more of the parties.[16]

His honour referred to the decision in *PMT Partners v Australian National Parks*[17]:

> Disputes are not readily resolved if there are parallel proceedings permitting different outcomes. Nor are they resolved by procedures which can be set at nought if one party elects to pursue some other course of action …The change in language from "shall" in clause 45(a) to "may" in clause 45(b) and the following provides no reason for thinking that Clause 45 does not provide an exclusive regime for the resolution of disputes.

Consequently, the dispute resolution clauses in the ASA and Guarantee required the dispute to be resolved according to the procedures specified. Therefore, if the mediation was unsuccessful, the matter could be referred to arbitration by one or both of the parties. As mentioned earlier, for the purposes of this chapter it is not intended to discuss the issue of the proper construction of the Guarantee or the general meaning and effect of the Guarantee.[18]

The issue of mandatory referral where "may" instead of "shall" is used has also recently been considered in *Plenary Research Pty Ltd v Biosciences Research Centre Pty Ltd*.[19] While the issue in *Plenary Research* related to an extension of time dispute and the enforceability of an expert determination clause, the decision illustrates that courts will look for an interpretation that is not capricious or

[15] *Hammond v Wold* [1975] VR 108.

[16] *Cape Lambert Resources v MCC Australia Sanjin Mining Pty Ltd* [2012] WASC 228 at para 54.

[17] (1995) 184 CLR 301 at 311.

[18] These issues are discussed in detail in paras. [60] to [100] of the judgement.

[19] [2013] VSCA 217.

inconsistent with business efficacy. Whilst the word "may" was not obligatory regarding referral of the dispute to an ADR process, when one party elects to do so, the ADR procedures will apply.

5.2.4 Compliance with the Dispute Resolution Procedures

The issue here was whether the parties were ready willing and able to do all things necessary for the conduct of the arbitration. The chronology of significant events are succinctly stated in paragraph [101] (a) to (s) of the judgment.

Clause 16.2(c)(1) of the Agreement required the parties to meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions.[20] At the same time it is trite to say that what constitutes good faith (as earlier noted above), best endeavours and acting reasonable in the context of commercial dealings is nevertheless contentions and problematical.[21]

Corboy J noted that there was no evidence to suggest that the meetings were not conducted according to those requirements.[22] However the arrangements for the mediation appear to have been protracted with allegations and counter allegations for the reasons for delays.

5.2.5 Findings on the Application for a Stay Under S53 CAA

Corboy J again referred to Jacobs[23] in considering the factors to be considered relevant to the exercise of the court's discretion whether to grant a stay.[24]

His Honour noted that a stay has been occasionally refused on the ground that a court was the most appropriate forum for determination but decisions to that effect may embody a view about arbitration that is no longer relevant having regard to the importance as an effective means of resolving commercial disputes. In any event there was no reason why the disputes between the parties in this matter should not be resolved by arbitration as these disputes are of a kind that the parties must have had in mind when they initially agreed the dispute resolution procedures.[25]

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[20]For a discussion of good faith in Australian contract law, see Carter, John and Peden, Elisabeth, Good Faith in Australian Contract Law ; 19 *Journal of Contract Law* 156, 2003. Available at SSRN: http://ssrn.com/abstract=947352.

[21]See *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 104. Applied *in Australia Media Holdings v Telstra Corporation* (1998) 43 NSWLR 104) *and Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.

[22]See paragraph [102].

[23]See Jacobs at 50.20.

[24]See paragraph 114.

[25]See paragraph 114.

5.2.6 Principles from the Cape Lambert Resources Decision

Where the ADR clause is clear and unambiguous and the court is of the opinion that it was always the original intention of the parties to resolve any disputes in an alternative forum to litigation, the parties to the contract will be required to comply with the dispute resolution clause procedures and prevented from commencing litigation proceedings. Courts will give effect to an ADR clause which requires mediation or conciliation as a condition precedent to litigation[26] and it is trite to observe that parties ought to be bound by their freely negotiated contracts.[27]

As can be seen in the dispute resolution clause (16.2), with the exception of clause 16.2(a) of the Agreement, the procedures were not time-related. This decision shows that courts are willing to imply terms into the dispute resolution process where there is nevertheless some uncertainty or absence of time-related requirements and arguments based on the futility of compliance with the ADR clause are unlikely to be acceptable. Courts will readily enforce the provisions of the freely agreed bargain which has clearly contemplated arbitration as the agreed procedure. It is a well-established principle that uncertainty or vagueness will only invalidate a term of an agreement where a court cannot reasonably determine what the intention of the parties was at the time of entering into the agreement.[28]

At the same time, care should be taken in the drafting of ADR clauses to ensure the procedures are clear, specific and any continuum requirements are time-related. A failure to do so may result in the clause being unenforceable.[29] Finally, what constitutes good faith, reasonableness and best endeavours will be factually determined depending on the circumstances of each case.

5.3 Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd [2012] QSC 290

Whilst the default provisions in the ADR clause related to expert determination, rather than arbitration, the case is relevant in that similar issues as found in *Cape Lambert Resources* were also considered in the *Wambo Coal Pty Ltd* (Wambo) application for an order staying proceedings until Downer EDI Mining Pty Ltd (Downer) had complied with the dispute resolution procedure in the contract.

The contract between the parties required Downer to provide maintenance of plant and equipment services to Wambo. Under the terms of the Operation

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[26]See *Hooper Bailee Associated Ltd v Natcom Pty Ltd* (1992) 28 NSWLR 194.

[27]*Travel Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326. See also *Western Australia v Dimmer* (2000) 163 FLR 426.

[28]See *Hillas v Arcos Ltd* (1932) LT 503, *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429.

[29]See *WTE Co-Generation & Anor v RCR Energy Pty Ltd & Anor* (2013) VSC 314.

Agreement, payments were to go into a separate account and Downer was to draw down from this account in order to recoup the costs of any maintenance services provided. It was further provided in the Operation Agreement that if there was any money left in the account at the end of the agreement it would be divided equally between the parties.[30]

When it became obvious that there would be a surplus in the fund at the end of the contract, Wambo determined to make no further payments as it would be paying into a fund from which it could only receive half at the end of the contract. Downer subsequently pleaded that as a consequence of declining to make further payments, Wambo was in breach of the agreement.[31]

5.3.1 The Issues for the Court

The basis of Wambo's application for an order staying proceedings were[32]:

(a) Downer had not satisfied a condition precedent to its right to commence proceedings in that it failed to comply with the dispute resolution procedure (DRP)
(b) Alternatively the court should require Downer to comply with the provisions and stay proceedings until that occurs.

The application was opposed by Downer on the basis that[33]:

(a) The DRP was vague and uncertain and thus unenforceable,
(b) There was no point in staying proceedings, whether or not the DRP was enforceable as Wambo in discussions had been intransigent and unmoveable; and
(c) The procedures in the DRP were unlikely to resolve the dispute and it would be futile and wasteful for compliance to be required.

5.3.2 The Dispute Resolution Clause

The dispute resolution clause in clause 46 of the Operation Agreement (the Agreement) was in four sections. To assist in the understanding of the issues and subsequent discussion below, clause 46 has been reproduced in full.[34]

[30]See paragraph [4].
[31]See paragraph [5].
[32]See paragraph [1].
[33]See paragraph [2].
[34]The dispute resolution procedures are found in paragraph [6] of the judgement.

"**46.1 Condition precedent to start of proceedings**

If any dispute between the parties arises from this Contract (whether during the Term of, or after termination of, this Contract) (**Dispute**), the parties agree to resolve it in the manner set out in this clause, and a party may not commence court proceedings concerning the Dispute unless:

(a) the party starting proceedings has complied with this clause; or
(b) the party starting proceedings seeks urgent interlocutory relief; or
(c) another party has first started proceedings other than under this clause; or
(d) the Dispute has been referred to an Expert under clause 46.4 and the Expert has not made a decision within the 20 Business Day period specified in clause 46.7(a)(vii); or
(e) there is manifest error in the Expert's decision.

46.2 Notice of Dispute

Where a Dispute has arisen, a party claiming that a Dispute has arisen must notify each other party to the Dispute specifying the nature of the claim (**Dispute Notice**).

46.3 Resolution of Dispute by negotiation

(a) During the 5 Business Days after the date the Dispute Notice is given (or a longer period as the parties may agree in writing) each party must:

    (i) prepare, and exchange with the other parties, a brief statement setting out its own position on the Dispute and its reasons for adopting that position; and
    (ii) give to the other parties any information they may reasonably require to consider the issues relevant to the Dispute.

(b) Subject to clause 46.3(d), within 5 Business Days after the date the statements are due to be exchanged under clause 46.3(a), the PCG1 will hold a meeting and the parties will attempt to resolve the Dispute. If the Dispute is not resolved by the PCG 5 Business Days after the meeting, the BRG2 must meet and use its best endeavours to resolve the Dispute.
(c) Subject to clause 46.3(d), if the BRG is unable to resolve the Dispute within 10 Business Days after the meeting of the BRG, the chief executive officers of each party must meet within 10 Business Days and use their best endeavours to resolve the Dispute, each having full authority to do so.
(d) If the parties have already attempted to resolve the matter the subject of the Dispute Notice under clauses 9.3, 23.2, 24.2(c) or 37.6, clause 46.3(b) and (c) will not apply and the chief executive officers of each party must meet within 10 Business Days after the date the statements are due to be exchanged under clause 46.3(a).
(e) In the absence of agreement between the parties as to the time and venue for any meeting, the meeting must take place at the offices of the Law Society of New South Wales at 9.00 a.m. on the last Business Day of the time period referred to in clause 46.3(b) (**Meeting Date**).

46.4 Resolution of issues by Expert

If the Dispute is not resolved under clause 46.3:

(a) for a Claim of less than $1 million (in any 1 year) or about fixing a CSF Target, either party may during the next 5 Business Days after the meeting referred to in clause 46.3(c)or 46.3(d) give a notice (**Expert Determination Notice**) to the other parties, requiring the Dispute to be referred to an Expert in the relevant discipline for determination; or

(b) for a Claim of $1 million or more (in any one year) either party may refer the matter to litigation."

As can be seen its form and content differed from the typical dispute resolution clause found for example in Australian Standard General Conditions of Contract[35] by virtue of its express reference to a condition precedent provision and a default provision requiring expert determination. Analogous with the good faith provision in *Cape Lambert* there was also a "best endeavours" negotiation clause.

Note clause 46.4 *Resolution of Issues by Expert* was dependent upon the amount of the claim; that is, being less than one million. What is particularly relevant is the absence in the clause of any procedures relating to the process for the appointment of the expert or any rules for the determination. There have been a number of instances where ADR clauses have been held to be unenforceable as a consequence of the absence of appointment procedures or inconsistencies with respect to relevant rules for the conduct of the process.[36]

Martin J noted that there was no relevant difference between an expert determination clause and any other dispute resolution clause.[37] Further, it was noted, there was no basis for treating this type of dispute resolution procedure any differently from an arbitration clause or an expert determination clause.

His Honour, referring to the decision *in Dobbs v National Bank of Australasia Ltd*[38] commented in relation to the dispute resolution clause;

> It is a product of the parties' agreement and it has never been the policy of the law to discourage the parties from resolving their differences in this way.[39]

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[35]See General Conditions of Contract; AS124-1992 and AS 4000-1997.

[36]See State of *NSW v Banabelle Electrical Pty Ltd* (2002) NSWSC 178; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 CLR 236; *Heart Research Institute Ltd v Psiron Ltd* (2002) NSWLR 646.

[37]The distinction has been considered in a number of cases including Forestry Corporation of New Zealand Ltd (In Receivership) v Attorney-General [2003] 3 NZLR 328, Age Old Builders Pty Ltd v Swintons Ltd [2003] VSC 307, and North build Constructions Pty Ltd v Discovery Beach Project Pty Ltd [2010] QSC 97. For a discussion of the enforcement of ADR clauses generally see "Expert Determination and the enforcement of ADR Generally" by Tomas Kennedy-Grant QC, presented to the Arbitrators and Mediators Institute of New Zealand Inc./Institute of Arbitrators and Mediators Australia Conference held in Christchurch New Zealand on 5–7 August 2010.

[38](1935) 53 CLR 643 @ 652.

[39]See *also Straits Exploration (Australia) Pty Ltd and Anor v Murchison United NL & Anor* (2005) WASCA 241.

5.3.3 Were the Procedures Uncertain?

As can be seen, the procedures did not allow for the contingency that the required representatives were incapable of meeting within the specified time. However, His Honour held that the lack of any mechanism to deal with the impossibility of holding a meeting within time does not render the procedure uncertain and again[40] referred to the principle determined by Wheeler JA in *Straits Exploration*:

> The tendency of recent authority is clearly in favour of construing such contracts, where possible in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the courts.[41]

5.3.4 The Issue of Futility of Further Meetings

Downer additionally argued that it would be futile for the meetings required by the dispute resolution procedures to be held because whilst a number of meetings had been held by senior persons, none of the meetings or discussions had resolved the issues in dispute. At the same time, Wambo submitted it remained ready and willing to participate in the process.

Objectively it can be seen that the intent of clause 46.4 was to allow specifically for the determination by an expert where the dispute could not be resolved by agreement between the parties as per clause 46.3 of the dispute resolution clause. His Honour noted that the issue was one of "participation" rather than "co-operation" as stated by Giles J in *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd*[42]:

> What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come.

Consequently, the proceedings were stayed pending compliance with the dispute resolution procedures contained in clause 46 of the Operation Agreement.

5.3.5 Principles for the Downer EDI Decision

As with the decision in *Cape Lambert*, this decision shows that courts are increasingly willing to imply terms into the dispute resolution process where there

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[40] At paragraph 21.

[41] (2005) WASCA 241 at para [14].

[42] (1992) 28 NSWLR 194 at 206.

is nevertheless some uncertainty or absence of time-related requirements and arguments based on the futility of compliance with the ADR clause are now unlikely to be successful.

Again, where the court objectively determines that the ADR clause is clear and unambiguous and the court is of the opinion that it was always the original intention of the parties to resolve any disputes in an alternative forum to litigation, the parties to the contract will be required to comply with the dispute resolution clause procedures and prevented from commencing litigation proceedings.

5.4 Pipeline Services WA Pty Ltd V ATCO Gas Australia Pty Ltd [2014] WASC 10

The facts relevant to ATCO's application for a stay under section 53 of the *Commercial Arbitration Act (WA)* 1985 (The CAA) are set out in paragraphs [5] to [21] of the decision but succinctly are as follows.

In 2012 ATCO was involved in the extension of an underground gas pipeline network in Perth's northern suburbs. ATCO called for tenders in connection with the work and the tender submitted by Pipeline was accepted. Subsequently, the parties then entered into a written agreement. Later Pipeline alleged a breach of the agreement and claimed damages for the breach together with an order for the bank guarantees as required by the agreement.

ATCO then applied for a stay of proceedings pursuant to section 53 of the CAA. It sought orders that the proceedings be stayed until completion of the dispute resolution procedures under clause 25 of the Agreement and, further, that the proceedings be stayed until completion of an arbitration of any outstanding disputes not able to be resolved through the dispute resolution procedures under clause 25 of the agreement.[43]

The dispute resolution clause in the agreement is produced in its entirety as follows[44]:

"**25. Dispute Resolution**

25.1 General

(a) Any party may, by written notice, notify the other of a dispute.
(b) Unless a party has complied with this Clause 25 that party may not commence court proceedings relating to any dispute under this Agreement, except where that party seeks urgent interlocutory relief.
(c) the Contractor [Pipeline] shall, if reasonably possible, continue to provide the Works during the Arbitration proceedings, and no payment due or payable by

[43]At paragraph 25.

[44]At paragraph 9.

the Company in respect of such Work shall, unless it is the subject matter of such proceedings, be withheld on account only of proceedings.

(d) Nothing in this Clause 25 affects a party's rights to terminate this Agreement.

25.2 Escalation to Contract Manager

(a) Any outstanding dispute must initially be put forward to the Contract Manager for resolution.

(b) If a party considers that the matter is urgent a special meeting may be convened by two business day's written notice, identifying the nature of the dispute, to the other party. [Philip: is this correct: surely a meeting cannot be convened by two business days!)

25.3 Escalation to Chief Executive Officers

If a resolution of the dispute acceptable to both parties cannot be achieved at the special meeting required in Clause 25.2, the dispute will be escalated to the respective Chief Executive Officers (or their delegates) of the parties, who must endeavour to resolve the dispute.

25.4 Escalation to Arbitration

(a) If the dispute is still to be resolved within two weeks of having to be referred to the Chief Executive Officers then either party may by notice to the other party refer the dispute to arbitration in accordance with the provisions of the *Commercial Arbitration Act 1985* (WA) (the 'Commercial Arbitration Act'), and for the purposes of the Commercial Arbitration Act, the parties agree that this Agreement is an arbitration agreement. [Philip: the beginning of this paragraph may be wrong; please check]

(b) Upon every or such reference, the cost of and incidental to the reference and award respectively shall be in the discretion of the Arbitrator, who may determine the amount thereof or direct the same to be taxed as between solicitor and client, or as between party and party, and shall direct by whom to whom, and in what manner the same shall be borne and paid. [I think this paragraph may not be correct, please check]

(c) The arbitration shall be conducted in accordance with the Commercial Arbitration Act except that:

  (i) The Arbitrator shall observe the rules of natural justice;

  (ii) A party may be represented by a qualified legal practitioner or other representative;

  (iii) The Arbitrator shall not have the power conferred by Sections 25 and 27 of the Commercial Arbitrator [sic] Act;

  (iv) The Arbitrator shall include in the arbitration award the findings on material questions of law and of fact, including references to the evidence on which the findings of fact were based; and

  (v) The parties consent to an appeal to the Supreme Court of Western Australia on any question of law arising in the course of the arbitration or out of the arbitration award."

ATCO asserted that at the time of commencement of proceedings by Pipeline, it was ready and willing to attend any special meetings convened and to refer any unresolved disputes to the respective Chief Officers of the parties as per clause 25.3 of the Agreement. ATCO further deposed that it was ready and willing to do what was necessary for the conduct of an arbitration.[45]

A complicating issue arose through the adoption in Western Australia of the *Commercial Arbitration Act 2012* on 7 August 2013.[46] This was unknown to both the court and the parties at the time of a hearing held on 14 August 2013. Section 44 of the new Act repealed the 1985 Act. The specific issue arising being, whether the new Act was to act retrospectively in that it affected the rights and obligations of ATCO with respect to the disputes in question,[47] as the procedures governing a stay of proceedings relating to disputes which are the subject of an arbitration agreement differ between the 1985 and 2012 Acts.[48]

5.4.1 The Issues for Determination

Consequently the issues for the determination by the court were[49]:

1. "Should ATCO's application for a stay of proceedings be dismissed on the ground that it was not made under the 2012 Act, or should it be treated as an application for a referral to arbitration under s 8 of that Act?
2. Does s 8 of the 2012 Act apply, and in particular:
   (a) did the arbitration agreement in cl 25 survive termination of the Agreement for the performance of the works;
   (b) is cl 25 void for uncertainty;
   (c) has ATCO waived its entitlement to insist upon compliance with cl 25;
   (d) is the dispute between the parties the subject of the legal proceedings capable of being resolved by arbitration; and
   (e) is ATCO precluded from requesting a referral under s 8 because it has submitted a statement on the substance of the dispute before requesting such referral?"

For the purposes of this Chapter issues 1 and 2 (a) to (d0 will be discussed.

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[45]At paragraph 26.

[46]Western Australia *Government Gazette* No 142 (6 August 2013) 3677).

[47]At paragraph 29.

[48]At paragraph 32. Section 53 of the 1985 Act provides the court with a discretion with respect to a stay however section 8 of the 2012 Act states in part that the court must refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed and further where an action has been brought, arbitral proceedings may be commenced or continued and an award made while the issue is before the court.

[49]At paragraph 33.

5.4.2 Dismissal of the Summons

Pipeline submitted that the ATCO summons be dismissed since ATCO was seeking relief under the 1985 Act however since August 2013 the provisions of the 2012 Act applied thus requiring ATCO to make a fresh application under the provisions of the 2012 Act. This was rejected by the court since Pipeline's contention ignored the section of the ATCO applications which sought a stay of proceedings in the inherent jurisdiction of the Court.[50] Further Pipeline's contention was in conflict with the objectives and procedures of the Court and with the objects of the 2012 Act which requires the facilitation of "the fair and final resolution of commercial disputes by impartial arbitration tribunals without necessary delay or expense".[51]

With respect to the issue of whether clause 25 survived the termination of the Agreement, the Court rejected Pipeline's contention that the arbitration clause did not survive the termination of the Agreement for the performance of the works. The reasons are discussed at length in the judgement.[52] The starting premise however was that:

> an arbitration agreement is generally considered to be a contract independent of the underlying contract in which it is contained, and for that reason in the absence of evidence of a contrary intention of the parties, evident in the language that they have used, survives termination of the underlying contract.[53]

Further it was clear from the express wording in clauses 26.14 and 25 that there was nothing to suggest that parties did not intend that the arbitration clause would not survive termination.

5.4.3 Uncertainty in Relation to the Dispute Resolution Procedures

Pipeline contended that clause 25 was void for uncertainty on a number of grounds.[54] These included;

(a) a lack of clarity with respect to the notice of dispute; and
(b) what was required in order to enable a dispute to be "put forward" to the Contract Manager; and

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[50]At Paragraph 35.

[51]Section 1C, *Commercial Arbitration Act 2012* (WA).

[52]See paragraphs 41 to 53.

[53]See paragraph 42. See also *Ferris v Plaister* (1994) 34 NSWLR 474, *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, *Heyman v Darwins Ltd* [1942] AC 356, *Rizhao Steel Holdings Group v Koolan Iron Ore* [2012]WASCA50.

[54]Paragraph 54 items (a) to (e) inclusive.

(c) the reference to the Chief Executive Officers having to "endeavour" to resolve the dispute.

Additionally, the fact that clause 25.2 does not mandate the convening of a special meeting, suggests that escalation to the Chief Executive Officer is conditional upon a special meeting being convened and finally that there is a provision in clause 25.4 that either party "may" refer the matter to arbitration.

In rejecting the Pipeline submissions Martin CJ referred to the decision in *Hammond v Van Lam Ltd*[55] stating;

> It is well established that a construction which renders a commercial agreement certain is generally to be preferred to one which does not.

With respect to uncertainty in relation to dispute resolution clauses generally, His Honour referred to a number of authorities with respect to established principles and the application of these principles.[56]

It was held that on plain and ordinary or natural meanings of the expressions used in the words in contention, they were sufficiently clear to give effect to clause 25.[57]

Martin CJ also rejected Pipeline's contention that clause 25.4 was uncertain because it provides a party "may" refer a dispute to arbitration. His Honour referred to the decision in *ABB Power Plants Ltd v Electricity Commissioner of NSW t/as Pacific Power*[58] commenting that there was no uncertainty with respect to the fact that both parties agreed to have the option to withdraw any claim from the dispute resolution procedures should they choose to do so. Additionally with respect to the construction and effect of clause 25.4, there was no uncertainty that the parties were given the option of referring the dispute to arbitration.

5.4.4 The Issue of ATCO Waiving Its Entitlement to Insist upon Compliance with Clause 25

Pipeline submitted that the failure of ATCO to invoke clause 25, in view of the threat to commence proceedings by Pipeline, constituted a deliberate decision not to enforce its rights under clause 25.[59] His Honour approached the issue from a consideration of waiver in what he described as both a "weaker" and "stronger" sense.

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[55][1972] 2 NSWLR 16. See also *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* [1968] HCA 8.

[56]See paragraphs 56 to 64.

[57]See paragraphs 60 and 61; 64 and 65.

[58](1995) 35 NSWLR 596.

[59]At paragraph 71.

His Honour described waiver in the "weaker" sense as arising from the "non-insistence upon a right either by choice or default".[60] However based upon the evidence, it was clear that ATCO, who was not the claimant in this dispute, did not intend to commence legal proceedings.

Pipeline further submitted that ATCO's conduct constituted waiver in the "stronger" sense as a consequence of not invoking clause 25 in the knowledge that Pipeline was threatening to commence proceedings. Pipeline argued that this should be taken as a deliberate decision not to insist on its legal rights under clause 25. It was held that this contention, however, was not supported by the facts.[61]

5.4.5 Was the Dispute Capable of Being Resolved by Arbitration?

Pipeline also contended that the dispute was not a matter which could be the subject of the arbitration agreement contained in clause 25. His Honour held that wider language could have perhaps been used to describe the dispute falling within the terms.[62] However, the language used was clearly wide enough to include the matter which was before the court.

5.5 Conclusion

These decisions indicate that courts will not be subtle in allowing commercial parties to overturn the freely agreed terms of the bargain and will where possible, imply terms to enforce the dispute resolution procedures despite claims of uncertainty or futility. The decisions also restate the well-established principle of common law that the dispute resolution clause survives the termination of the contract.

Where a dispute resolution clause uses terms such as "may", rather than "shall", this can still constitute a mandatory referral for determination under the agreed method of dispute resolution. Further, where the dispute resolution clause refers to alternative methods to be selected by the parties, the clause should clearly specify the procedures to be followed (as conditions precedent).

The cases also illustrate the problems and consequential costly delays which may result from the interpretation, application and enforceability of ad hoc dispute

[60]See paragraph [70]; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 457.

[61]See paragraphs 71 to 74.

[62]The language of clause 25 referred to "any dispute under this Agreement." His Honour suggested that wider language could have been used, for example "any dispute arising from or in any way connected or associated with the Agreement or the subject matter of the Agreement."

resolution clauses. Tiered or multi-staged ADR clauses also need to be drafted clearly in order to prevent the possibility of being declared pathological and unenforceable.

Chapter 6
Arbitral Law Reform in Australia: What Are the Signs of Progress to Date?

Peter Megens and Andrea Stauber

Abstract Arbitration is an essential tool for enforcing resources and commodities contracts. Without it Australia's international trade in resources would be vastly more complex and less efficient. With the revised domestic Commercial Arbitration Acts, and the updated International Arbitration Act, Australia now has a newly enhanced arbitration legislative regime which accords with international best practice. Whether it will actually deliver significant benefits to the resources industry will largely depend on how it is interpreted by the courts. Early signs are promising but there is some way to go yet. Even so, Australia appears to be keeping ahead of some of its neighbours. This chapter briefly surveys and discusses some recent judicial trends.

6.1 Introduction

Australia is a trading nation. Its prosperity depends largely on the sale of our natural resources to the rest of the world. This involves contracting with international entities and other states that purchase those resources. Therefore, the success of Australia's trade is crucially underpinned by our means to rely on and enforce our contracts, be it in the courts or before arbitral tribunals, and the means available to enforce the court judgments or arbitral awards resulting from those mechanisms. Without the ability to enforce our contracts, we are very much dependent on the goodwill, rather than the legal obligation, of our many trading partners.

Court judgments and arbitral awards must necessarily be enforced in jurisdictions where the debtor trading party has assets. This may not always be in Australia,

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and may therefore require enforcement proceedings in the courts of foreign and unfamiliar legal systems. This may raise concerns about impartiality, corruption, inefficiency, and unpredictability in outcome.

The ability to enforce court judgments in other jurisdictions is often not a certainty. Typically, judgments are difficult to enforce in other countries unless there are reciprocal enforcement treaties in place between the relevant states—something which is unfortunately still rare at international level.[1] This is where international arbitration has the advantage. It provides a mechanism for parties engaged in cross-border trade to settle their disputes by way of private international arbitration before qualified and experienced independent arbitrators, who generally produce impartial, reasoned and binding awards in a more timely manner than could otherwise be expected from the courts in various countries. Further, as a result of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (referred to as the "**New York Convention**"), arbitral awards are enforceable in 154 signatory countries.[2] For example, a successful claimant may obtain an arbitral award in Australia against an Indian counter-party, who then refuses to comply with the tribunal's orders to pay. The claimant is not limited to enforcing the award in Australia, but can choose to bring enforcement proceedings in India—or in any of the other 152 signatory countries in which the Indian debtor may have assets. This offers greater flexibility and ability to enforce in a much greater number of jurisdictions, thereby increasing the likelihood of being able to enforce an arbitral award and getting paid.[3]

The importance of international arbitration in international trade is well recognised. Speaking on the 40th anniversary of the conclusion of the New York Convention, the then Secretary General of the United Nations, Kofi Annan, stated that "International trade thrives on the rule of law: without it parties are often reluctant to enter into cross-border commercial transactions or make international investments."[4]

It is the thesis of the authors of this chapter that a lot has been accomplished to adopt world's best practice in arbitration law in Australia, but that there is still some way to go. Nevertheless, the trend is overwhelmingly in the right direction.

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[1]E.g., Australia is party to a bilateral treaty with the United Kingdom of Great Britain and Northern Ireland for the *Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* 1994, but is not party, for example, to the multi-lateral treaty on the *Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* 1971.

[2]For a current list of contracting states, see http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.

[3]Enforcement of international arbitral awards is by no means a perfect system, as will be addressed further below, but by and large it is effective and becoming more so in certain countries.

[4]Annan, Kofi, 'Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration', *Enforcing Arbitration Awards under the New York Convention, Experience and Prospects, Papers presented at "The New York Convention Day", 10 June 1998*, United Nations Publication, New York (1999), 1–3, at 2.

6.2 Australia's Arbitration Law

The *International Arbitration Act 1974* (Commonwealth) (the "**IAA**") gives effect to the New York Convention in Australia. In addition, it adopts the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law on International Commercial Arbitration ("**Model Law**") as the primary arbitral law that governs the conduct of international arbitrations taking place in Australia.[5] The Model Law is currently international best practice in arbitral law and procedure and is a scheme which has been adopted by many of our trading partners.

The various Australian States and Territories have each passed their own individual Commercial Arbitration Acts (the "**CAAs**"). The CAAs are part of a uniform scheme and are intended to be the same in each State and Territory. They adopt the Model Law into Australia's domestic regime and regulate domestic arbitrations in Australia. Prior to the introduction of the new CAAs in 2010,[6] there was a uniform domestic scheme based on the State and Territory Commercial Arbitration Acts which had largely been implemented in the 1980s (the "**old CAAs**").

6.3 Arbitral Law Reform in Australia

Immediately following the Global Financial Crisis, a major Australian mining house experienced defaults in over $1 billion worth of commodity contracts. Many of those defaults became the subject of international arbitration proceedings which sought to enforce commodity contracts with subsequent enforcement proceedings throughout the world. Without that mechanism, the mining house in question would have been forced to litigate in the plethora of local courts of its contractual counterparties or in Australia. Many of those proceedings would have been unsuccessful, for reasons which had nothing to do with the merits of the claim, or would still be languishing in those courts.

It is in the interests of Australian resources companies for there to be a robust international arbitration system providing ready remedies in the event of contractual default by a counterparty. However, Australia can hardly demand this of its trading partners unless it is prepared to give the same in return; we can only expect to get as good as we give. This is one of the reasons why arbitral law reform in Australia, especially at the international level, is so important.

We should not, however, overlook the importance of the domestic arbitration scene. It can also provide a robust, independent and speedier alternative to court processes before an expert tribunal with experience in the industry. The same arbitrators often appear in both domestic and international matters. Australia needs

[5]It also adopts the ICSID Convention but that Convention is beyond the scope of this discussion.

[6]They were in operation throughout Australia at the time of writing with the exception of the Australian Capital Territory.

to have strong and complementary arbitral law at both the domestic and international level. The 2010 reforms to Australia's arbitration law are crucial to achieving this.

As Mr. Robert McClelland, the then Attorney-General for Australia, said in his Second Reading speech when proposing the amendments to the IAA:

> Over time, international arbitration has developed as a practical, efficient and well-established method of settling commercial disputes without resorting to national courts. Arbitration is typically faster, less formal and more tailored to the particular dispute than court proceedings whilst at the same time retaining the benefits of impartial expert adjudication. Arbitral awards are also more readily enforceable around the world than are judgements of national courts. Finally, arbitration is a method of dispute resolution that is chosen and controlled quite frequently by the parties. This helps the parties to preserve their commercial relationship and resolve their dispute in a manner that suits their needs and is more likely to preserve their ongoing relationship.[7]

Australia's Federal and State laws, namely the IAA and the CAAs, have undergone progressive reform since 2010. One of the key aims of that reform process was better integration and assimilation of the Federal and State legislation, to allow Australia to maintain a solid and consistent approach to commercial arbitration and to develop its laws in line with international best practice. To this end, the Federal Court and the State and Territory Supreme Courts now have equal jurisdiction to hear matters arising under the IAA in relation to international arbitration matters in Australia. The 2010 reforms also aimed to address a number of anomalies that had arisen within Australian arbitration practice. Some examples can readily be given.

Prior to the reforms, there was the possibility that an international arbitration seated in Australia or having a hearing venue in Australia might be regulated concurrently by the international and domestic regime. In *American Diagnostica Inc v Gradipore Ltd*,[8] Giles CJ of the Supreme Court of New South Wales held that international commercial arbitration in Australia could continue to be regulated by State or Territory legislation even while the arbitration might be under the IAA. Both regimes could therefore apply to disputes which are the subject of international arbitration. This raised the prospect, for example, of two avenues of appeal against one award—under both the international and the domestic regimes.

In *Resort Condominiums International Inc v Bolwell*,[9] the Supreme Court of Queensland accepted the suggestion that the Court retained a residual discretion in relation to enforcement applications to refuse enforcement on grounds which were in addition to and wider than the narrow grounds under Article V of the New York Convention. In *Corvetina Technology Ltd v Clough Engineering Ltd*,[10] the Supreme Court of New South Wales, in dealing with an application to enforce an

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[7]Commonwealth, *Parliamentary Debates House of Representatives*, *25 November 2009*, Second Reading speech: International Arbitration Amendment Bill 2009, 12790 (*Robert McClelland*).

[8]*American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312.

[9]*Resort Condominiums International Inc v Bolwell* (1995) 1 Qd R 406; (1993) ALR 655.

[10]*Corvetina Technology Ltd v Clough Engineering Ltd* (2004) NSWSC 700.

award under section 8 of the IAA, described the discretion as conferred on the Court by the public policy ground under section 8(7)(b) of the IAA as "wide" and also opined that there may be, in addition, a general discretion to refuse to enforce a foreign award.

Furthermore, section 21 of the pre-amendment IAA effectively provided that parties could opt-out of the Model Law to the extent that it had been adopted by that Act. The section provided as follows:

> Section 21—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.

In *Eisenwerk v Australian Granites Ltd*[11] the Queensland Court of Appeal held that by adopting the International Chamber of Commerce Rules for their arbitration, the parties had opted out of the Model Law. This interpretation was widely seen as unsatisfactory because parties nominating either the International Chamber of Commerce Rules or the Australian Centre for International Commercial Arbitration Rules or any other set of institutional rules, all of which are procedural rules, would then be taken to have opted-out of the Model Law in its entirety and be unable to pursue certain avenues of relief or assistance provided for in the Model Law.[12] The decision was widely criticised. After all, Article 19 of the Model Law expressly contemplates the parties determining the rules of procedure. It provides as follows:

> Article 19(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.

Why should the parties' choice of their own rules of procedure have the effect of contracting out of the benefits of the Model Law which otherwise might apply? In fact, we would go so far as to say that most parties who were choosing their own procedural rules would be surprised to hear that in doing so, they were effectively abandoning the Model Law provisions.

Despite the strident criticism which had been levelled at the *Eisenwerk* decision, when presented with an opportunity of overruling the case, the Queensland Court of Appeal in *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS*[13] declined to do so. Rather, the learned judges distinguished *Eisenwerk* by noting that there were significant differences between the ICC Rules, (which had been applicable in *Eisenwerk*) and the UNCITRAL Rules that were under consideration in the current case. So if one chose the ICC Rules, one may be opting out of the Model Law but if one chose the UNCITRAL Rules, one was not opting out of the Model Law. On any view of matters, this is a rather peculiar result.

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[11] *Eisenwerk v Australian Granites Ltd* (2001) 1 Qld R 461.

[12] Revised Explanatory Memorandum, International Arbitration Amendment Bill 2010 (Cth), 15.

[13] *Wagners Nouvelle Caledonie SarlvVale Inco Nouvelle Caledonie SAS* (2010) QCA 219.

No such distinction was discerned by the learned judge in *Cargill International SA v Peabody Australia Mining Ltd*,[14] who held that *Eisenwerk* was wrong in principle and that adoption of the ICC Rules does not amount to an implied agreement to opt-out of the Model Law. Thus a conflict arose between the NSW and Queensland decisions. If your international arbitral tribunal sat in NSW, it could operate under the ICC Rules and the Model Law, but that was not necessarily the case in Queensland, where the adoption of the ICC Rules meant an exclusion of the Model Law. Again, this represented an even more peculiar result.

These are only some of the problems which existed with the pre-amendment IAA, and serve to highlight that it was certainly time for a review. In addition, the old CAAs were seen to be out of date and somewhat out of step with international best practice. They certainly permitted what many thought was an excessively high level of judicial intervention. The decision was made to adopt the Model Law as the basis for the new uniform State CAAs.

The amendments made to both the IAA and the CAAs in 2010 are significant, and best illustrated by way of a few examples.

The *American Diagnostica Inc v Gradipore Ltd* problem was squarely addressed by the reforms. The amendments to the IAA made it clear, in a new section 21, that the State and Federal laws could not both apply to the same arbitration. It provides:

> Section 21—if the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.[15]

The amendments to the IAA also dealt with the issue raised in *Resort Condominiums International* and *Corvetina Technology* by providing in section 8 (3A) that "The court may only refuse to enforce the foreign award in circumstances mentioned in subsections (5) and (7)." In short, there was no residual discretion reserved to a court, other than as set out in the IAA.

The *Eisenwerk* problem was solved by repealing the old section 21 and as the Explanatory Memorandum made clear: "Consequently, while the parties will continue to have freedom to choose both the procedures and applicable substantive law, they will not be free to oust the Model Law as the applicable arbitral law."[16] A mere choice of procedural rules would no longer oust the Model Law.

The States' old CAAs were completely reformed by the adoption of new CAAs, based on the Model Law, and in a fashion which was complimentary to the IAA.

But reform of the statutory regime is only one part of the equation. The other part is the effect which is given to the regime by the courts. For instance, in *Corvetina Technology Ltd v Clough Engineering Ltd* the learned trial judge, when considering the public policy ground for refusal to enforce an international arbitral award, noted that in his view he had a wide discretion to refuse to enforce a foreign award:

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[14]*Cargill International SA v Peabody Australia Mining Ltd* (2010) NSW SC 887.

[15]*International Arbitration Act 1974* (Cth) s 21.

[16]Explanatory Memorandum, International Arbitration Amendment Bill 2010 (Cth), [112].

> The very point of provisions such as section 8(7)(b) is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award. In some cases the enquiry that it requires will be limited and will not involve detailed examination of factual issues. In other cases the enquiry may involve detailed examination of factual issues … There is, as the cases have recognised, a balancing consideration. On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy.[17]

Such views, which in the authors' opinions were incorrect even if given their widest interpretation at that time, if carried forward to the new Federal and State statutory regime, would do much to undermine the reforms. Basically, if the courts interpret the legislation in such a way as to give the courts a wide role to play in relation to both international and domestic arbitrations, then the reforms will in large part be ineffective. This has now been recognised in the interpretation provisions of the new regime.[18]

It is against this background that we consider what have emerged as the recent trends in interpretation of Australia's arbitral legislation, with particular emphasis on the enforcement of awards in Australia. We will also briefly review the trends in some regional jurisdictions which are relevant to Australian commerce, particularly in the resources sector.

6.4 Recent Trends in the Enforcement of Awards

Although the countries which are parties to the New York Convention should, in theory, apply standardised principles and approaches to enforcement, in practice this is not always the case. Different legal and political systems, as well as diverse social values, mean that different trends in the application of recognition and enforcement principles ultimately emerge. The grounds for denying enforcement of awards, which are found in Article V of the New York Convention and adopted in the Model Law, have not always been uniformly interpreted. In particular, the public policy exception to enforcement has enabled countries to introduce some elements of nationalist subjectivity which is not welcome to many in the arbitral community but which nevertheless exists.

By far the most significant instrument which exists in relation to the transnational recognition and enforcement of arbitral awards, at least for those of its 154 countries that have ratified it, is the New York Convention. This multilateral treaty underpins the international arbitration framework, and with the help of the

[17]Note 10, [18].

[18]See s 2D, 3 and 39 of the IAA and s 2A and 5 of the CAAs.

UNCITRAL Model Law, has (at least in theory) established a common approach for commercial arbitration around the world. As set out above, both the New York Convention and the Model Law are adopted in Australian arbitral law.

6.4.1 The New York Convention

The New York Convention essentially allows a successful party to seek recognition and enforcement of an international arbitral award in any of the signatory countries (referred to as "**Convention countries**") in which the unsuccessful party may have assets to satisfy the award.

The majority of arbitral awards are enforced under the New York Convention without issue. However, Article V of the New York Convention sets out the limited grounds on which a court of a Convention country *may* refuse to recognise or enforce an international arbitral award:

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, 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
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference 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 decision 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
(d) The composition of the arbitral authority 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
(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

In the absence of an Article V exception being established by the party seeking to resist enforcement of an award, a court in a Convention country should, in theory, recognise and enforce the foreign award.

6.4.2 The Model Law

The principles relating to recognition and enforcement, and importantly, exceptions to recognition and enforcement, are also captured in Chapter VIII (Articles 35 and 36) of the UNCITRAL Model Law. Its provisions give effect to the New York Convention with a view to harmonising international arbitration laws in the arbitration regimes of Convention countries. As discussed above, the Model Law has been adopted in Australia both in the IAA and the CAAs.

Article 34 of the Model Law provides that the same Article V grounds may also be grounds for a supervising court to set aside an arbitral award. Given that Article 34 concerns the same grounds and principles as those relating to recognition and enforcement of awards, we will also refer to recent matters in which award debtors have sought to have arbitral awards set aside either as an alternative argument, or in addition to an application to oppose enforcement. Such setting aside applications should only take place in the supervising courts, usually the courts of the seat, but there have been occasions when the enforcing court has also decided, when refusing enforcement, to also purport to set aside the award.[19] As with the New York Convention, the Model Law may be enacted by a Convention country by way of domestic legislation. In doing so, Convention countries may amend or adapt how the Model Law will apply in domestic law. It is always important to consider whether there are any amendments or additional provisions in the particular jurisdiction in which the Model Law has been adopted.

6.5 The Australian Position

6.5.1 Legislative Framework

The New York Convention requirements for enforcement, adapted slightly for Australian conditions, find their home in Australia in Part II (sections 3 to 14) of the IAA.

The IAA limits the grounds on which enforcement of a foreign international award should be refused to those set out in the New York Convention and the

[19]See *Transfield Philippines, Inc. v Luzon Hydro Corporation* (G.R. No. 146717, 22 November 2004), where the Court of the Philippines purported to do just that, although Singapore was the seat of the arbitration.

Model Law. Section 8(3A) of the IAA provides that the court has no residual discretion to refuse enforcement of a foreign international arbitral award on any grounds other than those provided in sections 8(5) and 8(7), being the grounds set out in Article V of the New York Convention. Article 36 of the Model Law makes provision, in addition and on the same basis, for enforcement of non-New York Convention awards or for domestic international arbitral awards.[20]

6.5.2 Recent Decisions in Australia

Generally speaking, Australia is recognised as an arbitration-friendly venue with a desire for a harmonious development of international arbitral law. The decisions discussed below highlight that, on the whole, Australia is continuing to progress and develop as a pro-arbitration jurisdiction, although there continues to be debate about whether the Federal Court should have exclusive jurisdiction over international arbitral awards, both foreign and domestic, to the exclusion of the State and Territory Supreme Courts or, at the very least, whether the Full Federal Court should, to the exclusion of the State and Territory Supreme Courts, be the sole court of appeal for international arbitration matters.

(a) ***IMC Aviation Solutions Pty Ltd v Altain Khuder LLC***[21]

This case involved mining operations in Mongolia. A Mongolian arbitral tribunal made an award in favour of Altain Khuder LLC ("**Altain Khuder**") (a Mongolian mining company) against IMC Mining Inc ("**IMC Mining**") and a related Australian entity, IMC Mining Solutions Pty Ltd ("**IMC Solutions**").[22] When both IMC Mining and IMC Solutions failed to make payment in accordance with the award, Altain Khuder applied to the Victorian Supreme Court for an enforcement order against both IMC Mining and IMC Solutions. It was believed that the only substantial assets of the two IMC companies were located in Australia. A central issue in the case was how the Australian entity, IMC Solutions, had come to have an award made against it when it did not clearly appear to be a party to the underlying contract (and therefore, to the arbitration agreement). IMC Solutions relied on sections 8 and 9 of the IAA and Article V of the New York Convention to resist enforcement.

At first instance, the Victorian Supreme Court made an order for enforcement against both respondents and delivered a very pro-arbitration judgment.[23] The

[20] *International Arbitration Act 1974* (Cth) s 3 defines "foreign award" to mean "*an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the New York Convention applies*".

[21] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VCA 248.

[22] By the time of the appeal, IMC Mining Solutions Pty Ltd had changed its name to IMC Aviation Solutions Pty Ltd.

[23] *Altain Khuder LLC v IMC Mining Inc & Anor* [2011] VSC 1.

Court noted that under the New York Convention and the IAA, the party resisting enforcement has the "heavy" onus of showing that the award went beyond the scope of the arbitration clause.[24] The learned judge rejected IMC Solutions' arguments that it was not bound by the arbitral award because it claimed it was not a party to the arbitration agreement, had not been given notice of the arbitration, and therefore was deprived of an opportunity to be heard. On the evidence, his Honour was not satisfied of these matters, in respect of which he held that the party resisting enforcement had the burden of proof. Further, his Honour found that IMC Solutions was estopped from raising points that it could have made either in the arbitration or by way of a challenge in the Mongolian courts. In a separate judgment,[25] the learned judge also awarded indemnity costs against IMC Solutions, holding that an unsuccessful enforcement challenge to arbitral awards is one category of special circumstances which allows a court to exercise its unfettered discretion to award indemnity costs. In doing so, his Honour followed Hong Kong authorities to the same effect.

On appeal, the Victorian Court of Appeal overturned the first instance decision, finding that the Mongolian arbitral tribunal had exceeded its jurisdiction by making an award against a non-party and refusing enforcement on those grounds. The Court of Appeal held that it was able to fully rehear jurisdictional questions on an enforcement application if permitted by sections 8 and 9 of the IAA, thereby adopting the approach in *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*.[26] Following a review of the Mongolian law, the Court ruled that IMC Solutions was not a party to the arbitration agreement. The Court also allowed the appeal on the basis that it would be a breach of the rules of natural justice and be against public policy in Victoria to permit enforcement of the award, especially in the face of what it saw to be inadequate reasons in the award. Finally, the Court commented that an unsuccessful challenge to the enforcement of an arbitral award generally does not warrant an order of indemnity costs and that costs should be dealt with in the usual fashion.

Importantly, in their joint judgment, the majority found that to invoke the Court's jurisdiction to enforce an arbitral award, an award creditor must establish on a *prima facie* basis that:

i. an award has been made by a foreign arbitral tribunal granting relief to the award creditor against the award debtor;
ii. the award was made pursuant to an arbitration agreement; and
iii. the award creditor and the award debtor are parties to the arbitration agreement.

If these three issues are not readily apparent from the face of the award and the arbitration agreement, the award creditor must establish these matters on the

[24]Note 23, [61]–[63].

[25]*Altain Khuder LLC v IMC Mining Inc & Anor (No 2)* [2011] VSC 12.

[26]*Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763.

balance of probabilities. Once it has done so, the onus is then on the award debtor to prove, again on the balance of probabilities and not some heavier onus, that there is a ground on which enforcement should be refused. The decision appears to be at odds with jurisprudence in other jurisdictions about how the New York Convention should be applied, and may be seen to be generally out of step with the Federal Court approach which we will comment on below. This case was undoubtedly a difficult case but, in the authors' view, the Court of Appeal's approach is problematic. It imposes a burden of proof on a claimant which is seeking leave to enforce the award—being the burden of proving that the respondent was properly a party to the arbitration—which does not exist in other jurisdictions. The Court's ready application of natural justice principles as a basis for challenging the award was likewise out of step with other jurisdictions. The interpretation of the new statutory regime was off to a bad start.

(b) *Uganda Telecom Ltd v High-Tech Telecom Pty Ltd*[27]

In *Uganda Telecom Ltd v High-Tech Telecom Pty Ltd*, Justice Foster of the Federal Court was dealing with an application for leave to enforce a foreign international award in Australia. The award had been made by an arbitral tribunal seated in Uganda. Enforcement of the award was opposed on a number of grounds including that the award contained errors of law and that the respondent had been unable to present its case. Enforcement was opposed on the basis that it would be contrary to public policy to enforce the award in Australia. The award satisfied the criteria for enforcement under Ugandan arbitration legislation and was recognised by the High Court of Uganda. Justice Foster of the Federal Court found that the whole rationale of the IAA "and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in section 2D of the Act."[28] His Honour noted that in the United States the courts have generally regarded the public policy ground for non-enforcement as one to be sparingly applied: "[i]t has not been seen as giving a wide discretion to refuse to enforce an award which otherwise meets the definition of foreign arbitral award under the Convention."[29]

His Honour noted in considering *Resort Condominiums*[30] and *Corvetina Technology*[31]:

"Whether or not, in 2004, there was a general discretion in the Court to refuse to enforce a foreign award which was brought to the Court for enforcement, the amendments effected by the 2010 Act make clear that no such discretion remains.

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[27] *Uganda Telecom Ltd v High-Tech Telecom Pty Ltd* [2011] FCA 131.

[28] *Ibid*, [126].

[29] *Ibid*, [127].

[30] Note 9.

[31] Note 10.

Section 8(7)(b) preserves the public policy ground. However, it would be curious if that exception were the source of some general discretion to refuse to enforce a foreign award. Whilst the exception in section 8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases. The principles articulated in those cases sit more comfortably with the purposes of the Convention and the objects of the Act."[32]

His Honour accepted that erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.[33]

One wonders how this conclusion would be viewed by the Court of Appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*.

(c) *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*[34]

This matter related to a dispute between a Chinese-registered company, TCL Air Conditioner (Zhongshan) Co Ltd ("**TCL**"), and Australian-registered company Castel Electronics Pty Ltd ("**Castel**") in relation to an alleged breach of an exclusive distribution agreement by TCL. In July 2008, Castel submitted the dispute to arbitration before a three-member tribunal seated in Melbourne, Australia. In December 2010, the tribunal rendered two awards in Castel's favour; the first was an award for AUD 2.8 million in damages, and the second was an award for costs in the amount of AUD 732,500.

Following TCL's failure to pay the awarded amount, Castel applied to the Federal Court in March 2011 to enforce the awards. TCL opposed the enforcement sought by Castel, on the grounds that:

i. *the Federal Court lacked jurisdiction to enforce arbitral awards*
   TCL argued that as the awards were rendered in Australia, they did not fall within the IAA's definition of "foreign awards" and were instead "non-foreign awards". TCL argued that under the IAA, the Federal Court and the State and Territory Supreme Courts only have jurisdiction to enforce foreign awards, but not non-foreign awards.
ii. *the awards should not be enforced because of an alleged breach of natural justice by the tribunal* (*and enforcement would therefore be against public policy*)
   TCL contended that the Tribunal's rejection of evidence given by the parties' experts and instead coming to a finding that was allegedly not directly supported by expert evidence was a breach of both the no-evidence rule (i.e. there is no evidence to support the tribunal's factual finding) and the hearing rule (i.e. TCL

[32]Note 26, [132].

[33]Note 26, [133].

[34]*Castel Electronics Pty Ltd v TCL Air Conditioner* (*Zhongshan*) *Co Ltd* [2012] FCA 21 (dated 23 January 2012), and *Castel Electronics Pty Ltd v TCL Air Conditioner* (*Zhongshan*) *Co Ltd* (*No 2*) [2012] FCA 1214 (dated 2 November 2012).

was not given a reasonable opportunity to address the relevant findings of the tribunal given that those findings were not based on any argument put before it).

In an initial judgment in January 2012, Justice Murphy dealt with the jurisdiction ground.[35] His Honour held that given that the *Judiciary Act 1903*(Cth) confers on the Federal Court jurisdiction in any matter arising under any federal law, it follows that the Federal Court has jurisdiction to enforce both foreign and non-foreign awards made under the Model Law as adopted by the IAA. His Honour's finding is in part based on the 2010 amendment to section 21 of the IAA which removed the parties' ability to 'opt-out' of the Model Law, which amendment was found to apply retroactively to arbitration agreements entered into prior to when the 2010 amendments came into effect.

In a further judgment in November 2012,[36] Justice Murphy rejected TCL's submission that the award should be set aside, holding that there had been no breaches of natural justice and the enforcement would not be contrary to public policy. In doing so, his Honour:

i. found that 'public policy' has a similar meaning in relation to both an application to set aside an award and one to enforce an award;
ii. confirmed that the wording of Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law (being the Article V grounds) provide that a court *may* set aside an award or refuse enforcement if it finds that the award is in conflict with or contrary to public policy, and therefore the powers to set aside an award or refuse enforcement on grounds of public policy are discretionary; and
iii. looked to how other Convention countries have approached matters of public policy, with a view to achieving international uniformity in the meaning and operation of 'public policy'.

As to the alleged breach of the no-evidence rule, Justice Murphy found that the Tribunal was entitled to disregard TCL's expert evidence as it was based on incomplete data and evidence, and further entitled to arrive at the factual finding that it made. As to the alleged breach of the hearing rule, his Honour confirmed that an arbitrator is not entitled to decide a matter by taking into account evidence or arguments extraneous to the hearing without giving the parties notice and an opportunity to respond. However, his Honour held that in these circumstances, it was reasonably foreseeable to a reasonable litigant that the reasoning of the type that led to the tribunal's findings was possible.

Ultimately, Justice Murphy found that even if there had been a breach of the rules of natural justice, such a breach was minor and not one that could be described as offending fundamental notions of fairness or justice.[37]

His Honour noted that there is international support in favour of Convention countries adopting a narrow approach, and agreed that a court should not exercise

[35] *Castel Electronics Pty Ltd v TCL Air Conditioner* (*Zhongshan*) *Co Ltd* [2012] FCA 21.

[36] *Castel Electronics Pty Ltd v TCL Air Conditioner* (*Zhongshan*) *Co Ltd* (*No 2*) [2012] FCA 1214.

[37] *Ibid* [178].

its discretion to refuse enforcement unless the award seeking to be enforced is an "*offence to fundamental notions of fairness and justice*".[38]

(d) *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*[39]

Arguably the most significant recent decision relating to the enforcement of international arbitral awards in Australia is the constitutional challenge that arose out of *Castel Electronics v TCL*. Prior to the Federal Court's decision being handed down, TCL applied to the High Court seeking orders restraining the Judges of the Federal Court from enforcing the awards and/or orders quashing Justice Murphy's judgments in relation to the Federal Court proceedings.

In summary, TCL contended that the IAA, through the Model Law:

i. effectively forces the Federal Court to carry out a purely administrative 'rubber stamping' exercise of enforcing arbitral awards even when there is a *prima facie* error of law, which substantially impairs the Court's institutional integrity; and
ii. impermissibly vests the judicial power of the Commonwealth (conferred by Chapter III of the Constitution) on the arbitral tribunal that made the award, by making the tribunal's award a binding order of the Federal Court without review by the Court of its legal correctness.

In March 2013, a seven-member bench of the High Court unanimously rejected TCL's arguments and upheld the constitutional validity of the IAA. All Justices of the High Court (in two separate joint judgments) pointed to the distinction between an arbitrator deciding what the rights of the parties are on the one hand, and on the other hand, a court considering the successful party's right to enforce the arbitrator's decision. The High Court found that by agreeing to arbitrate, the parties inherently agree to accept the arbitrator's binding decision, be it right or wrong. Therefore, the Federal Court is not 'rubber stamping' the arbitrator's decision, but rather exercising judicial power to compel the parties to comply with the arbitrator's decision as per their agreement.

The High Court's decision signifies the judiciary's support for Australia's international arbitration system, and confirms the Federal Court's jurisdiction to enforce arbitral awards.

(e) *Gujarat NRE Coke Ltd and Anor v Coeclerici Asia (Pte) Ltd*[40]

This matter arose out of a resources contract. An award was made by an arbitral tribunal seated in London in favour of a Singaporean company against an Indian

[38] *Ibid*, [50]. This decision was appealed to the Full Federal Court, which dismissed the appeal and upheld the learned judge's decision. At the time of writing, the Full Federal Court's reasons for its decision have not been published.

[39] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.

[40] *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; on appeal from *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd* [2013] FCA 882.

company and its managing director. Application was made to enforce the award in the Federal Court of Australia. The award debtors held shares in Australian companies and orders were sought in aid of enforcement, including for receivers to be appointed over the shares in question in order to avoid their dissipation.

The award debtors resisted enforcement of the award on two grounds. Firstly, it was submitted that they were denied a reasonable opportunity by the tribunal to present their case in the arbitration proceedings (in breach of section 8(5)(c) of the IAA). Secondly, and in the alternative, they submitted that the said failure by the tribunal was a breach of the rules of natural justice and that therefore an enforcement of the award would be contrary to the public policy of Australia (that is, sections 8(7)(b) and 8(7A)(b) of the IAA).

In the Federal Court, Justice Foster briefly reviewed the facts and found that the award debtors had been given a reasonable opportunity to present their case. His Honour also found that, as the award debtors had sought to set aside the award on the same grounds in the seat of the arbitration, there was an issue estoppel which precluded the debtors from raising the same arguments to resist enforcement in another jurisdiction. Justice Foster said:

> The English High Court of Justice is the court of the seat of the arbitration. Under the *Convention and the International Arbitration Act*, any application to set aside the Award must be made in that Court. Even if there were no issue estoppel or res judicata, it would generally be inappropriate for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question as that reached by the court of the seat of the arbitration. It would be a rare case where such an outcome would be considered appropriate.[41]

Justice Foster's decision was upheld by the Full Court of the Federal Court on appeal.[42] The Full Court found it unnecessary to determine whether issue estoppel applied in this case, but noted that the issue is "one of importance and of potential difficulty … [and] is not resolved in a clear way by an authority binding on this Court".[43] The Full Court noted that it will generally be inappropriate for an enforcement court of a Convention country to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration.[44]

The New York Convention and the Model Law do not expressly recognise the concept of issue estoppel or res judicata. This decision shows that the Australian Federal Court is willing to go one step further if necessary to ensure international harmonisation and will, on jurisdictional or procedural matters, generally not entertain challenges to matters which have already been challenged in courts of the seat of the arbitration.

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[41] *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd* [2013] FCA 882, [103].

[42] *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109.

[43] *Ibid*, [64].

[44] *Ibid*, [65].

(f) *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)*[45]

In this matter, Justice Foster of the Federal Court considered an application by a Luxembourg company, Traxys Europe SA, to enforce an award made in England against the respondent Balaji Coke Industry Pvt Ltd, an Indian corporation. The respondent resisted the enforcement on three grounds, one of which was that to enforce the award would be contrary to public policy and the Court should refuse to enforce the award for that reason. The respondent argued that enforcement of the award was against the public policy of Australia because it would allow a party to commence and to maintain a futile application to enforce a foreign award, and do so in circumstances where there is an unresolved application to set aside the award before the Indian courts.

Considering the scope of the public policy exception to enforcement, Justice Foster noted:

> Clearly the pro-enforcement bias of the Convention, as reflected in the [IAA], requires that the public policy ground for refusing enforcement not be allowed to be used as an escape route for a defaulting award debtor. That ground should not be made available too readily, lest it undermine the purpose of encouraging and facilitating the enforcement of foreign arbitral awards embodied in the Convention and in the [IAA]. As previously observed, arbitration facilitates international trade and commerce by providing an efficient and certain dispute resolution process to commercial parties. If the enforcement of awards is to be subjected to the vagaries of the entire domestic public policy of the enforcement jurisdiction, there is the potential to lose all of the benefits of certainty and efficiency that arbitration provides and which international traders seek.[46]

His Honour noted that it is the public policy of the enforcement state which matters, and that there is no express reference to any concept of international or transnational public policy.[47] His Honour concluded that the expression 'public policy', particularly when used in section 8(7)(b) of the IAA, means:

> those elements of the public policy of Australia which are so fundamental to our notions of justice that the courts of this country feel obliged to give effect to them even in respect of claims which are based fundamentally on foreign elements such as foreign awards under the [IAA].[48]

His Honour then went on to clarify that:

> the scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defence of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state.[49]

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[45] *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* (*No 2*) [2012] FCA 276.

[46] Note 45, [90].

[47] Note 45, [94].

[48] Note 45, [96].

[49] Note 45, [105].

In the same matter, his Honour found that it was not a condition of being granted leave to enforce the award in Australia that the applicant had to prove that the respondent had assets in Australia.[50]

Justice Foster in *Uganda Telecoms* and in *Traxys*, and Justice Murphy in *Castel* took a significantly narrower view of the scope and role of the public policy exception than that which had been taken previously in *Corvetina*. It is the authors' views that, in adopting this approach and limiting the extent to which the inclusion of natural justice grounds in consideration of public policy can be used as a basis for setting aside or opposing the recognition and enforcement of an award, Justice Foster and Justice Murphy showed commendable restraint and ultimately brought about a result which narrowed the potential scope for the public policy exception.

(g) *Eopply New Energy Technology Co Ltd v EP Solar Pty Ltd*[51]

Eopply New Energy Technology Co Ltd commenced proceedings in the Federal Court to enforce an arbitral award made in China against the respondent, Australian-registered company EP Solar Pty Ltd. One week later, the respondent had liquidators appointed. Justice Foster of the Federal Court had to consider whether leave to enforce should be granted in light of section 500(2) of the *Corporations Act* 2001 (Cth), which provides that no action or other civil proceeding is to be proceeded with against a corporation after the passing of a resolution for the voluntary winding up of that company without the leave of the Court.

His Honour granted leave to enforce the foreign judgment relying upon three considerations. Firstly, granting leave would cause virtually no additional expense or inconvenience for the respondent, as judgment would be entered immediately.[52] Secondly, given the pro-enforcement objectives of the IAA, it is preferable for the Court to allow for easier recovery by the award creditor by granting leave to enforce the award, rather than leaving the award creditor "to the vagaries of the proof of debt process."[53] Thirdly, the liquidators did not oppose the application for enforcement.[54]

(h) *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*[55]

The applicant, Dampskibsselskapet Norden A/S, sought to enforce two arbitral awards against the respondent, Beach Building & Civil Group Pty Ltd, under the IAA. The arbitration had been seated in London under the auspices of the Rules of the London Maritime Arbitrators Association.

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[50]Note 45, [79]–[86].

[51]*Eopply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356.

[52]Note 51, [23].

[53]*Ibid*.

[54]Note 51, [17] and [23].

[55]*Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696.

The respondent resisted enforcement on two grounds; firstly, that it was not a named party to the arbitration agreement contained in the Charterparty and therefore it was not bound by the awards, and secondly, that the arbitration agreement was invalid because of section 11 of the *Carriage of Goods by Sea Act* 1991 (Cth).

Justice Foster of the Federal Court upheld the finding of the arbitrator, namely that it was clear that the respondent was the proper party and had merely been misdescribed on the Charterparty agreement, and that the arbitrator had been within his rights to correct the misnomer.[56]

Of particular interest is his Honour's discussion about the requirements under section 9(1) of the IAA for an award creditor to produce the arbitration agreement under which the award purports to be made. His Honour preferred the approach of the English courts over the approach of the Victorian Court of Appeal in *Altain Khuder*,[57] finding that the requirements of section 9(1) were satisfied when the applicant simply tendered copies of the two arbitral awards and a copy of the Charterparty agreement, under which the awards were 'purported" to be made.[58] His Honour found that once the applicant had established the section 9(1) requirements, the burden shifts to the respondent to establish one of the grounds specified in sections 8(5) and 8(7) of the IAA to succeed in resisting enforcement of the awards.[59] To do that, the respondent was required to do more than just point to the name stated on the Charterparty agreement and note that it was different to its own (as it had essentially done in this case).[60]

Ultimately, leave to enforce was denied on the basis that the arbitration agreement was in fact invalid under the *Carriage of Goods by Sea Act*, section 11 of which provides that an agreement in a 'sea carriage document' which purports to limit or exclude the jurisdiction of an Australian court is invalid, unless it provides for arbitration in Australia.

(i) *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*[61]

Yet another resources dispute, this arbitration spawned no less than 8 court proceedings. All of them were under the old CAA of Western Australia.

The appellant, PRC-based company Rizhao Steel Holding Group Co Ltd ("**Rizhao**"), appealed a decision by the Supreme Court of Western Australia which granted the Australian respondent company ("**Koolan**") leave to enforce two arbitral awards against Rizhao. The grounds of appeal were that the primary judge erred by dealing with the application for enforcement under the *Commercial*

[56] *Ibid*, [96]–[97].

[57] *Ibid*, [75]; in particular, the approach by Mance LJ in *Dallah Real Estate v Ministry of Religious Affairs* [2010] 2 Lloyd's Rep 691.

[58] *Ibid*, [73]–[74].

[59] *Ibid*, [77].

[60] *Ibid*, [76].

[61] *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* [2012] WASCA 50.

Arbitration Act 1985 (WA), when the only source of jurisdiction to enforce the awards was under the IAA and the Model Law.

The relevant dispute resolution clause under the sale and purchase agreement between the parties provided that the dispute be referred to arbitration in accordance with Western Australia's old CAA. The parties fell into dispute in late 2008, an arbitrator was appointed in February 2009, and an award of USD 114 million plus costs and interest in favour of the respondent was rendered in Australia in August 2010 (being shortly after the amended IAA came into force).

Rizhao's arguments were somewhat technical, but essentially boiled down to whether the amended IAA (in particular, section 21 which removes the parties' power to opt-out of the Model Law) applies retrospectively. Rizhao argued that:

i. the pre-amendment IAA did not allow the parties to opt-out of the Model Law provisions relating to the recognition and enforcement of awards because parties could only opt-out until such time as the dispute was 'settled'. It argued that the dispute is 'settled' at the time of the award, and beyond that, the parties no longer had any scope to opt-out of the Model Law; and
ii. the parties no longer had power to opt-out of the Model Law once the amended IAA came into force (namely, during the arbitration and prior to the final award and the commencement of the enforcement proceedings).

The respondent argued that Rizhao should not be allowed to raise the jurisdictional points on appeal as it had not raised them at first instance. The Court of Appeal agreed, dismissing the appeal on the basis that "it would be antithetical to the interests of justice for this court to now entertain a point which Rizhao chose not to raise before the primary judge."[62]

The Western Australian Court of Appeal did however go on to make the following significant findings:

i. even if the trial judge had been wrong to enforce the award under the CAA, the State Supreme Court had, in any event, power under the IAA to enforce non-foreign international arbitral awards;[63]
ii. the pre-amendment section 21 of the IAA allowed parties to opt-out of the Model Law until the time of the 'final satisfaction of the disputed claim', which was held to include recognition and enforcement steps following the making of the award;[64] and
iii. the amended IAA did not apply retrospectively to the parties' pre-amendment arbitration agreement and decision to opt-out of the Model Law in circumstances where the dispute had been referred to arbitration prior to the commencement of the amended IAA.[65]

[62] *Ibid*, [87].
[63] *Ibid*, [66] and [74].
[64] *Ibid*, [110]–[111].
[65] *Ibid*, [133].

On the whole, the Australian courts have shown a commendable pro-enforcement attitude and the broad Australian approach is quite supportive of international trends in favour of a pro-enforcement bias.

If one looks more broadly, beyond enforcement actions, it is also clear that the trend is for Australian courts to be generally pro-arbitration. The following decisions arise out of the resources industry and are further examples of the Australian courts' pro-arbitration stance.

Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd[66]

Cape Lambert Resources Ltd ("**Cape Lambert**") was to sell certain mining tenements and related assets to MCC Australia Sanjin Mining Pty Ltd ("**MCC**") pursuant to an asset sale agreement between the parties. The agreement contained a multi-tiered dispute resolution clause (good faith negotiation, then mediation, followed by arbitration at the Singapore International Arbitration Centre) which it was said "must be strictly followed". The same clause also provided that the parties may seek urgent injunctive or declaratory relief from the Supreme Court of Western Australia.

There was also a related guarantee agreement between Cape Lambert and MCC's group parent company under which it was obliged to satisfy the subsidiaries' payment obligations. The guarantee stated that if there was any dispute about an amount due for payment, that amount had to be paid into an escrow account within 24 h and released in accordance with the outcome of the mediation or arbitration. The guarantee contained a similar dispute resolution procedure.

Cape Lambert commenced proceedings against MCC in the Supreme Court of Western Australia seeking an interim order for payment of $80 million into an escrow account pursuant to the guarantee. MCC objected to the Court's jurisdiction on the basis of the arbitration clause. At first instance, the Court stayed the proceedings under section 7 of the IAA and rejected Cape Lambert's request for payment of money into an escrow account as an interim order under section 7(3) of the IAA. Cape Lambert appealed.

The Court of Appeal dismissed the appeal. The Court held that the escrow dispute fell within the dispute resolution clause, an interpretation which followed naturally from the plain and ordinary meaning of the words in the clause. It was observed that there was nothing preventing the parties from having the escrow dispute resolved expeditiously by arbitration before the other elements of the dispute were resolved. It was also observed that section 7(3) of the IAA enables courts to make interim orders in support of arbitration to preserve the status quo. An order to enforce the escrow payment obligation would fall outside the power because it would not be an order "to preserve the rights of the parties".[67]

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[66] *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) WASCA 66.

[67] *Ibid*, 54.

In the course of the judgement, the Court showed itself to be very well aware of the approach which it should take under the new IAA. It recognised explicitly the requirement under section 2D of the IAA that the objects of the IAA include to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes. The Chief Justice, in a long and carefully considered judgement, set out the history of amendments to the arbitration regime in Australia and canvassed many of the leading judgements. His Honour examined jurisprudence from Singapore, the United States and Australia in concluding that an expansive approach towards the construction of arbitration clauses was called for in the modern era. The Court concluded that the dispute resolution clause clearly applied to the escrow dispute and the escrow dispute therefore had to be determined in arbitration. The Court noted that it would be fundamentally inconsistent with the obligation of the Court under the IAA, the objects of the IAA and with the considerations which must be taken into account under section 39 of the IAA for the Court to use the powers conferred on it to effectively resolve the escrow dispute by making an order for payment of funds into an escrow account, or by making any stay of proceedings conditional upon such a payment. Rather, the Court thought the disputes should go, as the parties had agreed, to arbitration in accordance with the dispute resolution clause.

Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd[68]

ATCO Gas Australia Pty Ltd ("**ATCO**") was contracted to extend the underground gas pipeline network in Yanchep, Western Australia. ATCO contracted Pipeline Services WA Pty Ltd ("**Pipeline**") to carry out the necessary excavation work and installation of the pipelines.

Disputes arose between the parties and both asserted, albeit on different grounds, that the contract had been terminated. Notwithstanding that the contract between the parties contained an arbitration clause, Pipeline commenced proceedings in the Supreme Court of Western Australia against ATCO. ATCO applied for a stay on the basis that the dispute should go to arbitration. While the application was made under the old CAA of Western Australia at the time when this matter was argued, both parties and the Court were not aware that the new CAA had commenced operation in Western Australia only a week earlier. One of the matters for consideration by the Court was whether the application made under the old CAA could be treated as having been made under the CAA. The application was one for a stay but under section 8 of the new CAA, the application was one for a referral to arbitration. The Court decided to treat the application as one for referral to arbitration under section 8 of the new CAA. In a well-reasoned judgement, the learned Chief Justice granted the application for a stay on the basis that it was an application for referral to arbitration.

[68] *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* (2014) WASC 10.

ESCO Corporation v Bradken Resources Pty Ltd[69]

The ESCO Corporation ("**ESCO**") is a manufacturer of metal parts for the mining and construction industries, incorporated in Oregon, United States. It granted rights under a license agreement to an Australian entity, Bradken Resources Pty Ltd ("**Bradken**"), to manufacture and produce ESCO products in Australia, New Zealand and Papua New Guinea.

When a dispute arose between ESCO and Bradken, arbitration was commenced in Portland Oregon, USA, before a Canadian arbitrator. ESCO alleged that Bradken had breached the licence agreement by manufacturing products without including the ESCO trade mark symbol and by promoting products that competed with ESCO's products in the territory in the licence agreement. Bradken counter-claimed that ESCO had breached US anti-trust laws.

The arbitrator ordered Bradken to pay USD 210,000 to ESCO as reimbursement for procedural fees of the arbitral process; and USD 7.75 million as reimbursement for legal costs incurred by ESCO. Bradken paid the first order for procedural costs, but did not pay ESCO's legal costs in accordance with the second order.

ESCO applied to have the award confirmed in the United States District Court, District of Oregon. Bradken argued that it was not liable to pay the amount of costs awarded in respect of the anti-trust claims, as this would be contrary to US public policy.

ESCO sought to enforce the award in the Federal Court of Australia under section 8(3) of the IAA. Bradken sought to adjourn the enforcement proceedings until it had exhausted appeal proceedings in the USA. Justice Foster in the Federal Court, after reciting the relevant provisions of the new IAA, did adjourn the enforcement application but subject to "suitable security" being paid as is required by section 8(8) of the new IAA. His Honour found that "suitable security" included the amount in dispute and was to be by irrevocable bank guarantee or letter of credit from a major Australian trading bank.

ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat"[70]

ENRC Marketing AG ("**ENRC**") is a company incorporated in Switzerland whose assets are mainly located in Kazakhstan. OJSC "Magnitogorsk Metallurgical Kombinat" ("**MMK**"), a company incorporated in Russia, was alleged to be in breach of a long-term supply contract by refusing to accept monthly large quantities of iron ore from ENRC. The dispute went to arbitration with the ICC in Switzerland.

His Honour Rares J of the Federal Court of Australia was asked, on an *ex parte* basis, to make freezing orders in aid of the pending arbitration. The freezing order attached to assets held in Australia worth in excess of AUD 850 million, held by MMK and a related entity incorporated in Luxemboug, MMK-Mining Assets

[69] *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905.

[70] *ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat"* (2011) FCA 1371.

Management S.A. The order was made by the Court pursuant to Article 17J of the Model Law as given effect to by the new IAA. That section provides:

> Article 17J—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.

In granting the freezing order, the Court recognised that ENRC had no assets in Australia. The Court required it to provide AUD 30 million security in support of its undertaking as to damages. Again, the Federal Court showed itself willing to exercise the powers under the new IAA in support of international arbitration proceedings.

One would have to say that the trend of decisions, particularly in the Federal Court and the Western Australia Supreme Court, are supportive of arbitration and have shown a willingness to adopt the new approach which is called for by the new arbitration regimes in Australia.

6.6 Enforcement Trends in South East Asian Countries

It is also instructive to review some of the trends which are now developing in other courts in the region, as the courts in Model Law jurisdictions are likely to take note of how courts in other jurisdictions are developing and interpreting the Model Law.

6.6.1 Singapore

In three recent judgments, the Singapore High Court has affirmed its long-standing non-interventionist and pro-arbitration stance whilst providing some useful guidance on the standards to which international arbitrators should be held.

Two of the cases discussed below, *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd*[71] and *BLB v BLC*,[72] show that there is a strong emphasis on the limited supervisory role that the Singaporean courts should play. The judges in both cases acknowledged that it is the court's (difficult) role to uncover the genuine challenges to arbitral awards from those which are merely an appeal on the merits.

The Court in *PT First Media TBK v Astro Nusantara International BV and Others*,[73] repeatedly noted, and in no uncertain terms, that the primary object of the Singapore International Arbitration Act is to give effect to the Model Law, and the

[71] *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186.

[72] *BLB v BLC* [2013] SGHC 196.

[73] *PT First Media TBK v Astro Nusantara International BV and Others* [2013] SGCA 57.

Court of Appeal's decision certainly shows an intention to ensure that Singapore's international arbitral law develops consistently with the Model Law regime. When faced with uncertainty as to how a provision of the Singapore International Arbitration Act should be interpreted, the Singaporean courts are likely to review jurisprudence from other Model Law jurisdictions and attempt to develop law in keeping with the purpose and objectives of both the Model Law and the New York Convention as well as recognising the autonomy of the parties.

TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd[74]

In *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* Justice Chan Seng Onn of the High Court declined to set aside an arbitral award on the basis that the award was in breach of the rules of natural justice and the arbitrator had allegedly exceeded his jurisdiction. As to the allegations of breach of natural justice, his Honour considered the arbitrator's duties which the applicant alleged had been breached, namely the duty to give reasons, to understand the parties' submissions, to deal with every argument presented and to not look beyond the parties' submissions. The appellant failed on all grounds.

The duties owed by arbitrators in determining an arbitral dispute and rendering an award, as held by Justice Chan, can be summarised as follows:

i. Arbitrators have a duty to use their particular expertise and experience for which they were selected, which means that arbitrators are not straight-jacketed to only adopt in their conclusions the premises put forward by the parties.[75]
ii. All that is required is that the arbitral tribunal turns its mind to and deals with the 'essential issues' in its award. It does not need to deal with every point made in an arbitration or every argument canvassed under each of the essential issues. Further, arbitrators should be given a long reign in determining what the essential issues are.[76]
iii. Arbitrators are not obliged to set out each step by which they reached their conclusion. However, ultimately, the parties must be informed about the matters on which the decision is based.[77]

As to the arbitrator's duties to give reasons, Justice Chan referred to the Australian High Court decision in *Westport Insurance Corporation v Gordian Runoff Ltd*[78] and noted that the International Arbitration Act of Singapore also did not contain any provision that requires arbitrators to give reasons of a judicial standard. However, his Honour noted that as the rules of natural justice must be applied as rigorously in arbitration as they are in court litigation, the standards

[74]*TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186.
[75]*Ibid*, [65].
[76]*Ibid*, [73].
[77]*Ibid*, [104]–[105].
[78]*Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 281 ALR 593; [2011] HCA 37.

applicable to judges are "*assistive indicia*" to arbitrators.[79] Ultimately, this must be weighed against the important factors of promptness and price.

Notably, Justice Chan made some strong general observations which reflect the pro-arbitration and non-interventionist stance that has been so evident in the Singaporean courts. His Honour noted that over-zealous scrutiny of the arbitral tribunal's decision by the courts would encourage parties to use the courts to frustrate and delay the enforcement of arbitral awards and ultimately subvert the integrity and efficacy of the arbitral system,[80] and that the real task is for the court to sieve out the "genuine challenges from those which are effectively appeals on the merits".[81]

His Honour's judgment begins with the following observation:

> However good or bad in the eyes of a party, the decision of an arbitral tribunal with the requisite jurisdiction is final and binding. This general proposition of law is a manifestation of the fundamental principle of interest *reipublicae ut sit finis litium* or finality in proceedings. Arbitration will not survive, much less flourish, if this core precept is not followed through by the courts. The integrity and efficacy of arbitration as a parallel dispute resolution system will be subverted if the courts appear unable or unwilling to restrain themselves from entering into the merits of every arbitral decision that comes before it.[82]

It appears to be generally settled law in Singapore that the courts should limit themselves to looking at the evidence on the record to determine the merits of the challenge, and such a process does not necessarily require a court to sift through the entire record of the arbitral proceedings "with a fine-tooth comb."[83] Justice Chan noted that the immense volume of material that was put before him was "both unnecessary and unsatisfactory", and that "[a]ny real and substantial concern should be demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions."[84]

BLB v BLC[85] was an application to set aside an arbitral award rendered by a sole arbitrator relating to an unsuccessful joint venture in Malaysia, on the basis of a purported failure to decide a counterclaim that was submitted to arbitration. Justice Belinda Ang Saw Ean of the High Court found that the tribunal had in fact failed to consider and decide the essential issue of the counterclaim, and that the failure was one that could have reasonably resulted in prejudice to the plaintiffs. Her Honour set aside the portion of the award to which the counterclaim related and remitted that aspect for reconsideration by a new tribunal.

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[79]Note 74, [103].

[80]Note 74, [125].

[81]Note 74, [2].

[82]Note 74, [1].

[83]Note 74, [42].

[84]Note 74, [125].

[85]Note 72.

Her Honour made similar comments to those of Justice Chan in *TMM* in relation to the difficult balancing act entrusted to courts when faced with challenges to enforcement of arbitral awards:

> The parties' opposing positions embody a tension that is becoming increasingly apparent in the context of curial challenges to arbitral decisions. On one hand, the supervisory function of the court requires it to step into provide relief in cases of genuine challenges. On the other hand, the linked principles of minimal curial intervention and finality in proceedings demand that this power of intervention be exercised warily and only in meritorious cases where statutorily prescribed grounds for setting aside have been established. This tension is further heightened when the losing party attempts to air its grievances before the court as complaints of breaches of natural justice or other established grounds of challenge and in doing so attempts to re-open the arbitration or traverse over the issues in the arbitration. The court must firmly resist any such attempts.[86]

Her Honour again agreed with Justice Chan in respect of the degree of review that is appropriate in challenges to arbitral awards, which:

> is ultimately a matter dependent on the type and nature of the challenge. Even so, the review should not involve a re-argument or re-trial of the arbitration. I must emphasise that it is not the role of the court to rake through the award and the record fastidiously with the view to finding fault with the arbitral process. Instead, "an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied".[87]

Whilst Justice Ang noted that although courts will exercise their power to set aside arbitral awards without hesitation if a statutory prescribed ground is clearly established, her Honour also stated that in "a borderline case the benefit of doubt would invariably favour the tribunal."[88]

PT First Media TBK v Astro Nusantara International BV and Others[89]

A string of recent cases that have caused a stir in Singapore and around South East Asia are those related to a SIAC arbitration between companies within a Malaysian media group ('**Astro Group**') and companies belonging to an Indonesian conglomerate ('**Lippo Group**') in relation to a failed joint venture. A three-member arbitral tribunal seated in Singapore rendered five awards totalling USD 303 million in favour of the Astro Group, which then sought leave from the High Court of Singapore to enforce the awards. Two enforcement orders were granted to that effect (collectively referred to as the "**Enforcement Orders**").

One of the arbitral awards, namely the 'Award on Preliminary Issues', contained an interim finding by the arbitral tribunal that it had the power to join the 6th to 8th respondents to the arbitration, notwithstanding that those two entities had not been parties to the arbitration agreement. The four subsequent awards were made on the

[86]Note 72, [2].
[87]Note 72, [35].
[88]Note 72, [3].
[89]Note 73.

basis of the Award on Preliminary Issues. The tribunal ordered award payments for around USD 250 million in Astro's favour, including payments to be made to the 6th to 8th respondents.

One of the Lippo Group entities, PT First Media TBK ("**FM**"), sought to set aside the Enforcement Orders on the basis that there was never any arbitration agreements between it and the 6th to 8th respondents, and that the Award on Preliminary Issues should not be enforced because by that time, the Supreme Court of Indonesia had ruled that the arbitral award violated the sovereignty of the Republic of Indonesia.[90]

The Judge dismissed the application without going into the merits of FM's arguments, having found that it was no longer open to FM to resist enforcement in reliance on grounds which it could have raised in challenge to the Award on Preliminary Issues at the time it was rendered under Article 16(3) of the Model Law, which provides:

> Article 16. Competence of arbitral tribunal to rule on its jurisdiction
> …
> (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. [emphasis added]

FM appealed to the Singapore Court of Appeal. The threshold question was whether FM was entitled to raise its objection to the joinder of the 6th to 8th respondents as a ground for setting aside the Enforcement Orders, in circumstances where it had not challenged the Award on Preliminary Issues under Article 16(3). In turn, this raised the following two issues:

i. whether the courts have a power to refuse enforcement of an award under section 19 (Enforcement of Awards), and if so, what the ambit or content of that power is;
ii. whether Article 16(3) is a 'one-shot remedy' with the corollary that FM's failure to challenge the preliminary ruling in the Award on Preliminary Issues precludes it from raising an issue when trying to set aside the Award later on.

Firstly, the Court considered the legislative background of section 19 of the Singapore International Arbitration Act, which provides:

> An award on an arbitration may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

The Court held that the content of the power to refuse enforcement under section 19 must be construed in accordance with the purpose of the Singapore

[90]The Indonesian proceedings are discussed in more detail below.

International Arbitration Act, which is to embrace the Model Law.[91] As to the ambit of the power of refusal, the Court of Appeal stated:

> Given that de-emphasising the seat of arbitration by maintaining the award debtors 'choice of remedies' and alignment with the grounds under the New York Convention are the pervading themes under the enforcement regime of the Model Law, the most efficacious method of giving full effect to the Model Law philosophy would, in our view, be to recognise that the same grounds for resisting enforcement under Art 36 are equally available to a party resisting enforcement under s 19 of the [Singapore International Arbitration Act].[92]

That is, the Court's power to determine the grounds on which it could refuse enforcement of domestic international awards under section 19 are not restrained and it remains open to the courts to align the exercise of that discretion with the grounds under Article 36. This was found to be in keeping with the spirit of the Model Law.

The Court then descended into a detailed analysis of whether Article 16(c) of the Model Law conveys a 'choice of remedies', that is, whether it gives respondents the option to either challenge a preliminary ruling under Article 16(3) (referred to as the "active remedy") or to later apply to resist enforcement of the award under Article 36 (referred to as the "passive remedy").

The Court examined a myriad of background materials relating to the Model Law and determined that Article 16(3) was not intended to be a 'one-shot' remedy, nor is it intended to affect the availability of defences at the stage of recognition and enforcement.[93] The Court of Appeal held that:

> we are compelled to conclude that Art 16(3) is neither an exception to the 'choice of remedies' policy of the Model Law, nor a 'one-shot remedy'. Parties who elect not to challenge the tribunal's preliminary ruling on its jurisdiction are not thereby precluded from relying on its passive remedy to resist recognition and enforcement on the grounds set out in Art 36(1). That having been said, we are of the tentative view, as noted above, that the position might not be the same in relation to whether such a party may raise such a ground to initiate setting aside proceedings under Art 34.[94]

Given that Article 16(3) is not a 'one-shot remedy', FM was entitled to apply to set aside the Enforcement Orders (i.e., to resist enforcement) pursuant to section 19 of the Singapore International Arbitration Act on any of the grounds which are found in Article 36(1).[95]

Having established that the Court has the power under section 19 of the Singapore International Arbitration Act to refuse enforcement of domestic international awards if one or more of the grounds under Article 36 of the Model Law are established, the Court then considered whether the joinder of the 6th to 8th

[91]Note 73, [53]–[55].

[92]Note 73, [84].

[93]Note 73, [111].

[94]Note 73, [132].

[95]Note 73, [99].

respondents fell within the Article 36 grounds, and if so, whether the application should be decided in FM's favour.

The arbitral tribunal had ruled that it had the power to join non-parties to the arbitration by interpreting Rule 24(b) of the 2007 SIAC Rules, which provides:

> Rule 24: Additional Powers of the Tribunal
> 24.1 In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have power to:
> …
> (b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration.

The arbitral tribunal held that 'other parties' for the purposes of Rule 24(b) referred to parties outside of the arbitration agreement, who could be joined without consent by all the parties to the reference. The Court of Appeal found, on the other hand, that for the purpose of Rule 24(b), 'other parties' referred to other parties to the agreement to arbitrate that had not been hitherto joined or involved in the arbitration.[96] This view was based on a number of considerations, including that a proposed forced joinder of non-parties would be a "*major derogation from the principle of party autonomy*", which their Honours found to be of "*foundational importance*".[97] It followed from this that FM's objection to the Tribunal's assertion of jurisdiction over the claims of the 6th to 8th respondents was sustainable as the tribunal had indeed improperly exercised its power by joining those respondents.[98] The Award on Preliminary Issues was incorrect as the tribunal did not in fact have the power to join the 6th to 8th respondents; it follows that the tribunal did not have jurisdiction to make awards against the 6th to 8th respondents.

Although FM was entitled to resist the enforcement of the Awards pursuant to section 19 of the Singapore International Arbitration Act as it then related to the 6th to 8th respondents given that there was no arbitration agreement between FM and those two respondents, the Court of Appeal maintained the Enforcement Orders against the remaining award creditors. The Awards happened to be sufficiently independent and not intertwined in a manner that would prevent severance and partial enforcement.

6.6.2 Hong Kong

A line of authorities arising out of a dispute between Pacific China Holdings Ltd ("**Pacific China**") and Grand Pacific Holdings Ltd ("**Grand Pacific**") has further reflected Hong Kong's pro-enforcement stance by developing the principle that

[96]Note 73, [198].

[97]Note 73, [188].

[98]Note 73, [198].

courts should be slow to interfere with procedural decisions of arbitral tribunals and arbitral awards in line with international standards.

Pacific China applied to set aside an arbitral award made pursuant to the ICC Rules, in which the arbitral tribunal ordered Pacific China to pay in excess of USD 55 million (plus interest) to Grand Pacific in relation to a dispute over a loan agreement. The Court of First Instance ordered the award to be set aside for alleged violations of Article 34(2)(a) of the Model Law, relating to procedural unfairness resulting from the tribunal's departure from the agreed timetable and from allegedly preventing Pacific China from properly making and responding to legal submissions.[99]

The Court of Appeal overturned the decision by the Court of First Instance and instead reinstated the award.[100] In its unanimous judgment, the Court of Appeal:

i. found that as a result of the tribunal's wide case management powers, no procedural irregularity had occurred and Article 34(2) of the Model Law had not been breached;
ii. held that an arbitral award may only be set aside on due process grounds when the procedural breaches alleged under Article 34(2) are 'serious' or 'egregious' in nature;
iii. confirmed that the courts should not set aside an award unless a breach, if established, would reasonably have affected the outcome of the dispute; and
iv. held that the burden to show that it has been prejudiced by the conduct of the tribunal lies with the party seeking to set aside the award.

The Court of Final Appeal refused to interfere with the Court of Appeal's decision, which now stands as the authoritative statement of the law in relation to setting aside arbitral awards in Hong Kong.[101] The Court of Final Appeal endorsed the Court of Appeal's findings, stating that:

> In our view, the Court of Appeal was entirely correct to hold that the complaints advanced by [the appellant] do not constitute viable grounds for setting aside the award under [Article 34(2)]. The rulings complained of were made by the tribunal in the proper exercise of its procedural and case management discretions, reflecting its assessment of the requirements of procedural fairness as appropriate to the circumstances. There is no basis for interference by the Court. No reasonably arguable basis has been disclosed for granting leave to appeal.[102]

The Court of Appeal's judgment highlights the wide scope of the procedural discretion available to arbitral tribunals seated in Hong Kong, which provides arbitrators with assurance of their power to make robust case management direction where appropriate. Further, it sends a message that the Hong Kong courts will not lightly interfere with the procedural discretion of arbitral tribunals, which is wide.

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[99] *Pacific China Holdings Ltd* (*in Liquidation*) *v Grand Pacific Holdings Ltd* [2011] HKCU 1249.
[100] *Pacific China Holdings Ltd* (*In Liquidation*) *v Grand Pacific Holdings Ltd* [2012] HKCU 971.
[101] *Pacific China Holdings Ltd* (*in Liquidation*) *v Grand Pacific Holdings Ltd* [2013] HKCFA 13.
[102] *Ibid*, [5].

Notably, and in direct contrast to the Australian approach in *Altain Khuder* as discussed above, the Court of Appeal handed down a separate judgment which confirmed that the Hong Kong courts can order indemnity costs against parties who unsuccessfully challenge arbitral awards. In doing so, it relied on the approach previously established in *A v R*[103] and *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)*[104] being that as the parties had agreed to arbitration, applications to set aside or resist enforcement of awards should be exceptional events. Consistent with this, a party who brings a challenge should expect to pay costs on a higher basis if it is unsuccessful. It is interesting to note the Court of Appeal's careful consideration of *Altain Khuder*, which was referred to in the applicant's submissions. The Hong Kong Court of Appeal found that notwithstanding the matters decided in the Australian decision, the courts in Hong Kong can and should order costs on an indemnity basis for unsuccessful challenges.

This decision to allow indemnity costs acts to discourage parties from applying to the courts seeking unmeritorious challenges to arbitral awards.

6.6.3 Malaysia

The Malaysian Arbitration Act 2006 adopts the UNCITRAL Model Law. The substantial amendments made in 2011 exemplify the importance placed on party autonomy as well as the necessity of finality of arbitration awards with minimal court intervention.

The Malaysian Arbitration Act applies to both domestic and international arbitrations. However, Part III (which provides for greater intervention by the courts, for example, by allowing parties to refer a question of law to the court, and allowing a court to extend the time imposed for commencement of arbitral proceedings or the delivery of an award) applies by default to domestic arbitrations unless the parties exclude its applications in writing (i.e. 'opt-out'). Conversely, Part III does not apply to international arbitrations unless the parties agree so in writing (i.e. 'opt in').[105]

The Malaysian Federal Court relatively recently handed down its judgement in *The Government of India v Cairn Energy India Pty Ltd.*[106]

The appellant and the respondents entered into an oil and gas joint venture and executed a production sharing contract in relation to the development of an area described as 'Ravva Field', situated off the coast of India. A dispute arose between the parties in relation to cost recoveries claimed by the respondent, and the respondent's calculations of rates of return. In keeping with various articles of the

[103] *A v R* [2009] 3 HKLRD 389.

[104] *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)* [2012] 1 HKC 491.

[105] See section 3 of the *Arbitration Act* (2005) (Malaysia).

[106] *The Government of India v Cairn Energy India Pty Ltd & Anor* [2012] 3 MLRA 1.

contract, the matter proceeded to UNCITRAL arbitration seated in Kuala Lumpur, with Indian law as the proper law of the contract, and English law as the law to govern the arbitration proceedings.[107]

The arbitral tribunal had decided four points of reference in favour of the appellant, and two in favour of the respondent. The matter was appealed through the High Court and then the Court of Appeal, and India was ultimately granted leave to appeal to the Federal Court on five questions.

The first two questions related to choice of law, in particular whether, given that English law was the substantive law of the arbitration but the arbitration was seated in Kuala Lumpur, the parties' intended curial law was that of England or of Malaysia. The Federal Court held that Malaysian courts, like English courts, can give effect to the agreement of parties to apply foreign law (i.e. the chosen substantive law) as opposed to curial law unless the application of the foreign law runs contrary to the sense of justice or decency.[108]

The Court maintained the current position of the law, which is that the seat of the arbitration is the place where challenges to an award are made.[109] The Federal Court found that it was clear that the English Court of Appeal holds that the curial law ought to be the law of the seat of the arbitration, and that in this case, the juridical seat of the arbitration is Kuala Lumpur which in turn means that the curial law is the law of Malaysia.[110]

The appellant also argued that the Federal Court should depart from a long line of authorities that establish a common law distinction between a specific reference and a general reference to arbitration in determining the scope of intervention by the courts. The Court was not persuaded, and maintained that:

> where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'. However, if the matter is a general reference, interference may be possible 'if and when any error appears on the face of the award' (see Sharikat Pemborong Pertanian [[1971] 2 MLJ 210]).[111]

In this case, the relevant issue (being the issue of the proper construction of an agreement) was held to be a question of law, rather than a question of fact. It followed that if the construction of an agreement is the sole matter referred to arbitration, it is generally not open for challenge for reasons other than extremely limited circumstances such as where an award is tainted with illegality.[112]

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[107] *Ibid*, [18].

[108] *Ibid*, [18]–[19].

[109] *Ibid*, [23], referring to *Lombard Commodities v Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 137, which in turn refers to the English case of *A v B* [2007] 1 Lloyd's LR 237 in which it was decided that challenges are to be made at the courts of the seat of arbitration.

[110] *Ibid*, [23].

[111] *Ibid*, [30].

[112] *Ibid*, [36].

The Federal Court found no illegality in this case.[113] The appeal was dismissed with costs.

Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd[114]

This case involved an appeal against, and application to set aside, two arbitral awards in favour of the respondent, on the grounds that the arbitral tribunal had no jurisdiction to hear the arbitration as there was no written agreement between the parties to arbitrate their dispute within the meaning of 'arbitration agreement' under the relevant Palm Oil Refiners Association of Malaysia (PORAM) Rules and section 9(5) of the Malaysian Arbitration Act, the latter of which provides:

> A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

The tribunal adopted a broad interpretation of section 9(5) and found that an arbitration agreement existed between the parties; it consisted of four unsigned sales contracts, and standard terms and conditions that were incorporated by reference. The standard terms and conditions contained an arbitration clause.

The High Court, and subsequently the Court of Appeal, agreed with the findings of the tribunal. In a judgment delivered by Ramly Ali JCA, the Court of Appeal maintained its pro-arbitration approach by reaffirming the very narrow circumstances in which a court may set aside an arbitral award under section 37 of the Malaysian Arbitration Act:

> Section 37(1) of the [Malaysian Arbitration Act] provides for the various grounds on which an arbitral award may be set aside. The onus is on the party making the application to provide proof. The court discretion in setting aside arbitral awardsis now limited to the narrowly defined circumstances in line with the modern international arbitral practice. The effect of the present sections 8, 9, 37 and 42 of the [Malaysian Arbitration Act] is that the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene. Once parties have agreed to arbitration they must be prepared to be bound by the decision of the arbitrator and restrain from approaching the court to set it aside. Constant interference of the court as was the case in the past will defeat the spirit of the [Malaysian Arbitration Act] which is for all intent and purpose to promote one-stop adjudication in line with the international practice (see: Taman Bandar Baru Masai v Dinding Corporation Sdn Bhd [2010] 5 CLJ 83; and Lesotho Highland Development Authority v Impregilo Spa [2005] UKHL 42).[115]

The Court cited a number of authorities in support of the position that an arbitral award is final, binding and conclusive and can only be challenged in exceptional

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[113] *Ibid*, [55].

[114] *Ajwa For Food Industries Co* (*MIGOP*), *Egypt v Pacific Inter-Link Sdn Bhd* [2013] 2 CLJ 395.

[115] *Ibid*, [13].

circumstances.[116] It was held that an error in drawing a wrong inference of facts from the evidence, as was alleged in this case, was not in itself a sufficient basis to set aside an arbitral award. In any event, the Court was not of the view that the arbitral tribunal had in fact drawn an incorrect finding of fact, and agreed that a binding arbitration agreement did in fact exist. It was sufficient that the terms of the contract executed by the parties (in this case, a sales contract) included a reference to and incorporated a document that contained the arbitration agreement (in this case, the respondent's standard terms and conditions): "this is imputed knowledge that the terms of the document incorporated are binding as if it was written into the contract itself … whether [the parties] take the trouble of reading them or not".[117]

The Full Court of Appeal upheld the findings of the lower court, maintaining the broad interpretation of what constitutes an arbitration agreement for the purposes of the PORAM Rules and the Malaysian Arbitration Act.[118]

6.6.4 Indonesia

Indonesia ratified the New York Convention by issuing Presidential Decree No. 34 of 1981, and enacted the Arbitration and Dispute Resolution Act (Indonesian Arbitration Act) in 1999, which applies to both domestic and international arbitration.

International arbitration awards require recognition and execution orders from the District Court of Central Jakarta to be enforceable in Indonesia. Enforcement of international arbitral awards may be refused if the award fails to meet the requirements of Article 66 of the Indonesian Arbitration Act, one of which is that the award must not violate public order.

'Public policy', or 'public order', are defined by Article 66(c) of the Indonesian Arbitration Act as something that:

i. is not against the foundations of the entire legal system and societal system in Indonesia;
ii. is not in violation of the prevailing laws and regulations; and
iii. is not against the State and legal sovereignty of the Republic of Indonesia.

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[116] *Ibid*, [14]–[15]: "*The law regarding the effect of arbitration's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such if an Arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary that in itself is not sufficient for the setting aside of his award.*": *Intelek Timur Sdn Bhd v. Future Heritage* [2004] 1 CLJ 743: '*It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been "misapprehended and misunderstood.*"': *Sharikat Pemborong Perumahan v. Federal Land Development Authority* [1969] 1 LNS 172; [1971] 2 MLJ 210.

[117] *Ibid*, [17].

[118] *Ajwa For Food Industries Co* (*Migop*), *Egypt v Pacific Inter-Link Sdn Bhd* [2013] 4 AMR 789 (Full Court).

Commentators have noted that the Indonesian courts tend to employ the public policy exception to enforcement as justification to reject applications for execution orders. In a recent article, Fifi Junita of the Law Faculty of Airlangga University in East Java discussed Indonesia's approach to the concept of public policy and noted that "*the concept of public policy in Indonesia is so broad that it [is] frequently confused with [the] state's political interests*".[119] Further, Fifi Junita opined that Indonesia's concept of public policy is based on domestic considerations representing fundamental local policies and principles of domestic law, which is in contrast to the narrow international approach to public policy and therefore not conducive to the establishment of a pro-enforcement culture.[120]

A good example of the Indonesian courts' approach to public policy is the recent enforcement proceedings in relation to the arbitration between the Astro Group and the Lippo Group as discussed above. The Astro Group brought an enforcement application in the Central Jakarta District Court, in circumstances where there were pending proceedings before the South Jakarta District Court involving some of the parties that were also parties to the arbitral award.[121] Further, the arbitral award itself ordered two of the parties, PT Ayunda Mitra and FM, to stop funding and pursuing the pending or future Indonesian Court proceedings.

The Central Jakarta District Court refused to enforce the awards, on the basis that the arbitral awards clearly amounted to foreign interference with the Indonesian judicial process, which is banned by Indonesian law. The Court also found that the arbitral award was a violation of prevailing Indonesian principles relating to the individual's right to defend his or her interests.

On appeal, the Supreme Court of Indonesia upheld the Central Jakarta District Court's decision to reject enforcement of the awards, and the awards remain unenforced in Indonesia.

6.6.5 India

Notwithstanding that India's Arbitration and Conciliation Act 1996 is based on the Model Law and that India is a signatory to the New York Convention, the Indian courts have historically adopted a rather interventionist approach that gave the courts similar jurisdiction over foreign-seated international arbitrations that they had over domestic arbitrations. This allowed the courts to grant interim orders and set aside foreign international arbitral awards under Part I of the Indian Arbitration Act for, inter alia, violating Indian statutory provisions and being contrary to Indian

[119]Fifi Junita, 'The Concept of Public Policy Exception to the Enforcement of Foreign Arbitral Awards: The Indonesian Perspective', 2013 *International Arbitration Law Review* 148, 152.
[120]*Ibid*, 160.
[121]Note that the South Jakarta District Court proceedings were commenced prior to the commencement of the SIAC arbitration.

public policy (the scope of which was very broadly interpreted). However, over the last two years the Supreme Court of India has overturned those previous decisions and India is now emerging as a more international arbitration friendly jurisdiction.

Bharat Aluminium Co. v Kaiser Aluminium Technical Service[122]

In Bharat Aluminium, the Constitutional Bench of the Supreme Court of India held that Part I of the Indian Arbitration Act did not apply to arbitrations seated outside India, and that Part II applies to those arbitrations exclusively. This restricted the grounds on which the Indian courts can set aside international arbitral awards, and removed the courts' power to grant interim orders in relation to foreign arbitrations. Parties resisting enforcement of foreign international awards now have recourse only to one of the grounds provided under section 48 (in Part II) of the Indian Arbitration Act, which are based on the New York Convention's Article V grounds.

Shri Lal Mahal Ltd v Progetto Grano Spa[123]

The Supreme Court of India further reduced the possible avenues of challenge before the Indian courts, by restricting the use of public policy as a ground of appealing international arbitral awards. The Supreme Court held that a distinction must be drawn between the application of public policy to domestic and to foreign international arbitral awards, finding that a narrower scope of public policy applies to challenges to foreign awards under section 48(2)(b) of the Indian Arbitration Act. That is, a mere contravention of an Indian statute no longer allows the Indian courts to set aside an award on public policy grounds. A party challenging the enforcement of the award now needs to establish that the award is in contravention of (i) the fundamental policy of Indian law; (ii) the interests of India; or (iii) justice or morality.

Further, the Supreme Court held that section 48 of the Indian Arbitration Act did not allow the courts to review the merits of a foreign arbitral award at the enforcement stage.

6.7 Conclusion

Overall, the recent trend in decisions relating to enforcement of international arbitral awards both in Australia and in courts in the South East Asian region could be described as going 'two steps forward, one step back'. Whilst Australia's recent arbitral law reforms evidence a general trend towards pro-enforcement and the desire to harmonise international arbitration law with respect to the enforcement of awards, it cannot yet be said that all Convention countries are equal in their approach and this is undoubtedly the reason why commercial parties seeking to seat

[122] *Bharat Aluminium Co. v Kaiser Aluminium Technical Service*, Civil Appeal No. 7019 of 2005.
[123] *Shri Lal Mahal Ltd v Progetto Grano Spa*, Civil Appeal No. 5085 of 2013.

their arbitrations or enforce a foreign arbitral award are choosing certain 'hubs' over other seats. Considering the recent cases extending beyond enforcement applications, the major arbitration seats in the region remain at the forefront of arbitration practice and enforcing international arbitral awards and of adopting a legislative framework and a judicial climate which is pro-arbitration. This can only be described as being in Australia's trading interest.

Chapter 7
Mediation in the Resources Sector: 'Alternative' Dispute Resolution or Now the Norm?

Michael Hollingdale

Abstract The normal process for resolution of transnational commercial disputes in the resources sector is arbitration. Few disputes are mediated following an unsuccessful negotiation or once arbitration has commenced. This may be contrasted with domestic commercial dispute resolution throughout developed (and in many developing) jurisdictions where some form of mediation is commonplace. The European Parliament recognised the value of mediation of cross border disputes through its Mediation Directive in 2008. Other institutions and influential intermediaries such as international arbitration centres and the ICC have rules that facilitate and govern commercial mediation. The question arises: why are disputants in the resources sector not more predisposed to mediation as a first step in the dispute resolution process before resorting to arbitral or litigation proceedings? This chapter argues the case for the greater use of mediation by transnationals in the resources sector. It outlines some of the positive factors that ought to encourage participants to turn to mediation as their preferred process for dispute resolution in this sector or indeed have it as the default process. Some potential negative factors that might dissuade parties from adopting a 'mediate first' approach are considered. Different mediation processes and styles are also considered to demonstrate mediation's flexibility and suitability to the resources sector.

7.1 Introduction

The focus of this chapter is on resolution of private disputes between transnationals doing business in the resources sector. Some degree of international participation is the norm for project developments and operational activities in the oil and gas, energy and mining sectors. Participants in these sectors have long favoured arbitration over litigation when seeking a binding determination of disputes between

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each other, principally motivated by concerns about cost, speed, expertise and confidentiality.

Since the 1970s and 1980s mediation of commercial disputes has grown in stature. It is now a well-established alternative to litigation and arbitration in the domestic arena. In this chapter I argue the case for greater use of mediation by transnationals in the resources sector and for it to become the norm. The drivers for change are upon us. What will continue to drive this change is recognition that neither arbitration nor litigation are usually superior processes when it comes to achieving a satisfactory, lasting resolution of a dispute. Mediation, when appropriately utilised and properly administered, can prove to be superior in most instances.

In order to bring about this change, those responsible for drafting commercial contracts in the resources sector should make provision for mediation as an optional first step in the dispute resolution regime. Following an unsuccessful negotiation, mediation would then be the usual next step before a reference to arbitration.

Like other consensual ADR forms, while mediation is not a panacea process, its upside is high while the downside risk for parties is limited. Assuming parties and their advisers properly turn their minds to it, then instead of asking 'why mediate this dispute?', the question becomes 'why not mediate it first up?'. While occasionally there may be sound reasons for not mediating, those occasions are likely to become more often the exception rather than the norm in the resources sector. Institutions have recognised this by introducing rules and guidelines that encourage parties to adopt a mediate first approach to resolving commercial disputes.

I do not favour mandatory mediation for the simple reason that compulsion is inconsistent with the consensual nature of mediation. The opt-in approach to mediation for the resources sector is also problematic. A party can too readily dictate a default position (of arbitration) by refusing to mediate once a dispute has arisen and is unresolved. Unlike in the construction sector where the dispute types are relatively predictable and almost invariably well suited to resolution by mediation, I prefer the opt-out approach to mediation of other disputes in this sector.

In some jurisdictions, court rules make mediation a mandatory step before a matter is listed for trial, irrespective of any contractual dispute resolution regime agreed by the parties. In other jurisdictions, such as Singapore and the United Kingdom (UK), litigants are merely encouraged to mediate, but the judiciary do have limited powers to take a refusal to mediate into account when making a costs order.[1]

[1]The Right Honourable the Lord Woolf (discussing compulsory reference to mediation), 'Mediation: The Way Forward' (Speech delivered at the 2013 Singapore Mediation Lecture, Singapore, 10 October 2013) http://www.mediation.com.sg/assets/downloads/address-by-the-rt-hon-the-lord-woolf/lordwoolfspeech.pdf.

7.2 Some Definitions

Nomenclature is important. Confusion can arise when moving between arbitration, conciliation and mediation in different spheres of commerce and in different legal systems. First, a definition of mediation as adopted by NADRAC,[2] an Australian government advisory body, to inform this discussion:

> *Mediation* is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.[3]

The EU's Mediation Directive[4] and ADR institutions and advisory bodies provide similar definitions; some are more prescriptive than others.

While the subject of this chapter is not conciliation, many international organisations will be more familiar with conciliation than mediation and so the definitional distinction should be made for present purposes. NADRAC defines conciliation as follows:

> *Conciliation* is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

The material difference between the two processes is that unlike a mediator (at least one who adopts the traditional facilitative role), a conciliator is expected to provide expert advice and legal information in some circumstances. As will be discussed later, evaluative mediators often do this as well when parties request or allow them to do so.

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[2]NADRAC was an independent non-statutory body established in 1995 to provide expert policy advice to the Australian Attorney-General on the development of ADR and promoted the use of alternative dispute resolution. NADRAC concluded in late 2013.

[3]NADRAC, *Dispute Resolution Terms* (3 September 2003) Australian Government: Attorney-General's Department http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF.

[4]*Council Directive 2008/52/EC of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters* [2008] OJ L 136/3, art 3(a) ('*EU Mediation Directive*'), includes this definition: '*Mediation* means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested by a court or prescribed by the law of a Member State.'

Thus, common elements of mediation and conciliation may be summarised as:

- listening to and being heard by each other;
- working out what the disputed issues are;
- working out what everyone agrees on (common ground);
- working out what is important to each person;
- aiming to reach a workable agreement;
- developing options to resolve each issue;
- developing options that take into account each person's needs and desires; and
- discussing what parties could do as a way of assessing options and exploring what might lead to an outcome that everyone can live with.

As one leading commentator has written, 'conciliation is essentially an applied psychological tactic aimed at correcting perceptions, reducing unreasonable fears, and improving communication to the extent that permits reasonable discussion to take place and, in fact, makes rational bargaining possible'.[5] And another described it as 'the psychological component of mediation in which the third party attempts to create an atmosphere of trust and cooperation that is conducive to negotiation'.[6] Another view of the overlap between the two processes is that mediators practise conciliatory moves.

If readers are more familiar with this concept of the role that a third party adviser plays when assisting in a dispute resolution, by all means consider references to mediation throughout this chapter as also being applicable in practice to conciliation, unless a distinction is being drawn between the two for a particular purpose.[7]

7.3 Context

Many disputants will be international contractors and suppliers engaged during the infrastructure and development phase of a resources project. In the field of domestic commercial disputes in Australia, the UK and the United States of America, mediation is commonly provided for in industry standard documents as an integral step before ultimate escalation to an expert, arbitral or court determination in a

[5]Adam Curl, *Making Peace* (Tavistock Publications, 1971) 177.

[6]Christopher W. Moore, *The Mediation Process, Practical Strategies for Resolving Conflict* (Jossey–Bass, 1st ed, 1986) 124.

[7]Conciliation is rarely the preferred means of resolution of commercial disputes in Australia. It is, however, in the field of industrial relations: the *Conciliation and Arbitration Act 1904* (Cth). While much has changed in the industrial landscape over the last century, conciliation is an integral part of industrial relations and arguably remains an important principal means of resolving industrial disputes in Australia. The Institute of Arbitrators & Mediators Australia (IAMA), a professional body that has provided arbitration and conciliation services since 1975, has embraced mediation since the mid-1990s when the demand for domestic arbitrations and conciliation dropped off.

tiered dispute resolution process. The courts will strongly encourage, if not mandate, use of court annexed mediation as part of a system of active case management.

Modern alternative dispute resolution in the United States is said to have been born at the 1976 Pound Conference. ADR can trace its origins in Australia to the mid-1980s through the Australian Commercial Dispute Centre (ACDC) and to 1990 in the UK through the Centre for Effective Dispute Resolution (CEDR). Mediation, in its many guises, has become widespread and is the most common form of ADR for domestic disputes in these countries and many others over the past few decades. Its adoption throughout the European Union is inevitable following the EU Mediation Directive (in May 2008). New legislation has been enacted in a number of European countries to give effect to it.[8] The International Chamber of Commerce's launch in 2014 of its Mediation Rules and associated clauses signifies renewed recognition of the important role that mediation can play in resolution of international disputes.

Nearly 40 years or so have passed since the Pound Conference in the United States. And yet despite these initiatives, it may fairly be asked how well mediation is faring today? Some suggest that mediation has not become the success it promised to be and as a process it is perceived as having stalled.[9] While the former view is undoubtedly true, the latter is debatable. Often where arbitration is preferred over litigation, as it is in the resources sector, mediation will be a mere afterthought, if seriously contemplated at all. It is perplexing that mediation is still perceived as a marginal method of dispute resolution in the resources sector, despite its obvious advantages. Quite apart from party reticence or ignorance, arbitrators themselves appear reticent about promoting mediation once they enter into the reference.[10]

One answer that has been suggested to address mediation's perceived lack of currency is the promotion of a more pragmatic approach with users being placed back at the core of any mediation debate and strategy. Resources sector participants have much to gain by taking up this approach.

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[8]For a discussion on the objectives and applicability of the *EU Mediation Directive* governing various mediation issues within Member States, and for a review of the availability and process of mediation in 21 jurisdictions across the Americas, Asia-Pacific and Europe specific examples see: Linklaters, *Commercial mediation—a comparative review—2013* (3 April 2013) http://www.linklaters.com/Publications/Commercial-mediation-comparative-review-2013/Pages/Index.aspx#sthash.uQ3mDcMV.

[9]Christian-Radu Chereji and Constantin-Adi Gavrila, 'What went wrong with mediation?' on *Kluwer Mediation Blog* (6 February 2014) http://kluwermediationblog.com/2014/02/06/what-went-wrong-with-mediation/.

[10]Lord Woolf, 'Mediation: The Way Forward', above n 1:

> An explanation may be that arbitrators, especially in commercial litigation, are more diffident in encouraging the use of mediation than full time judges who would conduct the trial in civil or commercial courts. After all, they usually owe their appointment as arbitrators to the parties' lawyers. Thus, arbitrators would be likely to defer to them on questions such as whether there should be an attempt to resolve the dispute by mediation.

On that note of pragmatism, one may ask why parties should be more inclined to control the outcome of a dispute by a consensual process, instead of allowing a process where a decision is imposed through a determination or adjudication? For owners and senior executives of businesses in the resources sector with naturally risk averse culture, I would suggest one obvious answer: to retain control over their destiny. And a second answer: because parties themselves can be, and need to be, at the centre of the mediation process. Despite this, some middle managers of businesses may answer differently. They may be personally risk averse or feel ineffectual for political reasons. As they would be accountable for settlements they negotiate, they may believe it would be safer to make someone else responsible for making the decision, such as an expert, arbitrator, or judge. Armed with that decision, they could then either congratulate themselves if that independent decision maker agrees with them or deflect blame elsewhere if it is adverse to their interests.

7.4 Resources Sector Disputes

The resources sector generates a typically broad range of commercial disputes, while some are peculiar to the sector. The exploration phase may involve tenure and access issues. During the Front End Engineering Design (FEED) phase, relations between venturers may be tested over issues such as scope of study and investigations, cost estimates and level of accuracy for financial investment decision. Next, the development phase of a project life can generate disputes commonly encountered in the construction and infrastructure sector with consultants and contractors, for example site conditions, changes in scope, delays, approvals from authorities, performance guarantees and the like and may affect the time and cost of the project.

Once the project enters its operational phase, disputes could arise over interpretation of a joint operating agreement, its application and enforcement, royalties applicable over the life of a mine, change of circumstances under a long term take-or-pay contract, gas price formula or indices ceasing to exist. Disputed breaches of a joint operating agreement may cover performance obligations, farm-in arrangements, whether venturers contemplated certain activities being within the operator's scope, whether a breach amounted to wilful misconduct or gross negligence, or whether a failure to perform was due to a *force majeure* event.

A particular feature of the resources industry is the long term and complex nature of contracting. Whether through multi-party joint ventures, operation and maintenance service providers or suppliers, more often than not there will be a mix of local and international parties. Quite apart from endeavouring to have consistent applicable laws and dispute resolution regimes, a myriad of hard to predict issues can arise in these relationships. They might be continuity and conditions of access and ultimately, for land-based operations, remediation obligations. Drafting provisions that have sufficient predictability and certainty in long term contracts, is no mean

feat. Such contracts often fall short in providing a consistent methodology for addressing and allocating newly arising risks. The stakes are invariably high and competition is ever increasing (whether it be from new market entrants, re-engineering or technological innovation). Hence, the need for greater self-determination and de-risking the dispute resolution process when conflicts arise has increased.

Consider, for example, a production/mining joint venture. Generally speaking, participants will be keen to avoid litigation. First and foremost this is because the adversarial nature of litigation is incompatible with the joint venture relationship. Secondly, this is due to the public nature of litigation. However, once a joint venture relationship has broken down, or a final determination of the participants' rights and obligations is required, for example to resolve an important question of contractual interpretation or to imply a critical term into the agreement, one might be tempted to assume arbitration litigation may be the only appropriate course.

It is important therefore that joint venturers have robust and effective mechanisms for resolving disputes between them, both in their capacity as participants and about the conduct of the manager's role. But does 'robust and effective' necessarily equate to arbitration/litigation simply because the parties may seek, and be confident of achieving, a final and binding outcome according to the governing law and evidence as presented?

Contrary to the view of some commentators, even if a dispute concerns matters fundamental to the joint venture relationship, for example the scope of the joint venture or the admission of new entrants to the joint venture, a non-binding dispute resolution process may still be appropriate, at least to explore the option of amicable resolution.

7.5 Arbitration/Litigation—Spot the Difference

Arbitration remains the predominant dispute resolution process that transnational parties default to when disputes arise.[11] Arbitration is already a big business for professionals serving an industry that has built up around international dispute resolution, particularly over the past 30 or so years. The arbitration business is growing, as privately run organisations promote its use internationally. Legislators and courts are lending a hand to its promotion and independence by limiting a party's right to seek judicial relief when faced with unfavourable awards or aberrant arbitrator conduct. However, in recent years there has been a growing recognition by business managers and their in-house counsel that arbitration has become too akin to litigation. For many of them it may be rapidly losing its appeal. Its advocates can no longer claim many of the trade mark advantages over litigation: cost,

[11]This view is based on a review of many contracts in the oil & gas sector and mining sector in Western Australia and beyond, including forms of Joint Operating Agreements (JOAs) used in the upstream oil and gas sector commonly adopted by multinationals, and based on my discussions with those who draft such contracts.

speed, agility, pragmatism, commerciality and procedural simplicity. Admittedly though, one key insignia of arbitration, confidentiality, remains a clear point of difference and one of its few remaining advantages over litigation.

International commercial arbitration of high value stakes between private disputants today shares a number of common features with litigation. These include:

(i) optimism bias: where the collective expectations of the parties and their advisers exceeding 100 % chance of success;
(ii) budget overruns: parties and their legal advisers habitually underestimating the total cost of the arbitral project process, assuming it will be more efficient and less of a battle compared with litigation;
(iii) increasing complexity: in part due to project size, multi-party participation and voluminous documentation, leading to a greater need for legal project management;
(iv) 'scorched earth' warfare: the adversarial drivers to win at any cost, discourage cooperation and risk-taking (for example by narrowing the issues, scope of discovery, evidence, and other fast track procedures);
(v) procedural formality and case management;
(vi) inordinate investment of time and emotions: leading to a strong sense of frustration and entitlement when facing the prospect or reality of compromise once the serious risk of an adverse outcome finally dawns; and
(vii) in terms of weighing up the certainty of outcome benefits in having an award or judgment, there is still the risk of unexpected delay in delivery of the award or judgment (sometimes many months and even years after the hearing), possibly rendering it worthless due to the change in commercial circumstances.

Despite the drive for improved efficiency through case management and legal project management, fundamentally arbitration and litigation are both designed to achieve a determination of rights and entitlements (by award or judgment) through an adversarial process.

On the other hand, as the earlier NADRAC definition suggests, mediation is essentially a consensual process designed to enable parties to relatively quickly convene and achieve a constructive dialogue and outcome, assisted by a third party neutral. Mediation enables a dialogue to occur about the parties' respective immediate and longer term interests in the place of, or at least in addition to, an analysis of how their rights and entitlements may be determined.

Having made that distinction, I now turn to consider current trends concerning the use of mediation during commercial litigation and arbitration. First it may be observed that very few actions commenced in superior courts proceed to trial.[12]

[12]In the Supreme Court of Western Australia for example a mere 3 % of cases filed proceed to a trial. By comparison, the incidence of disposal of arbitral proceedings by award following a hearing may reveal a different outcome, though this is conjecture and would not easily be established given the number of ad hoc arbitrations.

The expectation of court administrators is that the vast majority of cases will settle at some stage or other of the proceedings. Accordingly courts will rarely, if ever, allow commercial matters to proceed to trial without directing parties to attempt mediation at least once. As noted earlier, arbitrators on the other hand seem to be less willing promoters of mediation. This is set to change as international arbitration institutions assume a demeanour that at least supports greater use of mediation.

Debate continues among court administrators and the legal profession over when the matter is most likely to be ripe for mediation. The answer will depend on numerous factors and 'there is no universal ripe time to mediate civil disputes'.[13] Some courts will encourage multiple attempts at mediation, in other words at different stages of the proceedings, including before an appeal is heard, if earlier attempts do not achieve a final resolution.

Administrators of arbitration institutions and other ADR organisations are now keenly interested in this topic of ripeness as they turn their attention to introducing mediation as an intermediate step during the arbitration process.[14]

7.6 Arbitration/Mediation—Spot the Substantive Differences

Having considered the striking similarities in current practice between international arbitration and litigation, I now turn to how mediation differs from those two processes.

There are many substantive and procedural differences between the processes. These include:

- party autonomy;
- flexibility, informality, speed and cost;
- interests-based versus rights-based;
- enhanced prospect of relationship preservation;
- a greater degree of confidentiality (compared with arbitration); and
- the ability to produce creative 'win-win' results.

From a commercial and management perspective, mediation may therefore be seen to have a number of advantages, and even be superior to, arbitration/litigation.

In its mediation audit in 2012, The Centre for Effective Dispute Resolution (CEDR) concluded that 'civil and commercial mediation is now an established field which not only makes a very significant contribution to the business economy in

[13]Justice PA Bergin, 'The objectives, scope and focus of mediation legislation in Australia' (2013) 2 *Journal of Civil Litigation and Practice* 49, 56.

[14]For example IAMA in Australia, CEDR in the UK, the International Chamber of Commerce ('ICC') in Europe and American Arbitration Association in the United States.

terms of cutting the cost of conflict, but itself is remarkably cost-effective in so doing'.[15]

From a risk benefit analysis then, mediation may be seen from two perspectives:

(a) on the upside: each party has control over its participation in the process (including its scope, and how much time and cost it is willing to devote to it); the chance of success is very high; there is far less cost and time and a lower risk of an unexpected/undesirable outcome; there is also less risk of antagonism if a skilful mediator is on hand to effectively manage and dilute tensions; and
(b) on the downside: albeit limited, more time can be added to an already lengthy formal arbitration/litigation process; and there is a quite limited addition to the total dispute management cost (assuming no positive outcomes from the mediation such as clarification/narrowing of issues that ultimately fall to be determined by the tribunal). It may produce a result that requires enforcement through a separate action, and in that sense it is not directly enforceable.[16] It encourages, though does not require, a willingness to compromise one's legal entitlement and so may appear to be an affront to that party's sense of justice.

As described in the section above on arbitration/litigation, it may be acknowledged that arbitration, as with litigation, can often be a very high-cost, high-risk, drawn out and reputation destroying activity. Mediation's advantages do address these problems: it is invariably faster, cheaper, safer and (if successful) more likely to be better for all parties through the process of achieving a mutually acceptable outcome, namely one that each party can live with.

Once a party recognises that an agreed outcome will provide, or is likely to provide, a better option than the risk of not achieving a more favourable outcome through an arbitral determination of its legal or contractual rights, a party will be prepared to accept its outcome. This is often despite needing to make a compromise and so the outcome will not necessarily be seen as a 'win'.

Where parties have in place long term arrangements for their resources projects, mediation can also be better, indeed superior. This is because relationships can be preserved and nurtured and arrangements can be better tailored for those purposes. If a party's sense of individual autonomy is merely based on and reliant on a concept of legal rights or contractual entitlements, that party's mindset may become limited to an 'I versus You' and a zero sum game. Mediation offers the potential of transforming that mindset to a more conventional and cooperative, even trusting,

[15]CEDR Ireland, *The Mediation Report* (21 March 2013), 8 http://www.cedr.com/docslib/CEDR_Ireland_Mediation_Audit_main_(2).pdf.

[16]This disadvantage is more relevant to foreign enforcement; it can be readily addressed, particularly in the Med-Arb process discussed below. This is also being addressed through the *EU Mediation Directive* [2008] OJ L 136/3 which provides for agreements reached through mediation to be made enforceable should the parties request it. Any agreement that has been made enforceable in one Member State should be recognised and declared enforceable in other Member States in accordance with Community or national law.

relationship. It can therefore become one based more on 'us'. In this respect, a mediated outcome may prove to be more enduring than one that has been imposed.

In my view, these advantages ought to resonate with participants in the resources sector where commercial and market factors become the imperative for pragmatic decision makers. This is particularly the case for leaders of project teams charged with getting a project into production and contractors keen to close out a contract.

7.7 When Mediation Might Be Inappropriate

Despite its many advantages and the broad scope of its potential application, mediation is not a cure-all. Here are just a few examples of when mediation is not worth exploring or persisting with.

- If an authoritative decision such as a legal clarification is being sought or time is of the essence, an application for declaration or injunctive or emergency relief may be necessary, leaving little to be gained by spending valuable time attempting a consensual process as a precursor.
- If there is an intolerable power imbalance, the disempowered party will in all likelihood lack a sufficient degree of self-determination. This can be as a result of coercion (for example, due to an unacceptable level of abuse[17]) or lack of resources that renders that party being vulnerable or an unwilling or ineffective participant.
- Once a contract has ended or is due to expire soon, this may mean there is little incentive for one or both parties to preserve or invest in their relationship. There is then a temptation to hand the dispute over to the lawyers to deal with and close out the parties' respective entitlements).
- Requiring a dispute over a mere computational matter to be mediated may also be questionable. An immediate referral to expert determination, or alternatively a fast-tracked hybrid process may be the better answer.
- A party steadfastly demonstrates an unwillingness to participate.[18]

Even when mediation is unlikely to work, for reasons other than urgency, it may still prove beneficial. Work undertaken in preparing for mediation is unlikely to be wasted, and preparation costs are relatively insignificant compared with arbitration/litigation. The passing of time sometimes takes the heat out of the dispute, or brings

[17]There are techniques mediators can adopt to counter abusive behaviour, though sometimes if it persists and is sufficiently damaging to the process, little will be gained by allowing the mediation to continue. For further reading on this subject and valuable techniques see: Roxanne K Livingston, *Chronically Hurtful People: How to Identify and Deal with the Difficult, Destructive and Disconnected* (Createspace, 2011).

[18]A party who unreasonably refuses to mediate a dispute that is later litigated can suffer adverse costs consequences. For example *Phillip Garrit-Critchley and Others v Andrew Rinnan, Solarpower PV Limited* [2014] EWHC 1774.

a change in attitude (for example, new personnel charged with resolving the dispute may be more dispassionate and effective negotiators, or a political change occurs internally or externally).

If parties in dispute over a defect have entrenched positions on liability but an urgent need to find a technical solution, another option may be to park the issue of liability while experts confer on a technical solution with the assistance of a facilitator or mediator. By taking this additional time, experts can be allowed to be brought together earlier in the process, and in a less adversarial environment, to genuinely seek out-of-the-box solutions rather than focussing on attributing blame. Given the requisite confidentiality of the expert conferral process (with parties and lawyers excluded), experts can bring solutions to the table without fear of attribution or retribution. Once the solution and usually the associated costs are agreed upon, as written up by the facilitator or mediator, the parties can negotiate on the liability issue assisted by the same mediator who will be privy to the technical issues and arguments. Then only if necessary will the unresolved dispute on liability be referred to arbitration for a determination. Consequently, the focus of the arbitration would be considerably narrowed and result in a substantial saving by all parties of further preparation and hearing time and cost.

If the dispute resolution regime in a contract provides for mediation but is expressed in terms of permitting a party to opt-out, no party will be required to mediate unless it considers it appropriate to do so.

7.8 Confidentiality

A mediation agreement or rules incorporated under the agreement will invariably provide that, unless otherwise agreed by the parties or required by applicable law, the mediation (but not the fact that it is taking place, has taken place or will take place) is private and confidential.[19] This is consistent with contracting in the resources sector where commercial confidentiality is usually of utmost importance. Consequently, documents, statements or communications that are submitted by another party or by the mediator in or for the mediation proceedings are not allowed to be produced and are not admissible as evidence in any arbitration, litigation or similar proceedings, unless they can otherwise be obtained independently by the party seeking to do produce or rely upon them in those proceedings. Similarly, any views expressed, suggestions made about possible settlement terms, or any admissions made by another party in the mediation, are not able to be referred to or relied on in other proceedings. The rationale for upholding confidentiality has been described as follows:

> It is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them

[19]International Chamber of Commerce, *ICC Mediation Rules*, Article 9 ('*ICC Mediation Rules*').

…. were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty free discovery process ….[20]

The EU Mediation Directive notes the importance of confidentiality and its Article 7 provides a minimum degree of compatibility with civil procedural rules for the protection of confidentiality in mediations in any subsequent civil and commercial judicial proceedings or arbitration.

7.9 Removal of Obstacles—A Cultural Shift Prompted by the EU Directive

The EU Mediation Directive sets out high level principles concerning use of mediation in crossborder disputes of a civil or commercial nature. The Directive described agreements resulting from mediation as being 'more likely to be complied with voluntarily and more likely to preserve an amicable and sustainable relationship between the parties'.[21] The Directive sought to promote a voluntary process 'in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time'.[22] New legislation has been enacted in a number of European countries to give effect to it.[23]

7.10 New ICC Mediation Rules

The International Chamber of Commerce in 2014 updated its mediation rules and guidance notes. The new Mediation Rules[24] came into force as from 1 January 2014. They are short, succinct and clear. The rules provide for the fundamentals of mediation while retaining sufficient procedural flexibility for appropriate facts and proceedings. The appendix to the rules sets out the fees and costs associated with

[20] *AWB Ltd v Daniels* (Unreported, New South Wales Supreme Court, Commercial Division, Rogers CJ, 12 May 1992).

[21] *EU Mediation Directive* [2008] OJ L 136/3, paragraph 6.

[22] Ibid paragraph 13.

[23] Many Member States have passed legislation specifically to implement the Directive, including France, Germany, Luxembourg, the Netherlands, Spain and Sweden (these jurisdictions are discussed in: Linklaters, above n 8). However to date, other states, including the UK, have only specifically implemented certain aspects of the Directive. Refer to the study entitled: Giuseppe De Palo et al., *'Rebooting' The Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the in the EU* (January 2014) European Parliament: Directorate-General for Internal Policies <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf>.

[24] *ICC Mediation Rules.*

making a request for mediation under the ICC Mediation Rules and, similar to arbitration, these cover both the filing fee and the administrative expenses for the ICC. The ICC describes mediation under the ICC Mediation Rules as a flexible procedure aimed at achieving a negotiated settlement with the help of a neutral facilitator.

In multi-tiered dispute resolution clauses, consideration needs to be given to the Emergency Arbitrator Provisions in the 2012 Arbitration Rules. Parties are encouraged to determine whether or not they wish to have recourse to the emergency arbitrator when providing for ICC mediation in parallel with or prior to arbitration proceedings administered by the ICC International Court of Arbitration.

Drafters should, however, take note of three other issues. The first is that article 7 (4) of the Mediation Rules provides that 'each party shall act in good faith throughout the mediation'. However, good faith means different things in different countries. Under Australian common law, the term is not precisely defined. The interpretation of what is required by an obligation to act in good faith has been the subject of many cases. Drafters may wish to consider whether they or their client wish to be bound by such an obligation. Second, article 10(2) provides that unless the parties have otherwise agreed, the parties may commence or continue any judicial, arbitral or similar proceeding, even though the mediation is taking place under the ICC Mediation Rules. Express wording will therefore be required in the parties' arbitration agreement or dispute resolution clause if mediation is to be a precursor to judicial arbitral or similar proceedings.[25] Third, when incorporating any of these clauses in their contracts, parties need to take account of any factors that may affect their enforceability under applicable law.

7.10.1 Model Mediation Clauses

The ICC has drafted four alternative model mediation clauses for parties wishing to have recourse to ICC mediation or other settlement procedures under the ICC Mediation Rules. The clauses can be amended to reflect local laws and the parties' particular needs. The clauses can be used for mediation alone or in parallel with or prior to arbitration or other proceedings. Two of the proposed clauses combine mediation with arbitration, one simultaneously, the other successively. Another creates an obligation to consider referring disputes to the ICC Mediation Rules. The least constraining clause, clause A, merely reminds parties of their option to use the ICC Mediation Rules.[26]

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[25]Nick Rudge, *Focus: Asia Pacific International Arbitration Update: New ICC Mediation Rules* (9 April 2014) Allens Linklaters http://www.allens.com.au/pubs/arb/foarb9apr14.htm#New_I.

[26]International Chamber of Commerce, *Suggested Clauses for ICC Mediation* http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/suggested-clauses/#sthash.FfsemL0f.dpuf.

Alternative clause A, is an example of an opt-in clause. It is entitled 'Option to Use the ICC Mediation Rules'. It provides:

> The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules.

The ICC's accompanying notes to this clause explain that:

> by including this clause, the parties acknowledge that proceedings under the ICC Mediation Rules are available to them at any time. This clause does not commit the parties to do anything, but the presence of the clause is designed to remind them of the possibility of using mediation or some other settlement procedure at any time. In addition, it can provide a basis for one party to propose mediation to the other party. One or more parties may also ask the ICC International Centre for ADR for its assistance in this process.

For the ICC's other suggested clauses, including an opt-out clause, refer to the ICC webpage.[27]

7.10.2 Guidance Notes

The ICC has published guidance notes to the Mediation Rules.[28] These notes are a very practical guide to both the rules and the general conduct of mediations. These guidelines include issues that can be addressed by parties preparing for the initial mediation conference and if appropriate raise them for discussion with mediators when designing the process. I mention just two issues that are covered. First, mention should be made of the recommended terms of settlement. This guidance note states:

> Without imposing terms of settlement on the parties, the mediator may, if requested by all parties, recommend terms of settlement for their consideration.

The second note is about combining mediation with other settlement procedures. It states:

> The parties and the mediator may agree that in certain circumstances (e.g. where a settlement agreement has not been arrived at after a certain period of time) the parties may jointly request the mediator to provide a non-binding evaluation of the merits of the dispute in order to assist them in reaching a negotiated settlement agreement.

Incorporation of the ICC Mediation Rules in a dispute resolution clause is just one means of encouraging mediation, whether it is administered fully by the ICC for a fee or an ad hoc mediation where the ICC plays no role in appointing the

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[27]Ibid.

[28]International Chamber of Commerce, *Mediation Guidance Notes* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Rules/Mediation-Guidance-Notes/ ('*ICC Mediation Guidance Notes*').

mediator or administering the mediation. Various national and international dispute resolution bodies have published model rules that participants may choose to incorporate into their agreement for the purposes of their dispute resolution mechanisms.[29]

When incorporating mediation into a multi-tiered dispute resolution clause, it is important that relevant matters be provided for with sufficient certainty, and yet with flexibility to deal with the specifics of any particular dispute. The ICC Mediation Rules are an example of that purpose being achieved.

7.11 AAA's Commercial Arbitration Rules and Mediation Procedures

Another institution, the American Arbitration Association (AAA) published its new Commercial Arbitration Rules and Mediation Procedures in October 2013. The AAA has improved its arbitration procedure by making mediation a normal process step that parties will have to opt-out of, rather than into. New Rule 9 provides:

> In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case. (*emphasis added*)

7.12 Use of Flexible Hybrid Mediation Procedures

Many dispute resolution clauses provide that mediation is to take place before arbitration (or litigation) proceedings are commenced. If mediation is not provided for, and the parties turn their minds to this option once arbitration has commenced, either they can agree with the arbitrator to take time out to mediate within those proceedings (and having the arbitrator also act as mediator). This process is known as 'Med-Arb'. Alternatively, the parties may agree to mediate (with an appointed mediator) separately from the arbitration proceedings.

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[29]For example, refer to Australian Centre for International Commercial Arbitration at www.acica.org.au, Institute of Arbitrators & Mediators Australia at www.iama.org.au, Australian Commercial Disputes Centre at www.acdcltd.com.au, Centre for Effective Dispute Resolution at www.cedr.co.uk and American Arbitration Association at www.aaa.com.

In some jurisdictions, the inclusion of mediation within the course of an arbitration (Med-Arb) is enacted in arbitration legislation. This hybrid process is said to offer several advantages: the potential of saving time and costs by appointing the same person as mediator and arbitrator, and the certainty that the dispute will be resolved either by agreement or award. However those advantages need to be weighed against potential risks of allowing one person to wear two hats. The risks include that disputants may be inhibited in what they say in the presence of the mediator in the knowledge that the same person may end up as the arbitrator who then has to decide the outcome. Another risk, particularly for international disputes, is that an arbitral award may be set aside or rendered unenforceable for breach of the rules of natural justice (want of procedural fairness).

To date, Med-Arb has not been adopted with any real enthusiasm in Australia or the United Kingdom. Despite the legislation entitling parties to arbitration in Australia to use a hybrid process, most practitioners concede it is problematic to do so as part of the arbitration process itself. A number of these concerns have been addressed in some jurisdictions, including in Australia,[30] Hong Kong and Singapore, by introducing gateways into what is essentially a consensual process. In Australia a party may opt-out at any stage and terminate the mediation proceedings and a new arbitrator will be appointed unless agreed otherwise.

Parties who consider using mediation once arbitration is under way are usually advised to treat it as a separate process. This seems to be the safer course despite the additional cost involved in having to appoint a mediator if the arbitration needs to follow an unsuccessful mediation.

Where mediation takes place during the course of arbitration proceedings, and the parties are content to alert the arbitral body to it occurring, it is often sensible to stay the arbitration to allow time for conducting the mediation and potentially save costs being unnecessarily spent on the arbitration. (Such a stay or pause in the proceedings is sometimes referred to as a mediation window.) By formally taking a time out, the parties can focus on the mediation without being distracted by the advance of the arbitration and incurring the costs of those steps when a settlement may be imminent. In other cases, such as when timing for a final award arbitration is critical, the parties may prefer to conduct the mediation without requiring a stay or pause in the arbitral proceedings.[31] The option for, and timing of, mediation may be raised at the initial arbitration case management conference.

ICC Mediation Guidance Notes[32] also address the option of the parties agreeing in the course of arbitration that they would like a sole arbitrator or a member of a tribunal (usually the chairman) to assist the parties in negotiating a settlement of

[30]*Commercial Arbitration Act 2010* (NSW) s 27D. Some other States in Australia adopted similar amending legislation.

[31]For a useful discussion on the relationship between Mediation and Arbitration refer to the *ICC Mediation Guidance Notes* (above n 29), paragraphs 28 to 35.

[32]*ICC Mediation Guidance Notes*, paragraph 34. Because of the potential risks in some jurisdictions, *ICC Mediation Rules,* Article 10(3) allows a mediator to act as an arbitrator in the same dispute only when all of the parties have consented in writing.

their dispute by acting as a mediator. If the mediation does not produce a settlement of all issues in dispute in the arbitration, the parties' agreement may also permit the mediator to return to the role of arbitrator and proceed to make or participate in the making of an award in the arbitration.

The Guidance Notes point to an advantage of this process that if the parties agree terms of settlement through mediation proceedings conducted in the course of arbitration proceedings, they may be able to record the terms of settlement in a consent award pursuant to Article 32 of the ICC Arbitration Rules. Such a consent award may be of assistance where, for example, one or more parties wish to be able to enforce the settlement agreement as an arbitral award.[33]

As our collective experience of Med-Arb evolves so too will its merits continue to be debated.[34]

Another example of a flexible mediation process that can provide the parties with more options is when parties mediate with a view to asking the mediator to provide a written non-binding opinion after a mediation conference concludes without a resolution. (The ICC contemplates this in its second guidance note to its Mediation Rules.[35]) Assuming the mediator has the requisite qualifications,[36] the perceived benefit in doing so is that the mediator has had the advantage of reading the material provided and of hearing the parties in joint and private sessions. Accordingly, it is suggested that the mediator is in a sufficiently informed position to assess the respective legal merits and risks being taken by the parties. Often the non-binding opinion will form the basis for further negotiations and a resolution. This option, in one form or another, is no doubt being adopted more in large commercial mediations particularly where the appointed mediator is a senior barrister or retired judge. Attractive as this option may appear to be, I suggest it is not without its risks. These risks are discussed below when dealing with the evaluative style of mediator.

7.13 Mediator's Role

Once parties have agreed and are satisfied that the appropriate time to mediate has arrived, they will need to turn their attention to the selection of a mediator. As with arbitration, parties usually endeavour to agree on the selection. If they are unable to

[33] *ICC Mediation Guidance Notes*, paragraph 34.

[34] For a further explanation and valuable contribution to the Med-Arb debate refer to: Alan Limbury, *Med-Arb: getting the best of both worlds* (29 February 2012) International Mediation Institute https://imimediation.org/cache/downloads/30zzdkccdig4skgw80c8swwc0/hybrid-processes-2010—article-by-alan-limbury.pdf was *Australian Alternative Dispute Resolution Law Bulletin* 2014 vol no. 4 devoted to the topic.

[35] *ICC Mediation Guidance Notes.*

[36] Regulation of mediators through accreditation is still evolving. While incidents of mediators abusing their position may be rare, (for example though lack of suitable training or experience or undisclosed conflicts of interest), safeguards need to be considered to uphold the integrity and competency standards of the mediation profession.

agree and are still committed to going ahead, they will need to call on an intermediary to appoint the mediator on their behalf. There is a risk in the appointment of a mediator whom the parties do not know: they may not get what they expect or want.

The mediator's role is multifaceted. One leading author on mediation, Christopher Moore,[37] described mediators as having these roles:

- *host*—safety and comfort;
- *emotional counsellor*—'conciliator';
- *referee*—ground rules, impartial, but no power to decide or order people around; parties invite mediator into their conflict to help them;
- *facilitator*—guidance and structure;
- *idea generator*—creative options, 'outside the box';
- *reality tester*—confront while maintaining neutrality;
- *negotiation coach*—patience, strength, energy, balancing act; and
- *conflict manager*—anticipation, diligence, design next steps.

In addition to the conflict manager role, I would add another: *process project manager*.

A mediator is more like a respected guest invited to join the disputants in discussion at their table.[38] What mediators do bring to the table as a neutral includes:

- creating a safe atmosphere;
- managing emotions;
- facilitating conversation; and
- balancing power.[39]

A mediator will often be in the middle of hostile and often damaging emotional combat. This is what they sign up to. Major disputes in the resources sector of their very nature involve high stakes, in terms of quantum and reputational risk. A mediator who lacks courage and resilience is destined for a short career.

7.14 Style of Mediation

Good mediators in my view maximise party control. They listen with insight, intelligence and understanding. Mediation is a dynamic, ever changing process requiring decisions to be made on the run, so flexibility is another key attribute of

[37]Moore, above n 6.

[38]Contrast this with an arbitrator or judge, the authority figure who must determine issues according to legal principles and on the evidence as presented.

[39]Bernard Mayer, *The Dynamics of Conflict Resolution: A Guide to Engagement and Intervention* (Jossey-Bass, 2nd ed, 2012) 271.

good mediators. They must be capable of maintaining a calm demeanour. They need persistence and to maintain a constructive and positive outlook.

They can do this well by adopting a structured approach. This means first by assessing the contextual elements of the dispute (some obvious, others less so) and next the situation, by recognising timing issues. Only then can the mediator perform the required balancing act designed to maximise the chances of the parties taking control of their collective destiny.

Much has been written on what best practice mediation comprises. The conduct of the mediation will depend on so many variables, both contextual and situational. Differences in mediator styles are marked and can determine how participants experience the process—positively, indifferently or negatively. I offer a few ideas that may assist disputants and their advisers in the resources sector when considering what to look for and expect from a mediator.

More often than not, the approach needed to be taken is active and strong management as the parties are invariably seeking guidance and sometimes clear direction about how to go about resolving their issues. I am not here talking about strong in the sense of robustness of viewpoint and level of intervention. I mean effective project management and governance of the process itself. That may seem a little counterintuitive to the idea expressed earlier about party motivation and desire for self-determination. Parties are usually content to have a professional provide them with clear guidance about the process and once given and the direction is set, they are content to be kept on track, recognising the need at times for some flexibility.

There is a spectrum of mediation models or approaches. At one end is what may be styled as a *process-oriented* mediation. This is designed to maximise party control because the focus is more on the parties' interests. The mediator essentially plays a facilitative and guiding role and encourages a win/win mindset. It is also known as the *facilitative* model. Expressing a view or proposing options is studiously avoided. In its extreme manifestation, this mediator is a 'discreet, almost anonymous presence'[40] because to do anything else would be unhelpful for parties who are collaborating effectively and getting on with the task of finding their own solution. The level of mediator input increases as one moves along the spectrum.

The empowering style may be contrasted with that of mediators who provide significant input, in which they are assertive, sometimes directive, and may provide legal information and give advice to the parties—this more robust approach bears some similarly to the evaluative method.

At the other end of the spectrum is the *substance-oriented* mediation. This style closely resembles a settlement conference during which parties seek a resolution based more on rights and entitlements. Here the mediator evaluates the case and usually offers substantive recommendations on options for settlement. And so any

[40]Mark Jackson-Stops, *Facilitative or Evaluative? The Myth of the Distinction* (18 December 2008) In Place of Strife: The Mediation Chambers http://www.mediate.co.uk/our-knowledge/news_full.html?id=10.

settlement may be seen through the prism of a party's sense of what it considers to be its proper, fair or just entitlement, albeit with varying degrees of compromise. By its very nature, this *evaluative* model is more adversarial and involves a judicial style of analysis (legal/contractual rights). The issues are presented more or less informally, but they tend to be limited to what would be considered in a legal system based on who will win or lose (as in an arbitration/litigation). Parties in this settlement environment tend to compete with each other (and for the mediator's favourable opinion), negotiate a compromise or may surrender by accommodating the other's position. They will usually complain that they have failed to achieve a just result.

The evaluative mediator is often an authority figure (a retired judge, senior barrister or in some jurisdictions even a serving judicial officer[41]) to whom the parties will appeal instead of seeking to persuade the other party.[42]

When mediation is allowed to be dominated by the lawyers, even more so when conducted under the auspices of a court, there is a tendency for it to default to the evaluative model.[43] The evaluative model undoubtedly has its place. My only qualification is that it is only appropriate if parties freely choose it and the mediator is mindful of its limitations. In its extreme manifestation, a mediator adopting this style may walk into a mediation meeting, announce that he or she has read the papers and proceed to express a view on who would win if the matter proceeded to trial before inviting the parties to consider their positions!

As an aside, mediators these days are rarely transaction lawyers, accountants or senior business executives. If a deal needs to be renegotiated as a result of a dispute over the way it has been struck, drafted (interpreted), run or administered, then appointing a facilitative mediator with relevant transaction negotiation and drafting skills may well prove effective. A deal mediator is likely to be better qualified than a conventional lawyer mediator to assist parties with that deal making objective in mind.[44]

One's preferred style of mediation, not just a mediator's relevant experience, should therefore inform a party's choice of mediator. There is much to be said for

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[41]In the Supreme Court of Western Australia, the Court may direct that a mediation be conducted by a Judge if warranted by the particular aspects of the case: Supreme Court of Western Australia, *Practice Direction 4.2.1* (*paragraph 3*) *and 4.2.1.2,* 2 March 2012. A number of judges have been accredited as mediators under the National Mediator Accreditation Scheme. For a detailed analysis of this topic refer to Nicholas Hasluck, 'Should Judges Be Mediators?' in *Legal Limits* (Federation Press, 2013).

[42]Often parties engaging in this style of mediation will say they have selected the mediator for this very purpose and had they believed they could persuade the other party they could have done so without a mediator and the only reason for agreeing to mediate is to have the mediator tell the other side that that party's position is untenable.

[43]Unsurprisingly so, as lawyers are trained to analyse and evaluate then argue a case for their clients based on legal principles.

[44]'Deal mediation' is an important topic and worthy of serious consideration for dealmakers in the resources sector. It is an emerging mediation model and competency. It enables parties who are seeking to negotiate or re-negotiate a deal to do this more effectively by engaging a neutral person (a 'Deal Mediator') to actively assist in and manage the negotiation.

the facilitative model. This is the 'pure' model traditionally taught in mediation accreditation courses. In practice, it usually gets watered down with the best of intentions. And so the spectrum develops, where a mediator may start at one end and move towards the middle, and *in extremis*, even end up at the other end. It is possible to move along the spectrum in one direction (facilitative to evaluative) with the parties' concurrence. (This is reflective of the resources project mindset where parties initially seek a collaborative resolution at project team level before escalating the issue to senior management.) Rarely will it work however in the opposite direction (evaluative to facilitative), as once a clearly partial view has been expressed that mediator's value in the negotiation process diminishes.[45]

One reason that could be attributed to mediation not living up to its promise or at least to it having stalled is that the substance-oriented style (or evaluative model) of mediation has come to dominate the mediation landscape. Unsurprisingly, some parties experiencing this style of mediation come away from it questioning its purpose and value, particularly when they believe they 'lost', were 'brow-beaten' or that 'the mediator sided with the other party'.

7.15 Stages of the Mediation Process

Effective preparation is usually critical to a successful mediation. I have mentioned that part of a mediator's role is to be a process project manager. Project management too is important, and is particularly valuable when mediating large disputes in the resources sector. Not only must the numerous parties and their advisers be suitably prepared but so too must the mediator. Investing sufficient time and the right resources before the mediation meeting will often prove to be determinative of a successful outcome. Here are some ideas about preparing for a large multi-party resources sector dispute, adopting the facilitative *process-oriented* model. This model is under-utilised and merits an explanation.

A mediator can assist parties prepare by adopting a questionnaire approach. This first stage of preparation helps the parties educate each other and the mediator about the context and situation (what's important and where the blockages are and may arise). Management is needed to ensure sufficient material has been exchanged for a meaningful dialogue to occur when the parties meet. While directions for much of this preparation can be given early, it may be better to delay giving directions until the mediator has a better appreciation of what is likely to be needed for a successful meeting.

The next stage is for the mediator to meet the parties and their legal representatives either together or, if time permits, separately, to set up effective communication channels and start to build (or more often re-build) relationships. A good

[45]Having effectively made a 'determination', will at least one party regard the mediator as being *functus officio*?

mediator will then better appreciate relevant drivers and factors of importance to individual parties, including any power imbalances. It will enable the parties to get comfortable with, and understand, the mediator's approach and refine what type of directions are needed (active project management).

The third stage involves the mediator's thinking time. This is to reflect on context and situation again and plan an approach to the conference. This might involve further discussion with each party to clarify issues or deal with possible misconceptions. At the end of this stage, the mediator will have read sufficient material and met the key players so as to be able to write up an assessment of the issues and possible outcomes from each party's perspective in readiness for the mediation meeting. This is not intended to be an evaluation of the merits nor a prescription for how the mediation will actually proceed. By preparing in this manner, the mediator will not be simply arriving at the mediation with a blank piece of paper and waiting to be educated about the parties and the problem. Instead, by careful thought and assessment, and assisting the parties with their own project management for the mediation, the mediator and the parties will be sufficiently prepared to go directly to the heart of the matter knowledgeably and, if necessary, be ready to descend into some of the detail.

The final stage is the face-to-face mediation meeting. This is where all the preparation should come to fruition (this includes project management issues such as venue logistics, agendas, people management, levels of authority and role descriptions). If all goes well, it would result in the parties themselves quickly beginning to speak respectfully and constructively. So ideally the collaborative process begins and only minimal facilitation ought to be required of the mediator. Or it may take longer, as it often does, while positions and assumptions are clarified, old ground is gone over and necessary venting or attributing blame occurs. Then commences the slow (but for the mediator, active) process of parties moving beyond the past and towards agenda setting, making small steps such as acknowledging or agreeing certain facts. The disputants, assisted as necessary by the mediator, then build an environment where they feel safe and confident to collaborate, towards closing the gap and resolving their dispute.

7.16 Conclusion

Mediators who believe in and trust the mediation process may at times appear to move in mysterious ways. If the parties respect and trust the mediator, they too will come to trust the process, confident in the knowledge that ultimately they will be empowered by controlling their own destinies. This approach rings true for the resources sector. This is the promise of mediation.[46]

[46]Taken from the title: Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass, 1st ed, 1994).

If disputants in this sector are truly predisposed to self-determination, they might consider regarding mediation as the norm and no longer describe it as an alternative to arbitration, whether preferred or otherwise. Once mediation becomes the preferred dispute resolution process in the resources sector, participants and the resources sector stand to reap real and lasting benefits.

Chapter 8
Statutory Adjudication and the Resources Sector

Jeremy Coggins

Abstract Over the course of the past 19 years, construction industry payment and adjudication legislation, in one form or another, has been enacted in the UK and throughout Australia, as well as in several other international jurisdictions. This legislation has had a significant impact upon payment culture and dispute resolution within the construction industry. Although the UK, Australian and New Zealand Acts provide 'mining exclusions', the courts have generally given these provisions a very narrow interpretation. Consequently, there is still a good chance that many types of construction works carried out at mining sites will be covered by the legislation and, therefore, subject to statutory adjudication. This chapter gives a background to statutory adjudication, provides an overview of the statutory adjudication process, considers the key legislative differences between the jurisdictions which have adopted statutory adjudication, analyses the legislative provisions concerning the mining exclusions, and reviews the relevant judicial decisions concerning statutory adjudication in the resources sector.

8.1 Introduction

Construction adjudication provides a quick and inexpensive process for resolving payment disputes, at least in the interim, arising on construction contracts. Typically, the adjudicator may be appointed upon application of one of the contractual parties within a matter of days, and the adjudicator must make their determination within a matter of a few weeks. An adjudicator's determination is immediately binding on the parties, and can only be overridden by a subsequent

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decision in arbitration or court if one of the parties chooses to initiate such formal proceedings. Consequently, construction adjudication has often been referred to as a "pay now, argue later" scheme.[1]

In its modern form, the origins of construction adjudication lie in the adjudication provisions for the resolution of set-off disputes introduced into the UK JCT Blue and Green Forms of subcontract used in 1976.[2] Thereafter, adjudication provisions progressively became an option in a number of standard forms.[3] In 1993, the Institution of Civil Engineers (ICE) New Engineering Contract (NEC), First Edition, became the first contract to require the application of adjudication to all contractual disputes that arose.[4] The publication in 1994 of Sir Michael Latham's final report into procurement and contractual arrangements in the UK construction industry[5] was the catalyst for the subsequent pioneering UK legislation[6] (commencing on 1 May 1998), which required all construction contracts to provide for adjudication of disputes.

The use of adjudication in the construction industry gained momentum due to the inefficacy (time and cost) of the existing formal dispute resolution processes used in the construction industry, particularly litigation and arbitration. Indeed, it was in this context that Latham recommended that adjudication be introduced within all the standard forms of contract and be underpinned by legislation.[7] Since its introduction, statutory adjudication has been widely accepted by the construction industry and usage rates are generally high. For example, in 2011/12, there were 1112 adjudication applications lodged in NSW[8] and 1023 adjudication referrals in the UK.[9]

Since the UK Act commenced sixteen years ago, construction industry payment legislation providing for construction adjudication in one form or another has been introduced into another fifteen jurisdictions (see Table 8.1). Several of the Acts[10]

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[1]Ackner (1996), House of Lords Debates, 571, Cols 989–990.

[2]Riches, J.L., and Dancaster, C. (2004), "Construction Adjudication", 2nd ed., Blackwell Publishing, Oxford, at 2.

[3]Such as the Association of Consultant Architects' form of contract (2nd ed., 1984), and the 1988 supplementary provisions to the JCT 1981 with Contractor's Design Contract.

[4]Riches and Dancaster, n 2 at 3.

[5]Latham, M. (1994), *Constructing the Team—Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry*, London.

[6]Part II of *The Housing Grants, Construction and Regeneration Act* 1996.

[7]Latham, n 5, 91.

[8]NSW Government Finance and Services (2012), Building and Construction Industry Security of Payment Act 1999, Adjudication Activity in New South Wales, Annual Report 2011/12, retrieved 5 April 2013 from: http://www.procurepoint.nsw.gov.au/sites/default/files/documents/annual-report-2012-final.pdf.

[9]Trushell, I., Milligan, J.L., and Cattanach, L. (2012), "Adjudication Reporting Centre Report, Research analysis of the progress of adjudication based on returned questionnaires from adjudicator nominating bodies (ANBs) and from a sample of adjudicators, Report no. 12", Glasgow Caledonian University.

[10]Namely, all the Australian, the UK and New Zealand Acts.

Table 8.1 Enacted building and construction industry payment legislation

Jurisdiction	Legislation	Date of commencement
England and Wales	Part II of *The Housing Grants, Construction and Regeneration Act 1996*	1 May 1998[a]
Scotland	*The Housing Grants, Construction and Regeneration Act 1996* (*Scotland*) (*Commencement No. 5*) *Order 1998*	1 May 1998
Northern Ireland	*The Construction Contracts* (*Northern Ireland*) *Order 1997*	1 June 1999
New South Wales (NSW)	*Building and Construction Industry Security of Payment Act 1999*	26 March 2000
Victoria	*Building and Construction Industry Security of Payment Act 2002*	31 January 2003
New Zealand (NZ)	*Construction Contracts Act 2002*	1 April 2003
Queensland	*Building and Construction Industry Payments Act 2004*	1 October 2004
Isle of Man	*Construction Contracts Act 2004*	1 June 2004
Western Australia (WA)	*Construction Contracts Act 2004*	1 January 2005
Singapore	*Building and Construction Industry Security of Payment Act 2004*	1 April 2005
Northern Territory (NT)	*Construction Contracts* (*Security of Payments*) *Act*	1 July 2005
Tasmania	*Building and Construction Industry Security of Payment Act 2009*	17 Dec 2009
Australian Capital Territory (ACT)	*Building and Construction Industry Security of Payment Act 2009*	1 July 2010
South Australia	*Building and Construction Industry Security of Payment Act 2009*	10 Dec 2011
Malaysia	*Construction Industry Payment and Adjudication Act 2012*	15 April 2014
Ireland	*Construction Contracts Act 2013*	Enacted 29 July 2013. Awaiting commencement order

[a]The provisions of Part II of *The Housing Grants, Construction and Regeneration Act* did not commence in England and Wales until 1 May 1998 when *The Scheme for Construction Contracts* (*England and Wales*) *Regulations 1998* came into force

contain provisions (the "mining exclusions") which, in one form or another, appear at first sight to exclude the resources sector from the scope of the legislation and, therefore, from the statutory adjudication process. However, in recent judicial decisions the courts have adopted a narrow interpretation of such provisions, limiting their meaning to preclude works which are preparatory or concurrent to the actual process of extracting minerals. Consequentially, there is a good chance that

many types of construction works carried out at mining sites will be covered by the legislation and, therefore, subject to statutory adjudication. As such, it is important for clients and contractors in the resources sector to be familiar with the construction industry payment legislation and the types of construction works it covers.

This chapter aims to provide a useful guide to statutory adjudication for parties involved in the resources sector. Initially, an overview of how the various legislative models, and their associated adjudication schemes, operate is given. Next, the legislative provisions concerning the construction work covered by the legislation and the mining exclusions are reviewed in detail. Before proceeding to consider in some detail the relevant judicial decisions concerning the mining exclusions, the law concerning the judicial review of adjudicators' determinations for jurisdictional error in Australia is explained as a necessary contextual background. The chapter concludes by summarising the judicial findings to date with respect to the types of construction works in the resources sector which may be the subject of a valid adjudication determination.

8.2 The Statutory Adjudication Models

In May 1998, England, Wales and Scotland were the first jurisdictions to introduce mandatory adjudication into the building and construction industry for payment claims by virtue of Part II of the *Housing Grants, Construction and Regeneration Act 1996*. Legislation very closely modelled on this Act commenced approximately one year later in Northern Ireland. The first Australian jurisdiction to introduce statutory adjudication was NSW which, despite basing its legislation broadly upon the provisions in the UK legislation, has significant differences in approach to the UK Act (as discussed further below).[11] Subsequently, the NSW Act has formed the basis for the legislation in most other Australian jurisdictions, culminating in the Tasmanian Act which received Royal Assent on 17 December 2009.[12]

In addition to the UK and Australian jurisdictions, building and construction industry payment legislation has been enacted in NZ, Isle of Man, Singapore, Malaysia and Ireland. The NZ Act drew its ideas from both the UK and NSW Acts,[13] as it appears the Malaysian Act has also done. The Isle of Man and Irish

[11]As noted by M Bell, and D Vella (2010), "From motley patchwork to security blanket: The challenge of national uniformity in Australian 'security of payment' legislation", 84 *Australian Law Journal* 565 at 567.

[12]Although the Tasmanian Act commenced operation before the ACT and SA Acts, it was actually the last Act to be passed in Australia.

[13]T Kennedy-Grant (2005), "Antipodean Dispute Resolution", paper presented at a meeting of the Society of Construction Law London, 16.

Acts are closely modelled on the UK Act.[14] The Singapore Act was modelled on the NSW Act in preference to the UK Act.[15]

The common objective of all of the legislation is to get cash flowing in as fair a manner as possible down the hierarchical contractual chains that exist on most commercial construction projects. In order to achieve this objective, all the legislation has included, in one form or another, core provisions which:

(i) prohibit clauses in construction contracts that make payment conditional on the payer receiving payment from a third person, e.g. 'pay when paid' or 'pay if paid' clauses;
(ii) establish a default right to stage, or progress, payments if the parties have failed to agree that in the construction contract;
(iii) prescribe how the amount of stage/progress payments are to be valued and the intervals in which they become due in the absence of prior agreement between the parties;
(iv) require prior notice to be given of reasons for withholding payments, in order for set off to be permissible;
(v) establish the right to suspend performance of contractual obligations for non-payment; and
(vi) establish a right to refer a dispute arising under the contract for adjudication.[16]

As such, all the legislation provides, although in differing forms, a payment system and an adjudication scheme. Within each Act, the payment system and adjudication scheme provisions are clearly distinguished from each other. The key characteristics of all the international legislation are compared and contrasted in Table 8.2.

Although all of the sixteen Acts differ from each other to varying degrees, they may be broadly categorised into one of three legislative models.

The first model (the "UK model") is the legislation based upon the UK Act[17] which provides an adjudication scheme designed to be "the key to settling disputes

[14]As such, the Isle of Man Act will not be dealt with separately in the legislative comparison that follows.

[15]According to PCF Chan (2006), "Security of Payment Legislation—Case of a Blunt but Practical and Equitable Instrument", *Journal of Professional Issues in Engineering Education and Practice* 132(3), 248, the NSW Act's focus on payment disputes as opposed to the UK Act's much wider scope of disputes, better serves the need of the Singapore construction industry which has been 'plagued by a great number of contractors and subcontractors becoming insolvent because cash flow could not be maintained as payments were withheld'.

[16]Coggins, J.K., and Donohoe, S. (2012), "The Validity of Adjudicators' Determinations containing Errors of Law—a Comparison of Judicial Approaches in England and New South Wales", *International Journal of Law in the Built Environment*, 4(2), at 198–199.

[17]The term 'UK Act' is used in this paper to collectively refer to Part II of *The Housing Grants, Construction and Regeneration Act 1996* (England and Wales), *The Housing Grants, Construction and Regeneration Act 1996* (*Scotland*) (*Commencement No. 5*) *Order 1998* (Scotland) and *The Construction Contracts* (*Northern Ireland*) *Order 1997*.

Table 8.2 Key characteristics of the international construction adjudication legislation

Key characteristic	NSW, Victorian, Queensland, Tasmanian, ACT, South Australian Acts	Western Australian and Northern Territory Acts	UK Acts	NZ Act	Singapore Act	Malaysian Act	Irish Act
Scope of disputes covered							
Applies to contracts for supply of goods related to construction work	Yes	Yes	No	No	Yes	Yes	No
Applies to contracts for professional services related to construction work	Yes	Yes	Yes	No	Yes	Yes	Yes
Applies to oral contracts as well as written contracts	Yes	Yes	Yes	Yes	No	No	Yes
Types of disputes covered	Payment claims for construction work done (or goods and services supplied)	Payment claims under the contract	Any differences under the contract	Any differences under the contract	Payment claims for construction work done (or goods and services supplied)	Payment for work done or services rendered	Disputes relating to the payment
Excludes construction contracts with 'residential occupiers'	Yes (except for the Tasmanian Act)	No	Yes	No (but certain statutory provisions do not apply)	Yes (but exclusion limited to contracts for insignificant building works)	Yes (for buildings less than 4 storeys high)	Yes (for dwellings of a floor area <200 m^2)
"Mining exclusion" provision included in the Act	Yes	Yes	Yes	Yes	No	No	No

(continued)

Table 8.2 (continued)

Key characteristic	NSW, Victorian, Queensland, Tasmanian, ACT, South Australian Acts	Western Australian and Northern Territory Acts	UK Acts	NZ Act	Singapore Act	Malaysian Act	Irish Act
Payment systems							
Enforces contractual progress payment mechanism. Default payment provisions implied into construction contracts which fail to provide adequate contractual payment provisions	No	Yes (default provisions in Schedule at the back of the Act)	Yes (default provisions in Regulations)	No	No	No	Yes (default provisions in Schedule)
Separate statutory payment procedure for making payment claims and responding to payment claims running alongside contractual payment system	Yes (highly detailed and regulatory)	No	No	Yes (less detailed and regulatory than NSW Act)	Yes (highly detailed and regulatory)	Yes (less detailed and regulatory than NSW Act)	No
Statutory consequences of principal failing to duly respond to a payment claim and pay full amount of claim	Claimant may: suspend contract works, and either: • recover claim as debt in court, or • apply for adjudication in which respondent	Claimant may apply for adjudication	Claimant may suspend works under the contract, and apply for adjudication	Claimant may suspend works under the contract, and recover claim as debt in court	Claimant may apply for adjudication in which respondent will not be allowed to submit an adjudication response	Claimant may apply for adjudication	Claimant may suspend works under the contract, and apply for adjudication

(continued)

Table 8.2 (continued)

Key characteristic	NSW, Victorian, Queensland, Tasmanian, ACT, South Australian Acts	Western Australian and Northern Territory Acts	UK Acts	NZ Act	Singapore Act	Malaysian Act	Irish Act
	will not be allowed to submit an adjudication response						
Adjudication schemes							
Allows parties to establish detail of a contractual adjudication process in lieu of the statutory adjudication scheme	No	No	Yes (subject the statutory guidelines)	No	No	No	No
Who can apply for adjudication under the Act	Payee only (contractor or supplier)	Either contractual party	Either contractual party	Either contractual party	Payee only (contractor or supplier)	Either the unpaid party or non-paying party	Either contractual party
Respondent to an adjudication application prevented from raising reasons for withholding payment in an adjudication response which were not previously included in a duly	Yes (except in Victorian Act for all payment claims and in the Queensland Act for complex payment claims)	No	No	No	Yes	No	No

(continued)

Table 8.2 (continued)

Key characteristic	NSW, Victorian, Queensland, Tasmanian, ACT, South Australian Acts	Western Australian and Northern Territory Acts	UK Acts	NZ Act	Singapore Act	Malaysian Act	Irish Act
served response to the progress payment claim							
Encourages adjudicator to adopt investigative approach to ascertaining relevant facts and law when making his or her determination	No	Yes	Yes	No	No	Yes	Yes
Time for adjudicator to make his or her determination	10 business days (15 business days for complex payment claims under the Queensland Act)	14 days	28 days	20 working days	14 days	45 working days	28 days

Modified from Coggins and Donohoe (2012, n 17)

[on construction contracts] in the construction industry."[18] The dispute resolution objective of the UK model's adjudication scheme is highlighted in the UK Act's provision that 'The parties may agree to accept the decision of the adjudicator as finally determining the dispute.'[19] As such, in relation to the UK Act, Bowsher J states that, 'Proceedings before an adjudicator are not legal proceedings. They are a process designed to avoid the need for legal proceedings.'[20] Other international Acts heavily influenced by the shape and form of the UK Act include those enacted in the Isle of Man, Western Australia, Northern Territory,[21] and Ireland.

By contrast, the second model (the "NSW model") is the legislation based upon the NSW Act which provides an adjudication scheme designed to be more of an independent progress payment certification mechanism than a dispute resolution process. The NSW model was enacted very much with the financial protection of smaller contractors in mind.[22] Other international Acts falling into this category include those enacted in Victoria, Queensland, Singapore, Tasmania, Australian Capital Territory and South Australia.

It should be noted that, following the recommendations of the Queensland Discussion Paper Report,[23] key reform to the Queensland *Building and Construction Industry Payments Act* came into effect on 15 Dec 2014. Under this reform, amendments have been to introduce a dual regime of adjudication and for adjudicators to be appointed by a single registry within the Queensland Building and Construction Commission in lieu of authorised nominating authorities. Under this dual adjudication regime, the timeframes under the Act are extended for 'complex' payment claims (i.e., payment claims which are greater than $750,000) with respect to the serving of payment schedules and adjudication responses, and the period in which an adjudicator has to make their decision. Furthermore, under the reform, respondents are now allowed to raise reasons for withholding payment in adjudication responses concerning 'complex' payment claims which were not previously raised in the payment schedule. The introduction of this dual regime

[18]Latham, n 5, 87.

[19]UK Act, s 108(3).

[20]*Austin Hall Building Ltd v Buckland Securities Ltd* [2001] EWHC Technology 434 at [19].

[21]It should be noted that, unlike the UK Act, the Western Australia and Northern Territory Acts do not allow for the adjudication of all disputes under the contract, but they do allow for adjudication of all payment claims under the contract.

[22]Iemma, M. (1999), NSW Parliamentary Debates, Legislative Assembly, 29 June 1999, at 1594; Delahunty (2002), Victorian Parliamentary Debates, Legislative Assembly, 21 March 2002, at 427.

[23]Wallace, A (2013), 'Final Report, Discussion Paper—Payment dispute resolution in the Queensland building and construction industry', May 2013, viewed 7 July 2014, http://www.bcipa.qld.gov.au/SiteCollectionDocuments/Publications/Andrew%20Wallace%20Final%20Report.pdf.

recognises that the "one size fits all" under the NSW legislative model concept is not appropriate for large or complex claims.[24]

The key differences between the UK and NSW models are broadly summarised as follows[25]:

- The NSW model Acts provide a detailed statutory payments regime (separate from the parties' agreed contractual payment mechanism), overriding any inconsistent contractual provisions, which parties undertaking "construction work" or "related goods and services" engage by submitting a payment claim in accordance with the Act at regular intervals and have it responded to within a certain timeframe. Under the NSW model's statutory payment regime, a claimant contractor is given a statutory right to summary judgment of its progress payment claim in circumstances where the respondent principal does not pay the claim by the due date and does not provide reasons for withholding payment (in a 'payment schedule') within a stipulated timeframe after the claim is served. Conversely, the UK model Acts largely preserve (rather than override) the parties' contractual interim payment regimes.
- Under the NSW model's statutory payment scheme, only payment clams for construction work undertaken and/or goods and services supplied under the contract may be claimed and adjudicated.[26] This is not the case under the UK model, which permits all payment disputes to be adjudicated in accordance with the parties' contractual interim payment regimes.
- As a consequence of only covering progress payment claims, the NSW model Acts only allow for adjudication of payment claims which are made up the "contractual stream" (typically by a subcontractor against its head contractor, or head contractor against its principal). Conversely, the UK model Acts allow for adjudication of payment claims both up and down the "contractual stream".
- Whilst both models allow for a statutory adjudication scheme to determine, in the interim, disputed payment claims, they differ with respect to adjudicator appointment, submissions which may be considered by an adjudicator, and the approach which an adjudicator is to adopt in order to arrive at his or her determination. In all of these respects the NSW model Acts are more restrictive, disallowing mutual agreement of an adjudicator, barring consideration of

[24]Department of Housing and Public Works (Queensland), *Building and Construction Industry Payments Act—Amendments*, viewed 7 July 2014, http://www.bcipa.qld.gov.au/SiteCollectionDocuments/Fact%20Sheets/BCIPA%20Fact%20Sheet%20-%20Amendments.pdf.

[25]Adapted from Coggins, J., Fenwick Elliott, R., and Bell, M. (2010), "Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia", *Australasian Journal of Construction Economics and Building*, 10(3) at 15.

[26]NSW Act, s 8(1).

reasons for withholding payment which have not been duly submitted in accordance with the statutory payment scheme[27], and discouraging an evaluative approach to adjudicators' determinations.

The third legislative model falls somewhere in between the other two models, combining key characteristics of the UK and NSW models. The NZ and Malaysian Acts fall into this category. Like the NSW model, the NZ and Malaysian Acts provide for a separate statutory payment scheme for progress payments, although far less detailed and regulatory in nature than the NSW scheme.[28] Like the NSW model, the scope of the Malaysian Act is restricted to payment claims for work done or services rendered under the construction contract.[29] The NZ Act, however, in addition to progress payment disputes, allows referral of any dispute or difference under the contract for adjudication.[30] Although adjudications under the Malaysian Act are limited to statutory progress payment claims, the detail of its adjudication scheme appears closer to the UK model—giving the adjudicator the power to act inquisitorially to take the initiative to ascertain the facts and the law required for the decision,[31] as well as allowing a much longer period (45 working days) than the NSW model Acts (10 business days) for the adjudicator to make their decision.

Conversely, although the scope of the NZ Act extends to all disputes under the contract, its adjudication scheme is more akin to the detail of the NSW model, limiting the adjudicator to a consideration of certain matters in making the decision.[32] Both the NZ and Malaysian Acts are more similar to the UK model with respect to adjudicator appointment, allowing the parties to mutually agree an individual adjudicator[33] rather than blind appointment via an 'authorised nominating authority' chosen by the claimant as occurs under the NSW model Acts[34]. However, the NZ Act has a unique provision which states that such an agreement is not binding if it was made by the parties before the dispute arose between them.[35] This prevents a party with dominant bargaining power from being able to unfairly influence the identity of the adjudicator prior to the dispute occurring.

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[27]With the exception of the Victoran Act, and for complex payment claims under the Queensland Act.

[28]For example, neither the NZ nor Malaysian Acts make the serving of a statutory payment schedule a condition precedent to the respondent's right to lodge an adjudication response. Further, unlike NSW model, the NZ Act expressly allows for contractually provided set-offs (e.g., liquidated damages) to be taken into consideration when calculating the amount of progress payments —see NZ Act, s 17(1)(c).

[29]See Malaysian Act, s 4.

[30]See NZ Act, s 25(1).

[31]See Malaysian Act, s 25.

[32]See NZ Act, s 45.

[33]See NZ Act, s33; Malaysian Act, s 21.

[34]With the exception of the Queensland Act which has recently been amended to provide for appiontment by a single government registry.

[35]NZ Act, s 33(3).

8.3 Construction Work Covered by the Legislation and the Mining Exclusions

All of the various Acts cover contracts under which one party undertakes to carry out construction work for another person. The Acts broadly define the "construction work" covered. By way of example, section 10 of Queensland Act[36] defines "construction work" as follows:

10 Meaning of construction work

1. Construction work means any of the following work:

   (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;
   (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for land drainage or coast protection;
   (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, airconditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
   (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;
   (e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including:

      (i) site clearance, earthmoving, excavation, tunnelling and boring; and
      (ii) the laying of foundations; and
      (iii) the erection, maintenance or dismantling of scaffolding; and
      (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and
      (v) site restoration, landscaping and the provision of roadways and other access works;

[36]The Queensland Act has been chosen as an example as several court decisions are discussed below which concern the definition of construction work under the Queensland Act. The definition of construction work in the Queensland Act is very similar to that in the NSW, Victorian, ACT, Tasmanian and South Australian Acts.

(f) the painting or decorating of the internal or external surfaces of any building, structure or works;
(g) carrying out the testing of soils and road making materials during the construction and maintenance of roads;
(h) any other work of a kind prescribed under a regulation for this subsection.

Most of the Acts also cover goods and services related to construction work.[37] By way of example, section 11 of Queensland Act[38] defines "related goods and services" as follows:

11 Meaning of related goods and services

1. Related goods and services, in relation to construction work, means any of the following:

   (a) goods of the following kind:

      (i) materials and components to form part of any building, structure or work arising from construction work;
      (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

   (b) services of the following kind:

      (i) the provision of labour to carry out construction work;
      (ii) architectural, design, surveying or quantity surveying services relating to construction work;
      (iii) building, engineering, interior or exterior decoration or landscape advisory services relating to construction work;
      (iv) soil testing services relating to construction work;

   (c) goods and services, in relation to construction work, of a kind prescribed under a regulation for this subsection.

With the exception of the Singapore, Malaysian and Irish Acts, the legislation contains provisions which to some degree exclude mining operations from the definition of "construction work" under the legislation.

[37]The UK and NZ Acts do not cover contracts which are solely for the supply of goods related to construction work. Further, the NZ Act does not cover contracts for professional services related to construction work.

[38]The Queensland Act has been chosen as an example as several court decisions are discussed below which concern the definition of construction work under the Queensland Act. The definition of related goods and services in the Queensland Act is very similar to that in the NSW, Victorian, ACT, Tasmanian and South Australian Acts.

The NZ Act and the six Australian Acts which are based upon the NSW model legislation exclude:

(a) the drilling for, or extraction of, oil or natural gas, and
(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose.[39]

The WA and NT Acts both exclude:

(a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;
(b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;[40]

The WA Act, but not the NT Act, further excludes:

(c) constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance.[41]

This discrepancy between the WA and NT Acts' exclusions is noted in the Second Reading Speech for the NT Act as follows:

> it [the NT Act] does cover other construction work which may be carried out in conjunction with mining activities. In this regard, the Northern Territory's approach differs from that taken in Western Australia.

As for the differences between the six Australian Acts based on the NSW model on the one hand and the WA and NT Acts on the other, it has been noted[42] that the WA and NT Acts:

- do not expressly exclude the process of extraction of minerals; and
- also do not expressly exclude tunnelling or boring (indeed, these are expressly mentioned in the *inclusions* sub-section)[43];

The UK Act excludes:

(a) drilling for, or extraction of, oil or natural gas;
(b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;

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[39]See NZ Act, s 6(2); NSW Act, s 5(2); Victorian Act, s 5(2); Queensland Act, s 10(3); ACT Act, s 7(h); Tasmanian Act, s 5(2); South Australian Act, s 5(2).

[40]WA Act, s 4(3); NT Act, s 6(2).

[41]WA Act, s 4(3).

[42]Coggins, Fenwick Elliott, and Bell, n 25, 18.

[43]NT Act s 6(1)(f)(i); WA Act s 4(2)(f)(i). It may, however, be expected that tunnelling and boring will usually fall outside the ambit of "construction work" either through the "constructing …" exclusion referred to in the first subpoint above or because mining is not an activity referred to in the inclusions sub-section.

(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is:

(i) nuclear processing, power generation, or water or effluent treatment, or
(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;

(d) manufacture or delivery to site of:

(i) building or engineering components or equipment,
(ii) materials, plant or machinery, or
(iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,

except under a contract which also provides for their installation[44];

8.4 Judicial Review of Adjudicators' Determinations for Jurisdictional Error in Australia

If an adjudicator commits a jurisdictional error in the course of making their determination in Australia, the State Supreme Courts have original jurisdiction to review and quash the determination by way of an order in the nature of certiorari. Jurisdictional error occurs where an adjudicator carries out actions which are not authorised or exceeds the powers conferred on them. A jurisdictional error may, for example, occur where the adjudicator made an error as to the existence of a jurisdictional fact (e.g., the existence of a construction contract), the existence of which was necessary to enliven the authority of the adjudicator. Certiorari is a writ used to remove the official record of the impugned decision into the court making the order and then, if the action is found to have been unlawful, to quash the impugned decision.[45]

For a number of years, following the decision of the NSW Court of Appeal in *Brodyn Pty Ltd v Davenport*[46] ('*Brodyn*'), it was thought that the jurisdictional error approach 'cast the net too widely'[47] and, accordingly, certiorari was not available for adjudicators' determinations. In *Brodyn*, the court limited the grounds for review of an adjudicator's determination by laying down the following five basic

[44]UK Act, s 105(2).

[45]Administrative Review Council (2006). *The Scope of Judicial Review, Report to the Attorney-General*, 10.

[46][2004] NSWCA 394.

[47]*Brodyn* at [54].

and essential requirements of the Act for the existence of a valid adjudicator's determination[48]:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
2. The service by the claimant on the respondent of a payment claim (s.13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
5. The determination by the adjudicator of this application (ss.19(2) and 21(5), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (s.22(3)(a)).

The power of the State Supreme Courts to review an adjudicator's determination for jurisdictional error, however, was restored by the NSW court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*[49] ('*Chase*').

In *Chase*, the claimant gave notice of its intention to apply for adjudication of the payment claim outside of the 20 business day period required by s 17(2)(a) the NSW Act. The adjudicator erroneously concluded that the notice had been given in a timely manner, and made a determination that the claimant was entitled to payment of the claimed amount plus interest. The respondent to the adjudication initiated an action in the NSW Supreme Court to have the adjudicator's determination quashed on the basis of jurisdictional error despite the Court of Appeal's finding in *Brodyn* that compliance with the more detailed requirements of s17 (amongst others) was not essential to a valid determination.[50] The NSW Supreme Court referred the case to the NSW Court of Appeal, which would not be bound by *Brodyn*.

The NSW Court of Appeal held that non-compliance with the notice provision under s 17(2)(a) of the NSW Act did amount to jurisdictional error. In doing so, the court reversed its position in *Brodyn*, finding that the Supreme Court does have the power to grant relief in the nature of certiorari to quash an adjudicator's determination. In reaching this decision, the court relied on the approach taken by the High Court of Australia in *Kirk v Industrial Court of New South Wales*,[51] 'that it was beyond the legislative power of a State to take away from that State's Supreme Court its supervisory power to grant relief for jurisdictional error.'[52]

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[48]*Brodyn* at [53]. The section numbers shown in brackets refer to the relevant sections of the NSW Act.

[49][2010] NSWCA 190.

[50]*Brodyn* at [54]. See, also, *JAR Developments Pty Ltd v Castleplex Pty Ltd* [2007] NSWSC 737 at [46].

[51](2010) 239 CLR 531.

[52]*Chase* at [154].

Whilst reinstating jurisdictional error as the basis for judicial review of adjudicators' determinations, the court did not, beyond its immediate consideration of s 17 (2)(a), list, or provide any 'rigid taxonomy',[53] as to the types of matters which might be considered jurisdictional error in relation to the Act. McDougall J did, however, consider that failure to satisfy the basic and essential requirements identified in *Brodyn* might also be characterised as jurisdictional error.[54]

As such, since *Chase*, judicial challenges to the validity of an adjudicator's determination have often hinged upon the question as to whether an error by the adjudicator is jurisdictional or non-jurisdictional in nature. The approach of the State Supreme Courts to this question appears to have varied somewhat. The NSW[55] and Victorian Supreme Courts,[56] have tended to be more amenable to construing certain jurisdictional facts in a "narrow" sense (i.e., contingent upon the actual existence of the matter or state of affairs)[57] and, therefore, finding that jurisdictional error has occurred. By contrast, the WA[58] and NT[59] Supreme Courts appear to have been more reluctant to interfere with adjudicators' determinations, tending to construe certain jurisdictional facts in a "broad" sense (i.e., contingent upon the decision maker having formed an opinion or belief which would be formed by a reasonable person with an understanding of the legislation in question)[60] and, therefore, finding that jurisdictional error has not occurred.

For example, in the Western Australian case of *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd*,[61] Thiess entered into a contract by which Thiess agreed to provide construction services in connection with the Sino Iron Project at Cape Preston in Western Australia. On 17 May 2010, Thiess submitted to MCC a bundle of documents which it contended constituted a payment claim within the meaning of the WA Act. The amount alleged by Thiess to be due on that 'claim' was not paid and on 12 July 2010 Thiess applied to have a 'payment dispute'

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[53]In *Chase* at [159], McDougall J noted that in *Kirk* the majority emphasised 'that the reasoning in *Craig* … is not to be seen as providing a rigid taxonomy of jurisdictional error', and 'not to be taken as marking the boundaries of the relevant field.'.

[54]*Chase* at [154]. Relying on the NSW Court of Appeal's concession, in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [71], that the description of basic and essential requirements as essential pre-conditions for the existence of an adjudicator's determination reflected the concept of jurisdictional error under the general law. Subsequently, in *Clyde Bergemann v Varley Power* [2011] NSWSC 1039 at [41], McDougall J confirmed that the basis and essential requirements in *Brodyn* may now be accepted as jurisdictional.

[55]See, for example, *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190.

[56]See, for example, *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd and Anor* [2013] VSC 535.

[57]For further discussion as to construction of jurisdiction facts in a "narrow" sense, see *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304 at [73].

[58]See, for example, *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304.

[59]See, for example, *K&J Burns Electrical v GRD Group (NT) Pty Ltd* (2011) 246 FLR 285.

[60]For further discussion as to construction of jurisdiction facts in a "narrow" sense, see *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304 at [74].

[61][2011] WASC 80.

determined by adjudication under the WA Act. MCC contended in the adjudication that the 17 May Letter was not a payment claim within the meaning of the WA Act or that if it was such a claim, the application for adjudication was made outside the time prescribed by the Act. It submitted that the adjudicator was bound to dismiss the adjudication application under s 31(2)(a) of the WA Act. That submission was rejected and on 3 August 2010, the adjudicator delivered a determination by which he held that MCC was liable to pay Thiess the sum of $7,309,740.88, together with interest. MCC initially sought a review by the State Administrative Tribunal (SAT) under s 46 of the WA Act of the adjudicator's decision not to dismiss Thiess' adjudication application. SAT, however, dismissed MCC's application.[62] In granting Thiess' application for leave to enforce the adjudicator's determination as a judgment, the court held that it did not consider that either:

- the adjudicator's conclusion that the 17 May Letter was a payment claim was seriously irrational or so unreasonable as to be likely to attract prerogative relief[63]; or
- if the 17 May Letter was a payment claim, it is likely that the adjudicator's finding that the adjudication application was made in time would be held to be unreasonable or arbitrary or capricious when regard is had to the evidence and the parties' submissions to the adjudicator.[64]

8.5 What Is the Scope of the Mining Exclusions?

Judicial decisions which have considered the definition of construction works and the scope of the mining exclusions in relation to adjudicators' determinations in the resources sector have been few. Most of these decisions have occurred over the past three years in Queensland. The Queensland decisions together with other relevant decisions from Western Australia and England are discussed in detail below.

In *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd and Anor*,[65] National Plant and Equipment Pty Ltd, ("*NPE*") hired four dump trucks and a wheel loader to HM Hire Pty Ltd ("HM Hire") for use at mining sites including the Burton Coal Mine in Central Queensland. They were used by HM Hire to perform excavation and removal of timber and topsoil from the site for the purposes of creating

[62] *MCC Mining (Western Australia) Pty Ltd and Thiess Pty Ltd* [2010] WASAT 140 in which it followed its earlier decision in *Match Projects Pty Ltd and Arccon (WA) Pty Ltd* [2009] WASAT 134. Note that subsequently, in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217, the WA Supreme Court has affirmed that the right of review by the SAT under the Act cannot be extended to review the determination of an adjudicator who has decided not to dismiss an application and made a determination on the merits.

[63] *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80 at [106].

[64] *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80 at [172].

[65] [2012] QSC 4.

an access road to the site of the works. After NPE and HM Hire fell into dispute about payment of the hire charges due under the rental agreement, NPE made a payment claim under the Queensland Act. The adjudicator determined that HM Hire was obliged to pay NPE a progress payment of $516,586.95. HM Hire applied to the court for a declaration that the adjudicator's determination was void. HM Hire claimed the adjudicator lacked jurisdiction because the rental agreement was not a "construction contract" as defined in the Act because none of the work the plant was hired to carry out was "construction work" and, further, that the work was "the extraction… of minerals" which is excluded from the scope of "construction work" by the mining exclusions in section 10(3)(b). After noting that goods and services related to construction work includes plant supplied for use in connection with the carrying out of the construction work under section 11(1)(a)(ii) of the Act, the court held that the work carried out by the plant was "construction work" under section 10(1) of the Act as it could certainly be described as:

> "works forming… part of land including… roadworks"[66]; and as an "operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in [s 10(1)(a), (b) or (c)], including… site clearance, earthmoving… site restoration, landscaping and the provision of roadways and other access works".[67]

The court also held that the mining exclusion contained in section 10(3)(b) of the Act did not cover work done for the purpose of opening or as preparatory to operating a mine.[68] As such, the excavation and removal of timber and topsoil works carried out by the hired plant was not excluded from the definition of construction works. As Douglas J stated,

> It also seems to me to be necessary to construe s 10(3) in the context set by s 10(1) which describes a relatively broad set of circumstances amounting to construction work. It would detract unnecessarily from the apparent purpose of the legislation and the normal understanding of s 10(1) and its hierarchy in the section [15] to extend the meaning of "extraction of minerals" to cover work associated with such extraction where the legislature … could readily have made such a purpose clear by the use of familiar language of wider meaning than this phrase. There is no reason why s 10(3) should be read so as to displace or render nugatory the meaning of s 10(1).

The court, therefore, found that the adjudicator acted within jurisdiction when determining NPE's payment claim and the adjudicator's determination was valid. HM Hire subsequently appealed the court's decision, but the Court of Appeal upheld the primary judge's findings.[69]

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[66]Queensland Act, s 10(1)(b).

[67]Queensland Act, s 10(1)(e).

[68]*HM Hire Pty Ltd v National Plant and Equipment Pty Ltd and Anor* [2012] QSC 4 at [12], agreeing with Fryberg J in *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2011] QSC 345 at [42].

[69]*HM Hire Pty Ltd v National Plant and Equipment Pty Ltd and Anor* [2013] QCA 6.

In *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor*[70] the appellant, Thiess, operated certain mines in the Bowen Basin region, where it extracted coal by open pit mining techniques pursuant to contracts with the respective mine owners. It entered into three separate contracts with the first respondent, Warren, as follows:

- one contract in which Warren agreed to construct dams and drains, including clearing land, grubbing and stripping and hauling topsoil at the Burton Coal Project; and
- two contracts for the dry hire of excavators from Warren at the Lake Vermont Coal Project.

Warren made claims for progress payments in respect of each contract under the Queensland Act which Thiess disputed. The claims were determined in Warren's favour by an adjudicator. Thereafter, Thiess brought an unsuccessful application in the Supreme Court seeking declarations that the adjudication decisions were void and an injunction restraining Warren from seeking adjudication certificates in respect of them. Thiess did so on the basis that the adjudicator had no jurisdiction to determine the adjudication applications because the contracts were not "construction contracts" within the meaning of the Queensland Act, as the contract works were not covered by section 10(1) of the Queensland Act and, in the alternative, if covered, were works covered by the mining exclusions in section 10(3)(b). The Supreme Court in the first instance dismissed Thiess' application, finding that the contracts were "construction contracts" within the meaning of the Act. Thiess appealed the Supreme Court's decision to the Court of Appeal which unanimously dismissed the appeal. Critically, in its decision, the Court of Appeal:

- confirmed that the construction of dams and drains constituted construction work within the meaning of section 10(1)(b) of the Act.
- confirmed as correct the application of a narrow definition of "extraction" as used in section 10(3) in accordance with its ordinary meaning and, therefore, found that the Act's mining exclusions did not extend to surface works which are preparatory to the extraction of minerals.[71] In construing section 10(3), Philippides J stated,

> Had it been the legislative intention, to extend the ordinary meaning of the phrase "extraction… by… surface working" to activities which are integral to or necessary for the extraction of minerals, it would have been a simple matter to do so by clear words.[72]

- found that as long as part of the works carried out under a construction contract fall under the definition of construction work in section 10(1), then an adjudicator has jurisdiction to determine a payment claim made under that contract.

[70][2012] QCA 276.

[71]In reaching this finding, the Court endorsed the observations made in *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd and Anor* [2012] QSC 4 at [16] as discussed above.

[72]*Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor* [2012] QCA 276 at [68].

Therefore, given that the excavators supplied under the hire contracts were used in part to construct dams and drains which constitute "construction work", it is correct to conclude that there was a sufficient basis to find that the hire contracts were also construction contracts. This is the case notwithstanding that the excavators supplied were also used in connection with the carrying out of work that was not "construction work" within the meaning of s 10(1) of the Act.

- found that where no jurisdictional error is shown to have been made by the adjudicator in proceeding to determine the adjudication application on the basis that the payment claim concerned a construction contract, the adjudicator's determination as to the extent and value of the "construction work" or "related goods and services" the subject of the payment claim does not concern a matter of jurisdictional fact. In other words, an incorrect determination of the extent and quantum of the work that comprised "construction work" in a construction contract by an adjudicator will not by itself invalidate the determination.

The Court of Appeal, however, was split as to whether clearing and grubbing land and stripping and hauling topsoil constituted construction work within the meaning of section 10(1)(b) of the Act. One of the judges considered those activities were construction work under section 10(1) of the Act, whilst the other two disagreed viewing the activities to be neither "works forming… part of land" nor "an integral part of… preparatory to or… for completing" other work falling within the definitions of construction work in s 10(1).[73]

The English courts have also adopted a narrow definition approach with respect to interpreting the exclusions in section 105(2) of the UK Act. In *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture*,[74] the English High Court considered the validity of an adjudicator's decision in the amount of £317,500 for the supply and erection of steelwork at a liquefied natural gas terminal at Milford Haven. The court found that the erection of the steelwork was included in the exclusion under section 105(2)(c) relating to the erection of steelwork for the purposes of supporting or providing access to plant or machinery, but the meaning of the word "erection" is limited to those operations which are carried out on-site at the process engineering site. In other words, the operations in lifting and connecting the steelwork after it has been delivered to site were covered by the section 105(2)(c) exclusion, but the operations in the preliminary stages (starting with the fabrication drawings, leading to the steelwork fabrication and then the delivery of the steelwork to site) were not.[75] Consequently, the adjudicator's decision was held to be partly within and partly outside her jurisdiction. In what appears to be a contrasting approach to the Queensland Court of Appeal's in *Thiess Pty Ltd v Warren*

[73] *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor* [2012] QCA 276 per Holmes JA at [2].

[74] [2010] EWHC 1076 (TCC).

[75] *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC) at [56].

Brothers Earthmoving Pty Ltd and Anor,[76] however, the court found that where an adjudicator has made a single decision relating to one dispute and the adjudicator does not have jurisdiction for some element of that dispute, the decision will not be valid and enforceable. The court did not consider it to be their role to open up, review and revise an adjudicator's decision in enforcement proceedings.[77] The court did, however, acknowledge that an adjudicator's decision would be severable if the adjudicator had not only made a decision on the whole dispute, but had also made a decision which dealt only with the part of the dispute which was within her jurisdiction, in which case "the decision on the whole dispute would not be enforceable or valid but there would be a valid decision on the part of the dispute which was within her jurisdiction."[78]

In *Agripower Australia Ltd v J&D Rigging Pty Ltd and Ors*,[79] J&D Rigging was engaged under contract to dismantle and remove mining plant which belonged to Agripower. The plant was affixed to land at the Skardon River Mine in Cape York which Agripower operated as the current holder of a mining lease. The plant comprised mixing tanks, storage bins, baghouses and a large kiln, all of which were mechanically fixed to concrete slabs or footings in the ground. J&D applied for adjudication under the Queensland Act in relation to a payment claim, and the adjudicator determined that an amount of $2,513,705.37 should be paid by Agripower to J&D. Agripower successfully applied to the Supreme Court of Queensland for a declaration that the adjudication decision was void on the jurisdictional issue that the work required by the contract fell outside the definition of "construction work" in the Queensland Act. In making its decision, the Supreme Court considered that the question as to whether the primary contract was for "construction work" turns on whether the mining plant to be dismantled consisted of structures or works "forming part of land" within the meaning of section 10(1)(a) and (b) of Queensland Act.[80] The court found that the mining leases were not "land" within the definition of statutory[81] or common law principles as the leaseholder, Agripower, did not acquire any estate or interest in the land[82] the subject of the mining leases.[83] Further, the court found that the plant did not meet the common law test for objective intent[84] required for chattels to become part of the land as fixtures. This was because the plant had been brought on to the mining site for the

[76][2012] QCA 276.

[77]*Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC) at [120].

[78]*Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC) at [110].

[79][2013] QSC 164.

[80]*Agripower Australia Ltd v J&D Rigging Pty Ltd and Ors* [2013] QSC 164 at [17].

[81]*Acts Interpretation Act 1954* (Qld).

[82]*Mineral Resources Act 1989* (Qld), s 10.

[83]*Agripower Australia Ltd v J&D Rigging Pty Ltd and Ors* [2013] QSC 164 at [64]–[66].

[84]*Agripower Australia Ltd v J&D Rigging Pty Ltd and Ors* [2013] QSC 164 at [55].

purposes of the mining leases, and had to be removed before the expiry of the mining leases. In so far as the plant was physically attached to the land, the court inferred that this was to stabilise it and allow its efficient operation, rather than to add some additional feature to the land on which it rested.

The Supreme Court's decision, however, was overturned on appeal in *J&D Rigging Pty Ltd v Agripower Australia Ltd and Ors*,[85] where the Court of Appeal considered that it was not appropriate to import the rules about fixtures in the law of real property in the context of a statute that is concerned with a construction contract.[86] Instead, the Court of Appeal found that the ordinary meaning of the words in s 10 calls for an inquiry into the physical relationship between a thing and land,[87] and that it is the degree of annexation that will be relevant to the issue of whether or not a thing forms part of land.[88] Further, the court held,

> The fact that the plant was affixed to the land to stabilise it and to allow its efficient operation does not mean that it did not form part of the land upon which it was constructed. The fact that the plant might have to be removed at some future time did not make it any less a feature of the land upon which it was affixed. BCIPA [the Queensland Act] extends to construction work on temporary buildings or structures, provided they form part of land … The treatment and storage plant in this case might be removed towards the end of the mining lease or after it expired. Until that happened, it formed part of the land upon which it was constructed because of the nature of its construction and the degree to which it was affixed to the land.[89]

In the Western Australian State Administrative Tribunal case of *Conneq Infrastructure Services (Australia) Pty Ltd v Sino Iron Pty Ltd*,[90] Conneq agreed to undertake work and provide services in connection with the construction of a desalination plant that was to form part of the Sino Iron ore project. The Contract was terminated by Sino, and Conneq made a claim for the payment of termination costs provided for in the contract. The claim was rejected by Sino. Conneq subsequently made an adjudication application under the Western Australian Act, but the adjudicator dismissed the application under s 31(2)(a)(i) of the Act on the basis that the contract concerned was excluded from being a construction contract by reason of section 4(3)(c), which states that construction work does not include "constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance." The adjudicator viewed that the works were captured by section 4(3)(c) as "the water the plant produces is used almost exclusively for the processing of the iron ore." In particular, the water was used to form slurry to facilitate the transport of the iron ore in the 25 km slurry line from the mine site to the processing plant and it was used in

[85][2013] QCA 406.
[86]*J&D Rigging Pty Ltd v Agripower Australia Ltd and Ors* [2013] QCA 406 at [19].
[87]*J&D Rigging Pty Ltd v Agripower Australia Ltd and Ors* [2013] QCA 406 at [37].
[88]*J&D Rigging Pty Ltd v Agripower Australia Ltd and Ors* [2013] QCA 406 at [57].
[89]*J&D Rigging Pty Ltd v Agripower Australia Ltd and Ors* [2013] QCA 406 at [59].
[90][2012] WASAT 13.

the process of producing pellets from the fines ore.[91] Conneq applied to the State Administrative Tribunal for a review of the adjudicator's decision to dismiss the adjudication application under section 46(1) of the WA Act. Although the Tribunal held that the adjudicator had made the correct decision, it did so for different reasons to that given by the adjudicator. The Tribunal held that work and services in connection with the construction of the desalination plant were covered by the section 4(3)(c) exclusion because:

- s 4(3)(c) of the Western Australian Act is concerned with the purpose of the plant in question and not the use that might be made of any product created by that plant (as had been the focus of the adjudicator), and the purpose of the desalination plant was to produce desalinated water[92]; and
- the wording of the subsection does not suggest that its application was intended to be limited to constructing plant used for extracting or processing substances that were intended to be mined for profit[93]; and
- salt is a mineral, and the desalination plant processes sea water.[94]

The Supreme Court of Western Australia adopted a consistent approach in *Re Graham Anstee-Brook*; *Ex parte Karara Mining Ltd*,[95] where the court, among other things, had to decide whether an adjudicator had committed a jurisdictional error in making a determination under the WA Act with respect to a contract for the construction of a 152 km long water pipeline connecting Twin Hills Borefield to Karara mine site. The court held that construction of the pipeline was not excluded by section 4(3)(c), reasoning:

> Whether the pipeline is part of any plant for the purposes of extracting or processing any mineral bearing substance, in this case iron ore, depends upon whether the pipeline, and the function performed by it, is so related to the extraction or processing of iron ore that it warrants being held to be plant. The evidence does not establish that the pipeline performs a function so related to the extraction or processing operations so as to make it part of the plant. The function performed by the pipeline is to transport water from the borefield to the mine site and camp … The water, or most of it, is then subsequently used for the purposes of extracting or processing iron ore. However, no extraction, concentration, filtering or other processes that form part of the extraction or processing of the iron ore takes place in the pipeline. The evidence does not establish the function performed by the pipeline, or the relationship between the pipeline and any part of the plant that directly extracts or processes iron ore, is such that the pipeline might be properly regarded as part of any plant for the purposes of extracting or processing any mineral bearing substance.[96]

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[91] *Conneq Infrastructure Services (Australia) Pty Ltd v Sino Iron Pty Ltd* [2012] WASAT 13 at [46].

[92] *Conneq Infrastructure Services (Australia) Pty Ltd v Sino Iron Pty Ltd* [2012] WASAT 13 at [84].

[93] *Conneq Infrastructure Services (Australia) Pty Ltd v Sino Iron Pty Ltd* [2012] WASAT 13 at [82].

[94] *Conneq Infrastructure Services (Australia) Pty Ltd v Sino Iron Pty Ltd* [2012] WASAT 13 at [70]–[71].

[95] [2012] WASC 129.

[96] *Re Graham Anstee-Brook; Ex parte Karara Mining Ltd* [2012] WASC 129 at [16].

8.6 Conclusion

Statutory adjudication has become a well-used form of dispute resolution in many of those jurisdictions which have enacted construction industry payment legislation. At first sight it may appear that construction works carried out at mining sites are excluded from the scope of statutory adjudication by the "mining exclusion" provisions contained in all the Australian, the UK and the New Zealand Acts. Similarly, it may appear that the construction[97] of any plant which processes mined raw materials is excluded by provisions contained in the Western Australian and UK Acts. An analysis of the few, but recent, relevant judicial decisions to date, however, reveals that the scope of these excluding provisions is not nearly as wide as it might seem.

The Supreme Court of Queensland has found that:

- The Queensland Act's mining exclusions are to be interpreted narrowly, and are limited to the process of extracting minerals. They do not cover work done for the purpose of opening or as preparatory to operating a mine. As such, the construction of dams and drains at a mining site does constitute "construction work" under the Act and, therefore, can be the subject of a payment claim and adjudicator's determination.
- The Queensland Act covers payments for plant hired at a mining site as long as the plant is at least in part used for "construction works" as defined by the Act.
- Construction of temporary buildings or structures on land which is subject to a mining lease is most likely covered by the Act if those buildings and structures are sufficiently affixed to the land.

Given that the wording of the Queensland Act's mining exclusion provisions is identical to the other five Australian Acts which are based on the NSW model (the NSW, Victorian, ACT, Tasmanian, and South Australian Acts), it is highly likely that the Queensland decisions will be followed by courts in those jurisdictions. It is also likely that the courts in Western Australian and Northern Territory would be heavily influenced by these decisions, even though the wording of the mining exclusions in their Acts differs from the other Australian Acts.

Although, in accordance with their narrow interpretation of the mining exclusions, the Supreme Court of Queensland Court of Appeal has found that clearing and grubbing land and stripping and hauling topsoil is not covered within the mining exclusions, there remains uncertainty as to whether such works are "construction works" under the Act where they are carried out for the purpose of exposing minerals for mining. If, however, such works are carried out at a mining site for the purpose of completing other works falling within the definition of "construction works" under the Act (e.g., an access road), they will be considered as "construction works".

[97]The UK Act also excludes demolition of plant or machinery as well as erection or demolition of steelwork for the purposes of supporting or providing access the plant or machinery.

Like the Queensland courts, the English High Court has also preferred a narrow interpretation in relation to the excluding provisions in the legislation, albeit in relation to the erection of steelwork for the purposes of supporting plant at a liquefied natural gas terminal There does, however, appear the be a divergence in the approaches of the Queensland and English courts with respect to the validity of adjudicators' determinations concerning contracts which partly cover "construction works" under the Act which have incorrectly valued the extent and quantum of the "construction work" component in a payment claim. In Queensland, an adjudicator's determination will not be void for lack of jurisdiction in circumstances where the adjudicator has mistakenly included in their determination amounts for non-"construction work". By contrast, in England it would appear that such a determination would not be valid and enforceable.

The Western Australian Act is unique amongst the Australian legislation in being the only Act to exclude the construction of plant for processing oil, natural gas or any derivative of natural gas, or any mineral bearing substance. The Western Australian courts have found that the application of this exclusion will be assessed on the purpose of the plant in question (rather than the use of the plant's product) and that the mineral processed by the plant does not necessarily have to be one that is mined for profit.

In light of the judicial decisions reviewed, it is highly recommended that parties operating in the resources sector familiarise themselves with the statutory adjudication process and the associated legislation in their jurisdiction, as well as keep up to date with developments in the common law with respect to adjudication of construction works carried out within the resources sector.

Chapter 9
Recent International Commercial Arbitration and Investor-State Arbitration Developments Impacting on Australia's Investments in the Resources Sector

Luke Nottage and Simon Butt

Abstract This paper highlights two sets of significant developments for business-people, legal advisors and policy-makers relating to international arbitration in the resources sector, particularly from an Australian perspective. Part 9.2 deals with international commercial arbitration (ICA), primarily between private firms, pointing out that a 'legislative black hole' arises for certain ICA agreements with the seat in Australia which were concluded before amendments to the International Arbitration Act (Cth) (IAA) commenced on 6 July 2010. Such ICA clauses are commonly included in long-term contracts, characteristic of the resources sector, so the IAA required amendment to provide support for ICA and these business relationships. A Bill introduced in 29 October 2014 aimed to fill this black hole. Part 9.3 turns to treaty-based investor-state arbitration (ISA), especially as it impacts on outbound investors from Australia. It reiterates opposition to the 'Gillard Government Trade Policy Statement', applied from April 2011 until the Abbott Government took power from 7 September 2013 and reverted to a case-by-case approach to including ISA protections in investment treaties. This Statement changed over two decades of treaty practice by insisting that Australia would no longer countenance any form of ISA in future treaties—even with developing countries with local laws and court systems that may not meet minimum international standards. We highlight problems that arise from such a stance, also proposed in a 2014 Bill in the Australian Senate from a minority Greens Party senator, by discussing two major developments in Indonesian law in 2012, both relevant to the resources sector. They suggest how international investment treaties (including two between Australia and Indonesia—both with ISA protections, which remain in effect, albeit perhaps limited in the earlier 1992 treaty) can help mitigate adverse effects on foreign investors. Part 9.3.1 discusses regulations issued to implement provisions of Indonesia's Mining Law requiring eventual

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divestment of majority ownership to locals. Part 9.3.2 analyses a subsequent Constitutional Court decision to disband Indonesia's regulator for upstream oil and gas exploration. Both examples highlight the need for Australia to retain ISA in addition to substantive law protections in any renegotiated or new investment treaty with Indonesia, including the bilateral free trade agreement under negotiation since September 2012, despite Indonesia's announcement in March 2013 that it would be reviewing its 67 bilateral investment treaties.

9.1 Introduction

Australia is becoming increasingly integrated into investment and trading relationships within the vibrant Asian region. Japanese and Chinese firms are now major inbound investors, particularly in the capital-intensive resources sector.[1] Australian resources companies, often as parts of large multinational groups, are increasingly investing offshore in neighbouring countries such as Indonesia. Both types of cross-border business relationships need support and monitoring at multiple levels, including by means of an appropriate legal framework, to maximise potential for 'Australia in the Asian Century'.[2]

This chapter highlights two sets of significant developments for Australian businesspeople, legal advisors and policy-makers relating to international arbitration in the resources sector. Part 9.2 deals with international commercial arbitration (ICA), primarily between private firms, pointing out that a 'legislative black hole' arises for certain ICA agreements with the seat in Australia which were concluded before amendments to the *International Arbitration Act* (Cth) (IAA) commenced on 6 July 2010. Such ICA clauses are commonly included in long-term contracts, characteristic of the resources sector, so the IAA must be promptly amended to provide support for ICA and these business relationships.[3] If the black hole is not filled, disputes arising under these contracts will cause serious problems for foreign investors in Australia as well as outbound investors who had agreed to international arbitration in Australia. Such disputes will also cause acute embarrassment as Australia attempts to reclaim ground lost since the 1990s to several major arbitral institutions in the Asian region (in China, Hong Kong and Singapore) and some newly emerging institutions (for example, in Korea and Kuala Lumpur).[4]

[1]On Japan's less visible (and more diversified) investments, see Drysdale (2010).

[2]Available (through the National Library of Australia archives) via http://asiancentury.dpmc.gov.au/. Accessed 16 April 2014.

[3]The problem was first highlighted in Garnett and Nottage (2011), 27–28. On the ubiquity of long-term contracts in Australia, particularly in the resources sector, see generally Dharmananda and Firios eds (2013), reviewed at blogs.usyd.edu.au/japaneselaw/2014/09/ltc.html. Accessed 12 August 2014.

[4]Compare generally Keane (2012).

Part 9.3 deals with treaty-based investor-state arbitration (ISA), especially as it impacts on outbound investors from Australia. It reiterates opposition to the 'Gillard Government Trade Policy Statement', which was in effect from April 2011 until the (Labor Party) Gillard Government lost power to the (Coalition) Abbott Government in September 2013.[5] This Statement changed over two decades of treaty practice by insisting that Australia would no longer countenance any form of ISA (or even investor-state mediation) in future treaties, even with developing countries on foreign investors with local laws and court systems that do not meet minimum international standards. We highlight problems that arise from a stance such as that adopted by the Gillard Government by discussing two major developments in Indonesian law in 2012, both relevant to the resources sector. They suggest how international investment treaties (including two between Australia and Indonesia—both with ISA protections, which remain in effect) can help mitigate adverse effects on foreign investors. Part 9.3.1 discusses regulations issued to implement provisions of Indonesia's Mining Law requiring eventual divestment of majority ownership to locals. Part 9.3.2 analyses a subsequent Constitutional Court decision to disband Indonesia's regulator for upstream oil and gas exploration. Both examples highlight the need for Australia to retain ISA in addition to substantive law protections in any renegotiated or new investment treaty with Indonesia, including the bilateral free trade agreement under negotiation since September 2012.[6] More broadly, we argue that the Australian government should decide whether and how to include ISA protections in future treaties on a case-by-case basis, in order to appropriately balance private and public interests. Since 2014, the Abbott Government has in fact reverted to this approach.[7]

9.2 The 'Legislative Black Hole' for Some Pre-2010 International Arbitration Agreements in Australia

Overall, the IAA amendments in 2010 appear to have changed very little about ICA in Australia. Although the legislative reforms aimed to clarify and streamline proceedings, litigation has not abated—if anything, there have been *more* IAA-related judgments rendered in recent years.[8] By mid-2013, case disposition times

[5]For critiques, see Nottage (2011a) and Trakman (2012). The Statement is no longer available on Australian government websites but is reproduced via http://blogs.usyd.edu.au/japaneselaw/2013/12/isds_back.html. Accessed 16 April 2014.

[6]See http://www.dfat.gov.au/fta/iacepa/. Accessed 16 April 2014.

[7]See http://www.dfat.gov.au/fta/isds-faq.html. Accessed 16 April 2014. For constructive suggestions for treaty (re)drafting, see, for example, Nottage and Miles (2009); Burch et al. (2012); Campbell et al. (2013).

[8]See Monichino et al. (2012), Figure 1. A large proportion of these involve enforcement of foreign awards, so this could reflect the growing numbers of ICA cases being filed world-wide through major arbitral centres.

had not improved significantly compared to the three years before the 2010 amendments, at least in the Federal Court.[9] It is as if the government has built a new highway to reduce the duration of commutes, only to find that so many people now use the road that commuting times do not improve at all. There has also been at least one example of 'road rage'. One case, involving at least five sets of proceedings, has ended up clogging the courts. These proceedings arose from a breach of contract claim 'won' at great cost, partly under arbitration with the seat in Melbourne, by an Australian distributor (Castel) against a large Chinese manufacturer (TCL).[10]

In one of the (many) judgments in that dispute,[11] Murphy J, at first instance in the Federal Court, observed that, prior to the 6 July 2010 amendments, IAA s 21 had allowed parties to agree to exclude the operation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on ICA (ML). However, since these amendments, Murphy J stated, the ML now covered the field for international arbitrations and had retrospective effect over prior international arbitrations. Murphy J, in obiter dicta, expressly rejected the view of Garnett and Nottage that the 'new' s 21 should not be applied retrospectively.[12] His Honour relied principally on *Maxwell v Murphy*,[13] where the High Court ruled that legislation may operate retrospectively if it does not 'determine the rights and liabilities of the parties' but rather has only procedural effect.

Soon afterwards, however, the Court of Appeal in Western Australia unanimously disagreed with Murphy J's application of *Maxwell* in the international arbitration context.[14] Their Honours reasoned that the 'old' s 21 still applied to allow exclusion of the ML, at least where the dispute had crystallised (per Martin CJ and Buss JA) or arbitration had commenced (per Murphy JA) before 6 July 2010. However, these remarks were also obiter. This case concerned an agreement over a large resources development, dated June 2007, between a Chinese company (Rizhao) and an Australian company (Mt Gibson). The agreement expressly provided for dispute resolution by arbitration with the seat in Western Australia according to the recently-repealed *Commercial Arbitration Act 1985* (WA) (CAA). At arbitration, the Hon Murray Gleeson AC QC rendered awards that were successfully enforced by Mt Gibson under s 33 of the 1985 Act in the Supreme Court of Western Australia (WA). Rizhao appealed this decision to the Court of Appeal,

[9]Nottage (2013d). See also an updated statistical Appendix at http://blogs.usyd.edu.au/japaneselaw/2013FedCt_NottageSummaryTable_LN06.pdf. Accessed 16 April 2014.

[10]Ibid, for the full and ongoing saga; see also Monichino and Nottage (2013) and, most recently, *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 (upholding the trial court's rejection of the Chinese manufacturer's "public policy" challenge to award enforcement).

[11]*Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd* [2012] FCA 21 (23 January 2012).

[12]Nottage and Garnett (2010), 27–28.

[13](1957) 96 CLR 261.

[14]*Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 262 FLR 1.

arguing that the first-instance court erred by not applying the provisions of the IAA to the issue of enforcement. The Court dismissed the appeal on the narrow ground that Rizhao should not be permitted to raise issues on appeal which it did not present to the primary judge.[15]

Garnett and Nottage subsequently published a further analysis of the problem, preferring the reasoning of the Court of Appeal relating to the non-retrospective effect of the new s 21, but arguing that the old s 21 should apply even if disputes are arbitrated after 6 July 2010.[16] However, this left a 'legislative black hole' for:

(a) 'international' arbitration agreements (for example, between Chinese and Australian parties);
(b) with their seat in a State or Territory that has now repealed the old CAA legislation, and replaced it with new uniform CAA legislation that expressly applies only to 'domestic' arbitrations[17];
(c) where the parties have agreed (impliedly[18] or expressly) to exclude the ML (for example, by specifying CAA legislation as the applicable arbitration law).

To fix this problem, Garnett and Nottage suggested amendments to:

(i) the IAA to clarify that the new s 21 does *not* have retrospective effect (which would mean overriding the parties' original agreement); and
(ii) all new uniform CAAs so that they apply to the relevant international arbitration agreements—either by reinstating the old CAA provisions for them, or applying the new CAA provisions (although this will mean parties lose the right to appeal certain errors of law, the default rule under the old CAA legislation).

[15]Ibid, para. [93].

[16]Garnett and Nottage (2012).

[17]*Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act* (Tas); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2013* (Qld).

[18]In relation to whether a choice of International Chamber of Commerce (ICC) Arbitration Rules indicates that the parties impliedly intended to opt out of the ML under the old s21, compare *Cargill International SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533 (finding 'plainly wrong' such reasoning by the Queensland Court of Appeal in *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing GmbH* (2001) 1 Qd R 461 (*Eisenwerk*)) and Queensland (refusing subsequently to disavow *Eisenwerk* (2001) 1 Qd R 461 in *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219 (20 August 2010), although that involved UNCITRAL Rules). In *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63, the Australian Capital Territory (ACT) Supreme Court also recently adopted the approach in *Eisenwerk* (2001) 1 Qd R 461, which has been widely criticised as essentially a 'category error': adoption of Rules amplifies the parties' arbitration agreement, which are trumped by any mandatory rules of the *lex arbitri*.

Unfortunately, however, States and Territories have continued to enact new CAA legislation that (uniformly but unfortunately) leaves a growing black hole,[19] by repealing the old CAA statute without a savings provision as suggested in (ii) above.

The most politically expedient way forward may now therefore be to amend only the IAA, expressly stipulating that the new s 21 applies retrospectively after all.[20] Retrospective legislation might be viewed with disfavour, but in Australia it is neither unconstitutional, nor unknown in practice.[21] Such an amendment would be far better than doing nothing—with the risk that a case will fall straight into the black hole, causing further embarrassment to Australia's attempts to reposition itself as an attractive venue for ICA. Another possibility is an amendment to the IAA to ensure that the relevant state or territory law as of 6 July 2010 (namely, the CAA legislation prior to repeal) continues to apply to prior international arbitration agreements which had excluded the Model Law under the old s 21. These two options were proposed by the federal Attorney-General's Department in an informal consultation initiated in October 2013 with various stakeholders, including Nottage, who favoured the latter amendment provided it is constitutional and can be drafted accurately. However, the alternative (making the new s 21 apply retrospectively) was proposed in Schedule 2 of the C*ivil Law and Justice Legislation Amendment Bill 2014* (Cth), introduced into the federal Senate on 29 October 2014.[22]

9.3 Natural Resources Investments in Indonesia Meet the 'Gillard Government Trade Policy Statement'

In 2012, Professor Chris Findlay wrote on the widely-read East Asia Forum blog about 'Australia's FDI challenges in the Asian Century'. This article accompanied his public submission to the Australian government's inquiry into developing closer relations with Asia.[23] Highlighting problems reported recently by ANZ Bank and

[19]Above note 17. However, the ACT has not yet introduced any new CAA legislation.

[20]Monichino (2012).

[21]See generally Sampford (2006), Gerangelos (2009), p. 306. However, particular attention would need to be paid to any relevant international arbitrations already commenced with the seat in Australia, if IAA s 21 were restated as clearly applying retrospectively, as the effects on the parties (and arbitrators) involved would be especially profound.

[22]Available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s980. Accessed 16 April 2014. As of 15 April 2015, the Bill had not been enacted by both Houses of Parliament. In any event, the proposed additional s 21(2) for the IAA does not completely fill the legislative black hole, as it provides that: 'Subsection (1) applies to an arbitration arising from arbitral proceedings that commence on or after the commencement of this subsection, whether the arbitration agreement giving rise to the arbitration was made before, on or after 6 July 2010'. This wording does not seem to cover the situation of an international arbitration already commenced, leaving the courts to try to divine the legislative intention for such situations.

[23]Above note 2.

Qantas in the region, Findlay's proposals included 'innovation in negotiating modalities' and a possible new plurilateral agreement in the World Trade Organization (WTO) that would cover all investments—not just in some services sectors.[24] While this is an attractive idea, it will be difficult to complete during the current Doha Round negotiations.[25] Regarding investment treaties, therefore, the Australian government should meanwhile reconsider its abrupt policy shift announced in April 2011 concerning ISA.[26] This important protection for foreign investors had been found hitherto in most of its bilateral and regional Free Trade Agreements (FTAs) and bilateral investment agreements (BITs).[27]

Australia's first BIT came into effect on 11 July 1988, with China, followed by one with Vietnam in force from 11 September 1991. All of Australia's investment treaties with Asian states provide for ISA, allowing foreign investors to bring direct claims before international tribunals if host states breach substantive commitments made in the agreements, rather than having to mobilise their home states to bring an inter-state claim, as is necessary under the WTO regime. Admittedly, Australia's BIT with China only allows ISA claims related to expropriation of the foreign investor's assets by the host state. However, as China has emerged as a major exporter of capital, and not just an importer of it, the treaties China has entered into have provided for full-scale ISA protections since the 1990s. Member states of the Association of Southeast Asian Nations (ASEAN) have also come to incorporate extensive ISA provisions even as among themselves.[28] A recent illustration is the ASEAN Comprehensive Investment Agreement, signed in 2009 and in force from March 2012.[29]

Yet the 'Gillard Government Trade Policy Statement' of April 2011 eschewed ISA for Australia's future investment treaties. Initially there appeared to be scope to interpret the Statement, consistently with the 2010 recommendations of its own Productivity Commission,[30] as allowing ISA under stricter conditions—at least with treaty partners having less developed domestic law frameworks for investment protection and dispute resolution.[31] But the Gillard Government subsequently clarified that it did mean to go further—arguably, beyond the Commission's recommendation—by not agreeing to ISA in any future treaties (although, curiously, without seeking to renegotiate or terminate any of Australia's investment treaties containing ISA).[32]

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[24]Findlay (2012).

[25]Cf. Hufbauer and Stephenson (2014).

[26]Above note 5.

[27]Mangan (2010).

[28]Bath and Nottage (2011).

[29]Losari (2012).

[30]Nottage (2011b).

[31]Nottage (2011a).

[32]Nottage (2013a) in a special issue of the *Asian Studies Review* on 'the international politics of resources'. See also Trakman (2014).

One rationale given for the Government's policy shift was that Australia's outbound investors had never filed a treaty-based ISA claim, and had not shown much interest in this protection. In fact, an Australian mining company had recently filed a proceeding under the Australia-India BIT. The company successfully argued that lengthy delays in trying to judicially enforce an arbitral decision obtained through a separate commercial arbitration claim, against its venture partner, violated India's commitments given in the BIT with Australia.[33] Along with other business groups, the Australian Chamber of Commerce and Industry subsequently voiced concern about the Trade Policy Statement's stance on ISA, most recently in the context of already-complex negotiations between Australia and other Asia-Pacific states towards an expanded Trans-Pacific Partnership Agreement (TPPA).[34] Australia's new stance also risked complicating negotiations commenced in November 2012 towards a 'Regional Comprehensive Economic Partnership' ('RCEP' or the 'ASEAN+6' FTA), as well as other pending bilateral FTA negotiations.[35]

The following two sets of recent regulatory changes in Indonesia provide further examples of the sorts of challenges facing foreign investors in the region, and how treaty-based protections may help to manage them.

9.3.1 Indonesia's New Mining Law Regulations Requiring Majority Local Ownership[36]

On 21 February 2012 the Indonesian government issued Government Regulation 24 of 2012. It requires majority or wholly foreign-owned companies holding mining licenses in Indonesia to divest a majority share of the company to an 'Indonesian participant' after ten years of production.[37] An Indonesian participant must own

[33]Robertson and Leeks (2012).

[34]See http://acci.asn.au/Research-and-Publications/Media-Centre/Media-Releases-and-Transcripts/Global-Engagement/Australian-Foreign-Investment-Requires-Right-to-Su.aspx. Accessed 16 April 2014. For complications for Japan arising from Australia's stance on ISA, see also, for example, Nottage (2013b).

[35]See generally, for example, Pakpahan (2012). All other 'ASEAN+' FTAs include ISA protections, except for the one with Japan. The latter lacks an investment chapter altogether, but this is mitigated by bilateral FTAs or BITs with all major ASEAN economies. See generally Hamamoto and Nottage (2013), with a more detailed analysis of Japan's treaty-based ISA protections at http://ssrn.com/abstract=1724999. Accessed 16 April 2014. See also generally Bath and Nottage (2015) regarding ASEAN+ treaties.

[36]Earlier and shorter versions of this section appeared in http://www.eastasiaforum.org/2012/05/13/divestment-of-foreign-mining-interests-in-indonesia/ and http://www.eastasiaforum.org/2012/05/14/indonesian-investments-and-international-treaty-law/ (with Dr Brett Williams), also at http://ssrn.com/abstract=2175951. Both accessed 16 April 2014.

[37]See generally, for example, http://www.bakermckenzie.com/ALAPMiningRegulationsMar12/. Accessed 16 April 2014.

20 % of the foreign company within the sixth year of production; 30% after the seventh year; 37 % after the eighth; 44 % after the ninth and, by the end of the tenth year, a minimum of 51 %. For many foreign investors, this will mean a mandatory divestment of equity.

An offer to purchase the share must first be made to the central government. If the central government is not prepared to purchase the share, then it must be offered to the provincial government or city/county government. If they refuse also, then the shares are to be offered by auction to (in order of priority) a State Owned Enterprise, a Regional State Owned Enterprise, or a national company. Failure to divest according to this schedule can lead to suspension of production and even revocation of the mining license.

The concept of divesting foreign interests in Indonesian mining enterprises is certainly not new. The 2009 Mining Law required a divestment after five years of production, but did not specify the required amount of the divestment. A 2010 Regulation required that Indonesian participants hold 20 % equity in foreign-owned mining operations after five years of production, but did not require further divestments. The new Regulation goes much further by requiring divestment of a majority share. However, mining companies operating in Indonesia have long had divestment obligations under Contracts of Work with the Indonesian government.[38] For example, in 2003 BP and Rio Tinto divested their majority shareholding in PT Kaltim Prima Coal, as required under their 1982 contract with the Indonesian government. And in 2011, USA's Newmont divested 51 % of its share in Newmont Nusa Tenggara, as required by its 1986 contract.

Predictably, many miners argue that ten years is insufficient for them to make a sufficient return on their investment. They also complain about the uncertainty the Regulation brings. In particular, some miners operating under a Contract of Work with less onerous or no divestment provisions fear that they will be required to renegotiate their Contracts to comply with the regulation's mandatory divestment provisions. On this, the government appears to have given mixed signals. Some officials, such as former Mining Ministry Director General for Mineral and Coal Thamrin Sihite, have said that the regulation only applies once the Contract of Work has expired or when an extension to that contract is sought. Others, such as former Deputy Mining Minister Widjajono Partowidagdo have said that Contracts of Works can be renegotiated whenever the government deems necessary.

Miners have also faced difficulties with the divestment process. It is often hard to find a tier of government or Indonesian company with sufficient funds to purchase the stake. In addition, if funds are available, national and regional governments sometimes bicker over which of them should get first priority to buy it. (Local governments argue that control should be theirs because the operation takes place within their locale. National governments are keen to obtain a share of these often lucrative investments.) And sometimes one branch of government even seeks to scuttle the efforts of another. In 2012, for example, the Constitutional Court heard a

[38]Bachelard (2012).

dispute between the government (that is, the president) and the national parliament. The government wanted to purchase US$246.8 million worth of shares in Newmont, which, after long-running legal battles had finally resolved to divest a majority share. However, the national parliament claimed that the government required parliamentary approval for such a purchase and refused to grant it, preferring instead for the local government to acquire it. The Constitutional Court, by a majority of five judges to four, sided with the national parliament.[39] The result makes a mockery of the divestment requirement and process, creating ongoing uncertainty and inconvenience for Newmont.

The main problem with the divestment policy, miners and Indonesian economists point out, is that it significantly reduces the desirability of the Indonesian mining sector for investors. Mining contributes 17 % to Indonesia's GDP and a significant proportion of Indonesia's foreign direct investment ($3.6 billion of US $20 billion in 2011).[40] If Indonesia wants to increase its economic growth from 6.5 to 8 %, then it simply must attract more foreign investment, including in the mining sector.

One explanation for the stance is 'resource nationalism'—a response to demands from Indonesians, particularly those who live near mining sites, for, as one senior Mining Official put it, 'a share of what the companies are earning'.[41] Indeed, the preamble of Government Regulation 24 of 2012 explicitly states that one of its rationales is to allow more Indonesians to participate in mining. The stance may also be part of a broader wave of political nationalism, which many within government, and various political parties, support. They believe, probably quite rightly, that this enjoys wide appeal amongst the electorate. Indications of this appeal were evident during the parliamentary and then presidential elections that took place over 2014.

Exploitation of natural resources by foreigners is not publicly popular anywhere in the world, but in formerly-colonial states such as Indonesia, it has greater currency. Article 33 of the Constitution, which requires the state to control natural resources and important public utilities for the 'greatest possible prosperity of the people', reflects this sentiment. The provision was drafted on the eve of the declaration of Indonesian independence and was retained intact during four rounds of constitutional amendments in the post-Soeharto era.

It is also significant that under the 1967 Mining Law's so-called 'Contract of Work' framework, the Indonesian government did not simply grant mining licenses to mining companies. Instead, the Minister appointed mining companies as contractors to carry out, subject to any conditions imposed by the Minister, mining activities that had not been or could not be carried out by the government or a national company. (In practice the Contracts initially contained conditions very favourable to the foreign investor who would inevitably have been very close to

[39]Constitutional Court Decision 2/SKLN-X/2012.

[40]Jakarta Globe (2012).

[41]Ibid.

Soeharto's inner circle.) The new rules, however, take government control one step further—to majority ownership of the mining entity itself, should the state so desire.

Reporters and other commentators, including several in Australia, have emphasised that Indonesia is not alone in seeking to renegotiate the terms for foreign investments especially into the mining sector, which is booming worldwide.[42] The 2010 Productivity Commission Report did note briefly the dramatic increase in FDI into Australia's mining sector over the last decade. Accordingly, a factor behind the Trade Policy Statement policy shift may have been the Gillard Government's intuition that no longer offering ISA would not significantly detract from inbound FDI or jeopardise entire treaty negotiations.

However, at least Australia's newfound aversion to ISA only affects future treaties. Foreign investors presently retain substantive protections as well as ISA rights. For instance, Australian investors in Indonesia have access to ISA under a BIT signed in 1992 and in force from 29 July 1993,[43] and under the 2009 ASEAN-Australia-New Zealand Free Trade Area FTA in force from 1 January 2010.[44] However, as existing treaties expire Australian investors will lose protections, under a policy shift like that announced in the Gillard Government Trade Policy Statement, and such a stance complicates the negotiation of new treaties (like the TPPA). It also risks making Australian investors less competitive than investors from third countries into Asia, as those third countries maintain or even expand investment treaties that include ISA protections.

Meanwhile, Australia's existing treaties should help mitigate two disturbing aspects of Indonesia's new measure. First, the measure may well have retrospective effect. Secondly, it targets only foreign investors, thus differing from other measures adopted by resource-rich states seeking to claim a larger share of revenues from mining. Those are usually done on a basis that is, at least formally, non-discriminatory, such as raising taxes levied on mining companies—affecting the profitability of domestic as well as foreign investors.

Thus, compared to measures introduced or mooted recently by other states, the new divestment regulations seems much more likely to violate substantive commitments made under various investment treaties or FTAs, generating significant potential for ISA claims. Admittedly, a concatenation of legal and pragmatic factors make informal settlements preferable to full-scale ISA proceedings. Yet the framework provides important baselines agreed between states. Australia's new stance eschewing ISA in future treaties risks undermining a system that has become widely known and accepted even in Asia, creating a serious risk of destabilising sustainable cross-border investment flows particularly over the medium- to long-term.

In fact, Indonesia's new Mining Law regulation requiring divestment of majority foreign investments is unlikely to generate many formal ISA claims against

[42]Ker and Yeates (2012).

[43]http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1993/19.html. Accessed 16 April 2014.

[44]http://www.austlii.edu.au/au/other/dfat/treaties/ATS/2010/1.html#ch11. Accessed 16 April 2014.

Indonesia, based on existing bilateral or regional FTAs or BITs. But this assessment is based primarily on immediate pragmatic considerations. This leaves considerable scope for the international investment law framework to begin unraveling, risking complex adverse effects on cross-border investment particularly in the rapidly evolving Asia-Pacific region.

In the short term, after all, foreign investors have probably done quite well from any mining investments now potentially affected by Indonesia's new regulation, and they may expect favourable treatment in future deals if they comply under the new rules. This conciliatory attitude is particularly likely where the home state of the investor lacks natural resources, such as Japan. That factor provides one explanation for the lack of (direct) ISA claims by Japanese investors under a growing number of investment treaties concluded by Japan around the world. Those include the Investment Chapter contained within the 2006 Japan-Indonesia Economic Partnership Agreement (JIEPA),[45] with its heavy focus on enhancing energy security for Japan. Korean investors have never publicly filed ISA claims either.[46]

More generally, few Asian states have been involved in ISA proceedings, whether as claimants or respondents. Rather than the direct influence of 'Asian culture', these phenomena are arguably linked to economic factors, such as unfamiliarity with investment treaty protections, concerns about costs involved in bringing or defending cases, and a concern that a formal ISA claim may jeopardise long-term beneficial relations not just in the particular host state but also other parts of the Asian region.[47] Japanese, Korean and other investors may also be able to easily mobilise their home states to help informally resolve an investment dispute caused by measures adopted by the host state, especially if their home states perceive a strong national interest in securing stable access to minerals and other natural resources.

Nonetheless, the new Regulation under Indonesia's Mining Law, or any similar measure introduced under other regimes, might lead to formal ISA claims, or—more likely—frame renegotiations with foreign investors (and possibly their home states) who are potentially covered by investment treaty protections. Indonesia has reportedly only been subject to three ISA proceedings under the framework 1965 International Centre for Settlement of Investment Disputes (ICSID) Convention, to which Australia and Japan are also party.[48]

Future ISA claimants regarding Indonesia's new Mining Law regulations may encounter a potential preliminary hurdle: the need for the investment to be 'admitted' or authorised by Indonesia. Many investment treaties concluded by

[45]See http://www.meti.go.jp/english/policy/external_economy/trade/FTA_EPA/indonesia.html. Accessed 16 April 2014.

[46]See, respectively, Sitaresmi (2011) The Japan-Indonesia Economic Partnership Agreement: an energy security perspective (ch. 7); Kim (2011) The evolution of Korea's investment treaties and investor-state dispute settlement provisions (ch. 11). In: Bath and Nottage (eds).

[47]Nottage and Weeramantry (2012).

[48]See https://icsid.worldbank.org/ICSID/Index.jsp. Accessed 16 April 2014.

Indonesia, and indeed other ASEAN states, provide protections only for such admitted investments.[49]

For Australian investors giving consideration to invoking Australia's two investment treaties with Indonesia, it should also be noted that the 1992 treaty defines an 'investment' to be one 'admitted by [Indonesia] in its territory in conformity with the laws, regulations and investment policies of [Indonesia] applicable from time to time' (Art. I.1(a)). The treaty also states that it applies to investments 'granted admission in accordance with the Law No. 1 of 1967 concerning Foreign Investment or with any law amending or replacing it' (Art. III.1(a)). The 2009 ASEAN-Australia-New Zealand Free Trade Area agreement (AANZFTA), which does not extend to prior investments, defines a 'covered investment' somewhat differently: one 'admitted by the host Party, subject to its relevant laws, regulations and policies' (Chapter 11 (Investment) Art. 2(a)).

A recent claim, initiated in 2011 by a UK-based banking-sector investor, brings the admission requirement into sharp relief. In July 2013, an ICSID tribunal found that Rafat Al Rizvi—who sought to argue that his investment had been expropriated by the Indonesian government—was unable to demonstrate that his investment had been approved or granted admission under the 1967 Law, as required by the UK-Indonesia BIT.[50] By contrast, in a Decision on Jurisdiction rendered by another ICSID tribunal on 27 February 2014 in *Planet Mining v Indonesia*, the Australian subsidiary of a UK mining company prevailed against Indonesia's argument that the investor needed to comply with national laws and policies applicable even after the original licence admitting the foreign investment, in order to be able to invoke ICSID arbitration procedures under the 1992 Australia-Indonesia BIT.[51]

Article 14(1) of AANZFTA adds that all foreigners' covered investments may be subjected to a requirement of being 'legally constituted under the laws or regulations of the [host state]', but 'provided that such formalities do not substantially impair the protections afforded by a host state'.[52] A particular difficulty that may be faced by foreign investors considering treaty claims against Indonesia is that post-Soeharto democratisation and decentralisation have generated an extraordinarily complex set of laws and policies impacting on foreign investments.[53]

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[49]This jurisdictional hurdle was also problematic in the only ISA claim ever brought under the old ASEAN investment treaty system, which required prior approval in writing (*Yaung Chi Oo v Myanmar* (2003) 42 ILM 540). However, elsewhere he has remarked that the situation may be different under the 2009 ASEAN Comprehensive Investment Agreement because that treaty now requires states to specify procedures for admitting investments. See Sornarajah (2011), p. 246. See also generally Bath and Nottage (2015); and Brown (2015).

[50]*Rafat Ali Rizvi v The Republic of Indonesia* (ICSID Case No. ARB/11/13). See Jakarta Post (2013) and generally Iswara et al. (2011).

[51]*Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40).

[52]Footnote 29 of the AANZFTA clarifies that for Vietnam or Thailand this means registered and/or approved in writing.

[53]As detailed by Butt (2011).

If such preliminary hurdles can be overcome, Australian investors might first argue that the new Indonesian regulations breach several substantive protections under international treaty law. First, AANZFTA provides 'national treatment' (NT) for covered investments, namely 'treatment no less favourable than that [the host state] accords, in like circumstances, to its own investors and their investments' (Art. 4). But footnote 33 makes this commitment subject to a Work Program (Art. 16), whereby member states shall discuss—for up to five years and under the aegis of a joint 'Committee on Investment' (Art. 17)—their schedules of 'reservations' made under Article 12. It is therefore crucial for foreign investors to check carefully for reservations that Indonesia may have made originally or subsequently adjusted as permitted by AANZFTA, relating to either certain measures contrary to NT obligations (Schedule to List I) or certain sectors or activities (List II). Nonetheless, Article 12(3) does state expressly that in general a host state 'may not, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to List II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective'.

Australia's 1992 investment treaty with Indonesia does not provide for NT. However, it does include 'most favoured nation' provisions (Art. IV), allowing Australian investors to claim the benefit of protections extended by Indonesia to third countries. Thus, for example, they can invoke the NT obligation found in JIEPA Article 59.[54] Yet, in the wake of the ICSID award in *Planet Mining v Indonesia*, Indonesia announced in March 2013 that it would be reviewing its 67 current BITs.[55]

Second, investors might claim compensation for 'expropriation' or its equivalent, arising from the host state's measures, as provided in both the 1992 treaty (Art. VI) and AANZFTA (Ch. 11 Art. 9—with greater detail provided in the text, footnotes and an Annex). Discriminatory measures (including expropriation) are particularly prone to challenge under international law. It is also generally unnecessary for the host state to benefit directly and financially from measures that detract from the foreign investor's investment. This contrasts with some national laws regulating expropriation, including arguably the Australian Constitution, which appear to require an 'acquisition' or 'taking' into government hands. (This is one reason why in 2011 Philip Morris Asia was able to launch the first ever ISA claim against Australia under a 1993 investment treaty with Hong Kong.[56] Other tobacco companies complaining about Australia's new plain packaging law had to challenge it—ultimately unsuccessfully—in the High Court of Australia.[57]) In any event, measures

[54]Although this too is subject to reservations under Art. 64, more detailed and arguably more pro-investor than under AANZFTA.

[55]Nottage (2014). However, there is no mention of Indonesia reviewing its current FTAs.

[56]Nottage (2013c).

[57]*TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 (13 March 2013).

such as the new Regulation under Indonesia's 2009 Mining Law appear to force foreign shareholdings into state hands or government-linked companies, at least initially. Such expropriation triggers foreign investors' rights to compensation.

Third, the host state commits to extending 'fair and equitable treatment' to Australian investors under both the 1992 treaty (Art. II.3) and AANZFTA (Art. 6(2), adding tighter definitions). A core aspect is due process with regard to measures impacting on foreign investments, including notifications and opportunities for affected investors to be fairly heard. However, in some situations this duty may extend to the protection of substantive 'legitimate expectations' held by foreign investors.[58]

Both treaties grant other protections which may be violated by Indonesia's new regulations, such as a requirement for 'transparency of laws' (Art. X and especially Art. 13, respectively). Some provisions may also impact on future restrictions on investors that have been mooted by the Indonesian governments, such as restrictions on foreigners holding key management positions in human resources departments.[59] In particular, the 1992 treaty permits Australian investors to employ 'key … managerial personnel of their choice' (Art. IX).

Lastly, the 1992 treaty allows Australian investors to commence ICSID arbitration under certain conditions (Art. XI(2)(b)). Surprisingly, the Decision on Jurisdiction in *Planet Mining v Indonesia* upheld consent to ICSID arbitration pursuant to coal mining licences given by Indonesian authorities, but not under the wording of the 1992 Australia-Indonesia BIT itself. The tribunal found that the countries had only given a "promise to consent" rather than full advance consent to ICSID jurisdiction, meaning that Indonesia could still refuse consent subject to potential review through an inter-state arbitration procedure separately provided under the treaty. If correct, this interpretation will greatly circumscribe ICSID arbitration rights provided by Art. XI(2)(b), rendering it largely inoperative in practice. Further, as both countries remained party to the framework 1965 ICSID Convention facilitating enforcement of arbitral awards, another BIT provision for ad hoc ISA (Art. XI(3)) was also unavailable to investors.[60] Fortunately for investors, however, AANZFTA adds broader scope for ISA, including ICSID and UNCITRAL Arbitration Rules designed for ad hoc proceedings (Art. 21(3)).

ICSID usually provides for greater transparency in proceedings; but AANZFTA allows the host state, for example, to make public all awards and decisions rendered by a tribunal (Art. 26). This is arguably important for host states given the greater public interests involved in ISA compared to inter-firm commercial arbitration. However, greater transparency may also be valuable for responsible foreign investors who might wish to file a claim in order to highlight prior treaty

[58]See, for example, Potesta (2012).

[59]Brown (2012).

[60]For a critical assessment of this aspect of the tribunal's reasoning, and implications for other Australian BITs containing similar wording, see Nottage (2014).

commitments to the host state, but are still prepared to negotiate an amicable settlement even after proceedings have commenced.[61]

After all, the international law regime does not and cannot solve all issues, even with increasingly sophisticated drafting of investment treaties.[62] Widely-accepted legal interpretations are still evolving and all ISA disputes tend to become quite fact-intensive, generating costs and delays. But international law does provide mutually-agreed understandings aimed at balancing a host state's national interests in maintaining appropriate regulatory discretion while attracting foreign investment, with reasonable predictability expected by foreign investors—especially in longer-term cross-border foreign direct investments involving politically sensitive sectors, such as the resource sector.[63] The ISA mechanism is important to give traction to substantive rights of foreign investors. Indonesia's regulations issued in February 2012 under the Mining Law therefore provide another reason to reconsider policy developments such as the Gillard Government Trade Policy Statement's eschewal of ISA in all future treaties, particularly since Australia continues to negotiate a bilateral FTA as well as RCEP with Indonesia.

9.3.2 *Indonesia's Constitutional Court Decision Disbanding the Oil and Gas Regulator*

Another significant development that appears to affect investors in Indonesia's resources sector occurred on 13 November 2012. On that day, the Indonesian Constitutional Court ruled that the regulator for upstream oil and gas exploration (*Badan Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi* or 'BP Migas') was unconstitutional and ordered that it be disbanded.[64] BP Migas has been established under Law 22 of 2001 on Oil and Natural Gas. This Law stipulated that BP Migas' main functions were to enter into cooperation contracts and to monitor their implementation (Arts. 44(1) and (2)); and to advise the Energy and Mineral Resources Minister on cooperation contracts, production plans, budgets and the appointment of oil and gas sellers (Art. 44(3)).

An 8 to 1 majority of the Constitutional Court decided to excise from the 2001 Oil and Natural Gas Law all references to BP Migas, including the provisions granting it powers and functions,[65] and ordered it to cease operating. The nub of the

[61]Burch et al. (2012).

[62]See generally, for example, Brown (2013).

[63]Kurtz (2012).

[64]Constitutional Court Decision 36/PUU-X/2012, reviewing Law 22 of 2001 on Oil and Natural Gas (*Oil and Natural Gas Law case* (2012)). See generally Butt and Siregar (2013), upon which this description of the case draws.

[65]*Oil and Natural Gas Law case* (2012), para. [3.13.5].

Court's decision was that BP Migas' control over the oil and natural gas sector was insufficient to meet requirements of 'state control' under Article 33(3) of the Indonesian Constitution. Article 33 states:

1. The economy shall be structured as a common endeavour based upon the family principle.
2. Branches of production that are important to the state, and that affect the public's necessities of life, are to be controlled by the state.
3. The earth and water and the natural resources contained within them are to be controlled by the state and used for the greatest possible prosperity of the people.
4. The national economy is to be run on the basis of economic democracy, and the principles of togetherness, just efficiency, sustainability, environmentalism, and independence, maintaining a balance between advancement and national economic unity.
5. Further provisions to implement [Article 33] will be provided in legislation.

The Court has, in a string of cases, commencing with its first ever decision—the *Electricity Law case* (2003)[66]—held that the state must perform five functions in order to exercise state control over natural resources and important industries within the meaning of Article 33(3). These functions are policymaking, administration, regulation, management and supervision. Further, these five activities must be performed for one purpose: the greatest prosperity of the people. In this context, the state's power to regulate natural resources and important industries does not, according to the Court, of itself constitute state control because the state already has an inherent power to regulate, irrespective of Article 33. Also, mere civil ownership by the state is not 'control' because natural resources are public assets collectively owned by all Indonesians, and the state is required under Article 33 to control those assets for the greatest possible collective prosperity.

In the *Oil and Natural Gas Law case* (2012), however, the majority took this jurisprudence a step further, categorising each of these five functions—into 'tiers' or levels of importance, depending on the extent to which the majority thought that function achieved the greatest possible prosperity of the people.[67] Direct management over the natural resource was 'the most important first-order form of state control'.[68] The majority stated that direct state management of natural resources through state-owned enterprises would ensure that all profits would flow to the

[66]Constitutional Court Decision 001-021-022/PUU-I/2003, reviewing Law 20 of 2002 on Electricity (*Electricity Law case* (2003)).

[67]Although the court did not explain why it decided to rank the activities and how it devised the ranking. The rationale for ranking direct management as the most important aspect of state control and regulation as the equal least important is unclear, because it appears that 'regulation also [includes] supervisory activities, as well as license-granting, standard-setting, in addition to the traditional understanding of enacting rules' (Afghani 2013).

[68]*Oil and Natural Gas Law case* (2012), para. [3.12].

state, thereby indirectly bringing greater benefits to the people. The alternative—allowing the private sector to manage natural resources—would result in profits being shared between the state and private entities, thereby reducing the benefits flowing to the people. The majority decided that the state needed to fully manage natural resources if the state had sufficient capital, technology and capacity to do so. Only if the state was unable to directly manage natural resources could opportunities be given to foreigners. Of secondary importance were, equally, policymaking and administration. Both regulation and monitoring fell within the third tier.

The majority found that BP Migas did not directly manage oil and gas resources; it merely contracted with commercial entities to do so. Also, by entering into these contracts, the prosperity of the people was not 'maximised' because any profits derived from the natural resources would, according to the majority, be shared with the private enterprise. Finally, the majority appeared to be uneasy with the state binding itself to a civil agreement over natural resources with private enterprises. According to the majority:

> Once the contract is signed, the government is bound by the contract. The government loses sovereignty and control over natural resources so that exercising that control might breach the contract. However, as representatives of the people and the controller of natural resources, the state needs freedom to make regulations that bring the greatest possible prosperity to the people … According to the Court, the relationship between the state and the private sector in the management of natural resources cannot be established through civil law. It is a public relationship … [because it involves] providing concessions or licences that are under the complete control and power of the state. Civil contracts degrade the sovereignty of the nation over natural resources—in this case oil and natural gas … To avoid this problem, the government can establish or appoint a state-owned enterprise and give it a concession to manage oil and natural gas in … a Working Area so that that state-owned enterprise is the one entering into contracts with commercial enterprises. In this way, there is no longer a connection between the state and the commercial enterprise.[69]

Until the government could issue new legislation in response to its decision, the Court declared that the Energy and Mineral Resources Ministry should perform the functions previously allocated to BP Migas.[70]

In response to the decision, the government issued Presidential Regulation No. 95 of 2012 and Presidential Regulation No. 9 of 2013. These transferred BP Migas' functions to the Ministry of Energy and Mineral Resources (MEMR), with a

[69]Ibid, para. [3.13.3]. In his sole dissent, Justice Harjono agreed that those contracts bound the state, but disagreed with the majority that any ensuing constraints on the state breached Article 33 for interfering with the state's 'control' of the natural resources to which the contract applied. Harjono emphasised that Indonesia is a 'law state' (*negara hukum*) and that the state could not simply use its power over national resources as it deemed fit once it had entered into such a contract. Rather, for Harjono, the state control requirement was met because the state controlled BP Migas. Its chairperson was appointed and dismissed by the president, after consultation with the national parliament. According to Harjono, the state (through BP Migas) exercised control over the sector when it negotiated contracts and awarded concessions. After agreements had been made and contracts signed, the control had already been exercised and the Indonesian government was bound by the contract.

[70]*Oil and Natural Gas Law case* (2012), para. [3.22].

new unit called *Satuan Kerja Khusus Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi* (SKK Migas).[71] These Regulations, and the Court's decision, specified that prior contracts entered into by foreign and domestic firms for oil and gas exploration in Indonesia were unaffected by BP Migas' disbandment. The Court declared that, in the interests of legal certainty, all working contracts made between BP Migas and commercial enterprises would continue in force until their expiry or a date upon which the parties agreed.[72] However, in the hiatus created by the Court's disbanding of BP Migas and the government's creation of SKK Migas within the MEMR, the absence of a regulator resulted in losses to some foreign companies. Pravesti points out that[73]:

> The Indonesian Customs authorities put restraints on the mining rigs of Niko Resources immediately after the dissolution of BP Migas. To release the mining rigs, the company required an approval from BP Migas. However, the approval could not be obtained since BP Migas [had] ceased to exist. Consequently, the company had to pay US$300,000 per day as storage rental fee at port pending a decision on the legal status of BP Migas by the Indonesian Government. Similar to Niko Resources Ltd., the mining rig activities of Total E&P, Chevron Indonesia and Vico Indonesia were also affected.

Pravesti argues that such losses, and any further measures that the government might introduce that undermine existing contractual arrangements between the government and foreign firms in this sector,[74] may violate Indonesia's various treaty obligations. These include the protection of 'legitimate expectations' of foreign investors under the rubric of 'indirect expropriation'[75]—as well as 'fair and equitable treatment', both prescribed under Australia's two existing investment treaties with Indonesia.[76]

However, the definition of 'investment' in these treaties must be analysed carefully to determine, for example, whether mining rig contracts are likely to be included. In any event, perhaps because the fees incurred by these foreign firms were likely small relative to their total operations in Indonesia or because the government provided at least some compensation, Pravesti remarks that as of April 2013 there had been 'no submission of formal legal complaints made by the investors'.[77]

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[71]Prawesti (2013).

[72]*Oil and Natural Gas Law case* (2012), para. [3.21].

[73]Prawesti (2013) (citations omitted). Originally, at least, Niko is a Canadian company; Total is French; Chevron and Vico (previously Huffco) are American.

[74]See now, for example, local content rules, which some commentators suggest may breach WTO obligations: http://www.bakermckenzie.com/files/Publication/a6aaa8ec-a172-4423-bc7f-2de74d4ad609/Presentation/PublicationAttachment/05690e99-fe3f-4389-bbf9-4f33065467a4/al_jakarta_oilgasrules_apr13.pdf. Accessed 16 April 2014.

[75]Prawesti (2013).

[76]Above section 3.1.1.

[77]Prawesti (2013).

Even once the new regulatory regime under SKK Migas becomes firmly established, SKK Migas might end up resembling Pertamina under the Soeharto regime, which operated as both regulator and industry participant. Pertamina, holding a monopoly and run primarily by military figures, was widely considered to be rife with corruption and a lucrative cash resource for the Soeharto regime.[78] Preliminary indications are far from promising.[79] Only several months after being appointed head of SKK Migas, Rudi Rubiandini was arrested by the Indonesian Anti-corruption Commission and later convicted for accepting large bribes from a foreign investor seeking approvals. If SKK Migas continues to engage in such practices, this will surely adversely affect foreign investors—dramatically increasing the chance of treaty-based claims.

Interestingly, since the Constitutional Court decision, SSK Migas has demonstrated a preference for foreign investors to choose Indonesian law as the governing law of the contracts and the Indonesian National Arbitration Board (BANI) for the arbitration of disputes. Total E&P Indonesie (a French company) has recently signed a rig contract with subcontractor PT Apexindo Pratama Duta which includes these terms.[80]

Even if the new regulator itself remains amenable to negotiating clauses providing for arbitration outside Indonesia, and does not come to resemble Pertamina before 1998, other parts of the Indonesian government—including a plethora of local authorities, under post-Soeharto decentralisation initiatives[81]—may themselves become more prone to interfere with arrangements reached between foreign firms and SSK Migas. Those parts of the government may also be influenced by the Constitutional Court's broader comments about the need to preserve public interests in the natural resources sector. Yet the Indonesian government as a whole would still be responsible under any relevant investment treaty obligations, regarding for example expropriation or fair and equitable treatment.

Such possibilities lead, however, to a broader and quite difficult question. What happens if international treaty obligations agreed by Indonesia conflict with those laid down in its present Constitution or another law, such as a statute or regulation? In other words, do treaties or the Constitution prevail, under Indonesia's 'sources of law' theory?

Unfortunately, the answer to this question is unclear.[82] Critically, Indonesian law is silent on the position of international law within the Indonesian legal system. Article 11 of the Indonesian Constitution and Law 24 of 2000 on International Agreements allow the president and the national parliament to ratify treaties on behalf of Indonesia. Article 10 of the Law on International Agreements specifies that parliament has jurisdiction to ratify treaties with subject matter including

[78]Hertzmark (2007).

[79]Jong (2013).

[80]Supriyatna (2013).

[81]Butt (2010, 2011).

[82]See generally Butt (2014).

politics, peace, defence, security, territorial boundaries, state sovereignty, human rights, the environment, and foreign loans and aid. Parliamentary ratification is also required if the treaty creates a new legal norm. By contrast, the president, by decree, can ratify treaties other than those reserved for parliament (Art. 11(1)). These include agreements about science, technology, economics, trade, avoidance of double taxation, and the protection of investments (Elucidation to Art. 11(1)).

However, there is significant debate about whether the international agreements Indonesia has ratified come into force 'automatically' once ratified by the president or the national parliament. Some Indonesian scholars argue that ratification is all that is necessary to bring treaties into force domestically. The leading proponent of this view is Kusumaatmadja, former Professor of Law and Dean of the Faculty of Law, University of Padjadjaran (Bandung), Indonesian Justice Minister (1973–1978), Indonesian Foreign Minister (1978–1983) and the lead author of Indonesia's foremost international law text, *Pengantar Hukum Internasional* (Introduction to International Law). Pointing to Indonesia's continental European legal heritage, he argues that Indonesia is 'monist'.[83] Even in the absence of formal ratification or implementing regulations, he states, 'we should consider ourselves bound by treaties and conventions approved by Indonesia'.[84]

However, most Indonesian scholars and judges take the alternative view—that Indonesia is 'dualist'. For them, ratification of a treaty will, in itself, be insufficient to render an international agreement applicable and enforceable in Indonesia. At a minimum, the treaty's principles, rights and obligations—or perhaps even a translation of the treaty provisions themselves—need to be included in an Indonesian domestic law.[85] This view appears to be confirmed by the absence of international law as a source of law in Indonesia's 'hierarchy of laws',[86] which seems to imply that it is not formally recognised as one might expect in a monist system.[87] The result is that it is possible—perhaps even likely—that an Indonesian court would refuse to enforce a treaty that has not been transformed into Indonesian domestic law by statute or regulation.

This means that, in order for treaty obligations to be enforced in Indonesian courts, the content of the treaty obligation will usually need to be reflected in an Indonesian legal instrument. Whether that obligation, as conveyed by the domestic law, trumps an inconsistent Indonesian law, depends, in a formal sense, on where the two laws sit on Indonesia's 'legal hierarchy' (*Tata Urutan Peraturan Perundang-undangan*). This hierarchy, contained in Article 7(1) of Law 12 of 2011 on Lawmaking, is as follows:

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[83]Kusumaatmadja (2003), p. 92.

[84]Ibid.

[85]For a variety of views, (see Juwana (2010), 74–76); Suhaedi (1996), 135; Boer (2000), 13; Hartono (2000), 16.

[86]The 'hierarchy of laws' is a list of types of laws within the Indonesian legal system indicating their relative authority. It is contained in Article 7(1) of Law 12 of 2011 on Law-Making. See Butt (2011).

[87]Agusman (2010).

(a) The 1945 Constitution (*Undang-undang Dasar 1945*);
(b) Decrees of the People's Consultative Assembly (*Ketetapan MPR*);
(c) Statutes/Interim Emergency Laws (*Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang*);
(d) Government Regulations (*Peraturan Pemerintah*);
(e) Presidential Regulations (*Peraturan Presiden*);
(f) Provincial Regulations (*Peraturan Daerah Propinsi*); and
(g) County/City Regulations (*Peraturan Daerah Kabupaten/Kota*).

In essence, each type of law must not conflict with any law higher than its own type in the hierarchy; and one type of law can amend or revoke a law lower than its own type in the hierarchy. So, for example, a presidential regulation that adopts the terms of an international treaty will be legally valid—at least formally—only if, when passed, it does not contradict a government regulation, statute, People's Consultative Assembly Decree or the Constitution; and, once passed, it is susceptible to being overridden by any of those higher level instruments.

The resolution of 'conflicts' between laws on the hierarchy is the task of Indonesian courts. However, there are very significant gaps in the judicial review jurisdiction held by Indonesia's courts, which make the hierarchy largely moot for many of these conflicts. The Constitutional Court can only review statutes against the Constitution. It could therefore only consider the constitutionality of a treaty obligation if that treaty obligation was embodied in an Indonesian statute. Thus, if a statute purported to grant protections to investors in line with a treaty obligation that, in the eyes of the Court, diminished state control over natural resources, the Court could invalidate that legislation. The Court could not, however, consider the constitutionality of a treaty obligation that was incorporated into Indonesian law by presidential or government regulation. Only the Supreme Court has power to do this, but its jurisdiction is limited to reviewing laws lower on the hierarchy than statutes against statutes. In other words, the Supreme Court could review whether a presidential or government regulation incorporating a treaty obligation was consistent with a statute.

There seems to be no judicial avenue to challenge lower level laws against other lower level laws mentioned on the hierarchy—such as presidential regulations and government regulations—or even as against the Constitution. The result is that, provided that a treaty is brought into force in the Indonesian legal system by a law below that of a statute, then it will, in most cases at least, be unreviewable against the Constitution, including Article 33(3).

9.4 Conclusion

Investment treaty protections are not a panacea. As outlined above, especially in Part 9.3.1, provisions need to be interpreted carefully—often across multiple directly or indirectly applicable treaties. As explained in Part 9.3.2, substantive

treaty protections may collide with constitutional rights, creating further complications. In addition, there are costs and other practical 'institutional barriers' to filing and prosecuting ISA claims, particularly in the Asian context.[88] Nonetheless, these procedural rights combine with substantive protections agreed through investment treaties to balance private investors' interests against the host state's public interest in regulation.

Australia's treaties, past and future, should include carefully-drafted provisions to secure the most appropriate balance,[89] bearing in mind the particular issues faced by foreign investors in the resources sector in major neighbouring economies such as Indonesia. The Gillard Government is long gone and its Trade Policy Statement of April 2011 does not bind the Coalition Government led by Tony Abbott, elected on 7 September 2013.[90] Prior to the general election, the then shadow Attorney-General had expressed an interest in revisiting the Gillard Government's decision to eschew all forms of ISA in future treaties.[91] Afterwards, the Abbott Government announced that Australia would revert to a case-by-case assessment regarding inclusion of ISA provisions, and indeed they were included in the FTA signed with Korea on 8 April 2014 and the FTA substantively agreed with China on 17 November 2014, but not the one signed with Japan on 8 July 2014. These three countries are major export markets for Australian resources as well as major sources of inbound investment.[92] Even this approach may further complicate Australia's ongoing negotiations with Indonesia and other countries (such as India) for bilateral and regional investment treaties,[93] given also that a Senator from the minority Greens Party has also tabled the *Trade and Investment (Protecting the Public Interest) Bill 2014* proposing once again to preclude Australia from including ISA in future treaties.[94] The Senate Committee, including even Labor Party members, has recommended against enactment of this Bill as it would significantly interfere with the executive branch's constitutional mandate to engage in treaty negotiations. However, Labor Party members sided with Greens Party members of the parliamentary Joint Standing Committee on Treaties, recommending against ratification of the FTA signed with Korea partly out of concerns over ISA. This stance made it politically difficult for the Abbott Government to pass implementing legislation through the Senate (where it lacks an absolute majority) and therefore to ratify and

[88]Nottage and Weeramantry (2012).

[89]See generally also Campbell et al. (2013).

[90]Callick (2013).

[91]Priest (2013).

[92]See respectively http://www.dfat.gov.au/fta/kafta/; http://trademinister.gov.au/releases/Pages/2014/ar_mr_141117.aspx?ministerid=3 and http://www.dfat.gov.au/fta/jaepa/. Accessed 3 December 2014.

[93]Nottage (2014).

[94]See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014 (including a Submission by Nottage). Accessed 16 April 2014.

bring into force that treaty.[95] It may still affect the FTA subsequently concluded with China, which also reportedly includes ISDS provisions.

A politically less controversial issue for Australia, relevant to both inbound and outbound investors, particularly in long-term projects involving resources, is to revise the IAA to fix the 'legislative black hole' for certain ICA agreements, outlined in Part 9.2 and resulting unfortunately from the 2010 amendments combined with new CAA legislation. A Bill to this effect was introduced into the Senate on 29 October 2014, but has not yet been enacted or come into effect, and arguably (as originally worded) does not completely fill the black hole.[96] In any event, a more wide-ranging round of amendments would help Australia in its quest to become a credible regional hub for cross-border dispute resolution.[97]

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[95]Nottage (2015).

[96]Above n 22.

[97]Nottage (2013d).

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Chapter 10
Domestic Court Proceedings Relating to International Commercial Arbitration in the Resources Sector

Gabriël A. Moens and John Trone

Abstract International commercial arbitrations often lead to related proceedings in domestic courts. This chapter provides some recent examples of domestic court cases relating to international commercial arbitrations in the resources sector. These cases have raised issues concerning the interpretation of the Model Law, arbitration under bilateral investment treaties, stay of proceedings, discovery under United States federal law and the enforcement of awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. These cases were decided by courts in Australia, Canada, the United States, the UK and Singapore.

10.1 Introduction

International commercial arbitrations often give rise to related proceedings in domestic courts. This paper examines some recent examples of domestic court cases relating to international commercial arbitrations in the resources sector. Of its nature, international commercial arbitration may give rise to domestic court proceedings in a wide variety of national legal systems. The cases discussed herein were decided by courts in Australia, Canada, the United States, the United Kingdom and Singapore. These cases have raised issues concerning the interpretation of the UNCITRAL Model Law, arbitration under bilateral investment treaties, stay of proceedings, discovery under US federal law and the enforcement of awards under the New York Convention.

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10.2 The Model Law

The Model Law on International Commercial Arbitration[1] was adopted by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law is not a treaty[2] and is not binding under international law.[3] It provides a template for national laws regarding international commercial arbitration.[4]

It has been implemented in many jurisdictions, including Australia,[5] Canada,[6] Hong Kong,[7] Singapore,[8] New Zealand,[9] India[10] and Ireland.[11] In Australia the Model Law is implemented by the Commonwealth *International Arbitration Act* 1974. The Commonwealth law modifies and supplements the application of the Model Law. The *Commonwealth Act* provides that the Model Law has the force of Australian law.[12]

The *Jardine Lloyd Thompson* case provides an example of domestic court assistance in the taking of evidence in an arbitration conducted under the Model Law. The Alberta Court of Appeal considered whether to assist the discovery of evidence from a non-party to an international commercial arbitration.[13] In that case Western made an insurance claim under a policy issued by underwriters in relation

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[1] *UNCITRAL Model Law on International Commercial Arbitration*, New York, 21 June 1985, 24 ILM 1302 (hereafter *Model Law*). For a commentary, see Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd ed, London: Sweet & Maxwell, 2009). Summaries of judicial decisions concerning the Model Law appear on the UNCITRAL website: http://www.uncitral.org/uncitral/en/case_law.html.

[2] [1999] ATS 38 p 211.

[3] *Dell Computer Corp v Union des consommateurs* [2007] 2 SCR 801 at [46].

[4] Gavan Griffith and Andrew D Mitchell, "Contractual Dispute Resolution in International Trade: The UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980)" (2002) 3 *Melbourne Journal of International Law* 184 at 185.

[5] ss 16–21, *International Arbitration Act* 1974 (Cth), as amended in 2010.

[6] By provincial legislation: *International Commercial Arbitration Act* (RSA, c I 6.6); *International Commercial Arbitration Act* (RSBC 1996, c 233); *International Commercial Arbitration Act* (CCSM, c C151); *International Commercial Arbitration Act* (RSNL 1990, c I-15); *International Commercial Arbitration Act* (RSNB, c I 12.2); *International Commercial Arbitration Act* (RSNS 1989, c 234); *International Commercial Arbitration Act* (RSNWT 1988, c I-6); *International Commercial Arbitration Act* (RSO 1990, c I.9); *International Commercial Arbitration Act* (RSPEI, c I-5); *Act to Amend the Civil Code and the Code of Civil Procedure in respect of Arbitration* (SQ 1986, c 73); *International Commercial Arbitration Act* (SS 1988–89, c I-10.2); *International Commercial Arbitration Act* (SY 1987, c 14).

[7] *Arbitration Ordinance* (cap 341) (HK).

[8] *International Arbitration Act* (cap 143A) (Singapore).

[9] ss 6–8 and 11, Sch 1, *Arbitration Act* 1996 (NZ).

[10] *Arbitration and Conciliation Act* 1996 (India).

[11] ss 6–20, *Arbitration Act* 2010 (Ireland).

[12] s 16(1), *International Arbitration Act* 1974 (Cth).

[13] *Jardine Lloyd Thompson Canada Inc v Western Oil Sands Inc* (2006) 380 AR 121 at [1], 264 DLR (4th) 358, 2006 ABCA 18; leave to appeal refused [2006] 1 SCR x (hereafter *Jardine*).

to the construction of an oil project.[14] The underwriters argued that the claim should be rejected for misrepresentations made on behalf of Western. Jardine was alleged to have acted as agents and brokers for Western in taking out the policy.[15]

Western and Jardine had entered into a 'standstill agreement'. They argued that this agreement was to remain confidential and could not be disclosed without the consent of both parties. Jardine refused to consent to disclosure.[16] The arbitral tribunal ordered the production of the agreement so that it could determine whether it should be disclosed to the underwriters. The tribunal also ordered the examination of Jardine's employees. The tribunal authorised the underwriters to seek discovery in the Canadian courts.[17]

The Alberta Court of Appeal noted that the Model Law provided that the arbitral tribunal could request from the domestic courts assistance in the taking of evidence.[18] The Court observed that the Model Law did not limit judicial assistance to the taking of evidence at the arbitral hearing.[19] Evidence was also taken through discovery.[20]

The Court granted the tribunal's request for assistance in relation to the examination of Jardine's employees.[21] The Court also held that the tribunal had jurisdiction to order production of the standstill agreement. Western had not advanced any ground of privilege on which it could decline to produce the standstill agreement in its possession.[22]

In the *CRW Joint Operation* case PGN was an Indonesian state gas company.[23] PGN entered into a contract with CRW for the construction of an onshore gas transmission pipeline and an optical fibre cable.[24] A contractual dispute between the parties was referred to a dispute adjudication board.[25] The board awarded CRW US $17.3 million.[26] PGN filed a notice of dissatisfaction with the board's decision.[27] CRW invoiced PGN for the full amount, which PGN refused to pay.[28] CRW then

[14] *Jardine* at [4].
[15] *Jardine* at [5].
[16] *Jardine* at [7].
[17] *Jardine* at [10].
[18] *Jardine* at [22]. See Art 27, *Model Law*.
[19] *Jardine* at [38]. See Art 19, *Model Law*.
[20] *Jardine* at [39].
[21] *Jardine* at [49].
[22] *Jardine* at [51].
[23] *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [3], [2011] SGCA 33 (hereafter *CRW*).
[24] *CRW* at [4].
[25] *CRW* at [5].
[26] *CRW* at [6].
[27] *CRW* at [7].
[28] *CRW* at [8].

sought arbitration before the ICC International Court of Arbitration as provided for by the contract.[29]

The arbitral panel issued a "final award" which found that CRW had a right to immediate payment of the amount. Despite its description of the award as "final", the panel reserved PGN's right to bring arbitral proceedings seeking modification of the adjudication board's decision.[30] The national court later described this reservation as "odd, to say that the least".[31]

PGN sought to set aside the award on the grounds that the tribunal had exceeded its jurisdiction and had denied it natural justice.[32] The Singapore Court of Appeal observed that its power to set aside an international arbitral award was restricted to the grounds stated in the Model Law and the national arbitration legislation that gave effect to the Model Law. "This policy of minimal curial intervention by respecting finality in the arbitral process acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen."[33]

The Model Law permits a domestic court to set aside an award if the arbitral tribunal exceeded its jurisdiction by deciding a dispute that did not fall within the arbitration agreement or by deciding matters that were outside the scope of the arbitration agreement.[34] The Court held that under the contract the tribunal did not have power to make a final award without examining the merits of PGN's notice of dispute by reviewing the merits of the decision of the adjudication board.[35]

A final award had been issued without considering the merits of the disputed decision. The tribunal should have issued an interim decision before considering the merits in a final award.[36] By issuing a final award the tribunal had exceeded its jurisdiction.[37] This excess of jurisdiction prejudiced PGN by compelling it to pay the award amount while depriving it of its right to a review of the board's decision without the time and expense of further proceedings.[38]

The Singapore international arbitration law provides that an award may be set aside for a breach of natural justice that prejudiced the rights of a party.[39] The Court held that PGN did not have a proper opportunity to present its case why the sum

[29] *CRW* at [9].
[30] *CRW* at [14].
[31] *CRW* at [84].
[32] *CRW* at [24].
[33] *CRW* at [25].
[34] Art 34(2)(a)(iii), *Model Law*.
[35] *CRW* at [25].
[36] *CRW* at [34].
[37] *CRW* at [82].
[38] *CRW* at [85].
[39] s 24(b), *International Arbitration Act* (cap 143A) (Sing). Breach of natural justice is contrary to Australian public policy under s 19, *International Arbitration Act* 1974 (Cth).

awarded by the board was too high.[40] This breach of natural justice had also caused real prejudice to PGN.[41]

Based on the excess of jurisdiction and the denial of natural justice, the Court set aside the award. The Court retained a residual discretion to decline to set aside an award that infringed one of the prescribed grounds for so doing, but that discretion would only be exercised where no prejudice had been suffered by the injured party.[42]

In the *Cargill* case Cargill and Peabody had entered into an agreement for the supply of coal.[43] In the arbitration Peabody claimed that payment had not been made for some coal deliveries while Cargill counter-claimed for demurrage in relation to some shipments.[44] The arbitrator upheld Peabody's claim and dismissed Cargill's counter-claim.[45]

Cargill challenged the award. Cargill argued that the arbitration was governed by Australian State arbitration legislation, while Peabody argued that the Model Law applied under the Commonwealth Act.[46] Cargill argued that the agreement of the parties to conduct the arbitration under the International Chamber of Commerce Rules was an agreement to opt out of the Model Law, so that the State arbitration law would apply.[47] Prior to 2010 the Commonwealth Act allowed parties to opt out of the Model Law, but they were required to do so in writing.[48]

The New South Wales Supreme Court held that the agreement to conduct the arbitration under specific procedural Rules was not an agreement to opt out of the Model Law as the law of the arbitration.[49] A contrary decision of the Queensland Court of Appeal[50] was wrongly decided.[51] The Queensland court had failed to appreciate the distinction between the law of the arbitration and the procedural rules of the arbitration.[52] The Model Law and the ICC Rules were not mutually exclusive and might apply in the same arbitration.[53]

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[40] *CRW* at [93].

[41] *CRW* at [96].

[42] *CRW* at [100].

[43] *Cargill* at [1].

[44] *Cargill International SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533 at [2], [2010] NSWSC 887 (hereafter *Cargill*).

[45] *Cargill* at [3].

[46] *Cargill* at [8].

[47] *Cargill* at [30].

[48] s 21, *International Arbitration Act* 1974 (Cth), prior to its repeal and substitution in 2010.

[49] *Cargill* at [31], [46–47], [83].

[50] *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Qd R 461. See *Cargill* at [43], [60].

[51] *Cargill* at [31], [91]. The Queensland Court of Appeal subsequently took a different view of its prior decision. See Sophocles Kithardis, "Australia's Reputation as a Centre for International Arbitration: *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS*: Missing a Critical Opportunity to Reverse the *Eisenwerk* Decision" (2011) 23 *Bond Law Review* 102.

[52] *Cargill* at [47], [62], [68–69].

[53] *Cargill* at [85].

Cargill argued that even if the Queensland decision was wrongly decided, the parties must be taken to have contracted on the basis of its interpretation of the law.[54] The Court rejected this argument because the contractual clause in this case was significantly different from that considered in the Queensland decision.[55]

Cargill also argued that by allegedly failing to consider one of its arguments the arbitrator had denied it natural justice in violation of Australian public policy.[56] The Court noted that the hearing rule was "one of the twin pillars of natural justice".[57] However, the argument that was said to have been ignored had not been clearly put to the arbitrator.[58]

The provision in the Commonwealth Act that allowed parties to opt out of the Model Law was repealed in 2010 and replaced by a provision which has the effect that the Model Law covers the field.[59] The Western Australian Court of Appeal has indicated by way of *obiter dictum*[60] that the 2010 repeal has the effect that it is no longer possible for parties to opt out of the Model Law.[61] The Court of Appeal also indicated that the repeal does not affect arbitration agreements that were entered into before the commencement of the repeal, at least where the parties had begun arbitral proceedings before that date.[62]

10.3 Arbitrations Pursuant to Bilateral Investment Treaties

An arbitration between Occidental Exploration and Ecuador gave rise to two English Court of Appeal decisions. In the first *Occidental Exploration* case Occidental had entered into an exploration and exploitation contract with an Ecuadorian state company.[63] Relying upon the contract Occidental sought

[54] *Cargill* at [92].

[55] *Cargill* at [108–110].

[56] See now s 19, *International Arbitration Act* 1974 (Cth), as repealed and substituted in 2010.

[57] *Cargill* at [226].

[58] *Cargill* at [241].

[59] s 3 and Sch 1, Item 16, *International Arbitration Amendment Act* 2010 (Cth). For a discussion of 'covering the field' under s 109 of the *Commonwealth Constitution*, see Gabriël A Moens and John Trone, *Lumb, Moens and Trone The Constitution of the Commonwealth of Australia Annotated* (8th ed, Sydney: LexisNexis Butterworths, 2012), 429–432.

[60] The Court had already held that it could dispose of the appeal on other grounds: *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 43 WAR 91 at [88], [2012] WASCA 50 (hereafter *Rizhao*).

[61] *Rizhao* at [124], [153–154].

[62] *Rizhao* at [149], [153–154], [200]. Murphy JA indicated that the position may be different for parties that had not begun arbitration proceedings before the commencement of the repeal: at [207].

[63] *Republic of Ecuador v Occidental Exploration and Production Co* [2006] QB 432 at [4], [2005] EWCA Civ 1116 (hereafter *Occidental I*).

reimbursement of value added tax from the Ecuadorian government. At first the Ecuadorian government reimbursed the tax but subsequently refused to reimburse Occidental and sought the return of previously reimbursed amounts.[64]

An arbitration held under a United States bilateral investment treaty decided against Ecuador. The Ecuadorian government sought to have the award set aside under United Kingdom arbitration law. Occidental argued that the British court would be required to interpret the investment treaty, in violation of common law rules that interpretation of an unincorporated treaty is non-justiciable and that the courts may not adjudicate upon the acts of foreign states.[65]

Occidental argued that the arbitration merely enforced the rights of the United States under the investment treaty.[66] The Court held that it was "artificial and wrong in principle" to argue that the investor was only pursuing the claim of its national government rather than its own claim.[67] A treaty was able to confer upon individuals direct rights under international law.[68] The investment treaty conferred direct rights under international law upon the investors themselves.[69]

A previous case that had held that the acts of foreign states were non-justiciable had concerned very contentious issues that had been the subject of international dispute.[70] Previous cases had also suggested that the interpretation of unincorporated treaties was non-justiciable.[71] However, English courts were not prevented in all circumstances from interpreting unincorporated treaties.[72] The Court held that Occidental's argument would represent an extension of current doctrines that had emerged in different contexts.[73]

In the second *Occidental Exploration* case the bilateral investment treaty provided that it did not apply to matters of taxation except in relation to the observance of an investment agreement.[74] It was common ground that the exploration and exploitation contract was an investment agreement under this clause.[75] The English Court of Appeal held that when Ecuador refused to reimburse the tax it was claiming to observe the contract between the parties.[76] Occidental's claim fell under

[64] *Occidental I* at [5].
[65] *Occidental I* at [3], [11].
[66] *Occidental I* at [14].
[67] *Occidental I* at [17].
[68] *Occidental I* at [19].
[69] *Occidental I* at [20].
[70] *Occidental I* at [23].
[71] *Occidental I* at [29].
[72] *Occidental I* at [31].
[73] *Occidental I* at [37].
[74] *Republic of Ecuador v Occidental Exploration and Production Co* [2007] 1 Lloyd's Rep 352 at [10], [2007] EWCA Civ 656 (hereafter *Occidental II*).
[75] *Occidental II* at [19].
[76] *Occidental II* at [29].

the investment treaty as it related to the observance of an investment agreement (the exploration and exploitation contract).[77] The arbitral panel thus had jurisdiction to decide whether Ecuador had violated the investment treaty in these circumstances.[78]

10.4 Stay of Proceedings Under the Commonwealth Act

The Commonwealth *International Arbitration Act* provides that upon the application of a party, an Australian court shall stay proceedings by a party to an arbitration agreement against another party where the proceedings involve the determination of a matter that is capable of settlement by arbitration.[79] The duty of the court is mandatory: it must stay the proceedings and refer the parties to arbitration.[80] However, the court may not refer to arbitration a claim that is not within the scope of the arbitration agreement.[81] A court shall not issue a stay if it considers that the arbitration agreement is 'null and void, inoperative or incapable of being performed'.[82]

In the *AED Oil* case, an oil company (AED) had entered into a charter contract with Puffin, the owner of a tanker. The Victorian Court of Appeal was required to decide whether a dispute regarding that contract should be decided by a court or by arbitration.[83]

Under the charter contract AED undertook to meet Puffin's tax liability.[84] Puffin alleged that AED had terminated the oil contract shortly after Puffin had demanded payment of its tax liability.[85] The main issue in dispute related to the depreciation of Puffin's assets. AED insisted that Puffin sign tax returns based upon AED's view regarding depreciation. Puffin refused to sign the returns as it considered AED's view to be incorrect.[86]

AED commenced court proceedings against Puffin, seeking to restrain the appointment of a receiver.[87] The trial judge issued an interlocutory injunction based

[77] *Occidental II* at [36].

[78] *Occidental II* at [40].

[79] s 7(2), *International Arbitration Act* 1974 (Cth). This provision was not affected by the 2010 amendments to the Act.

[80] *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* (1998) 217 ALR 435 at [79–80]; [1998] VSC 103; *APC Logistics Pty Ltd v CJ Nutracon Pty Ltd* [2007] FCA 136 at [2]; cp *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Qd R 461 at [13].

[81] *Pan Australia Shipping Pty Ltd v The Ship 'Comandate' (No 2)* (2006) 234 ALR 483 at [119]; [2006] FCA 1112, revd (2006) 157 FCR 45; [2006] FCAFC 192.

[82] s 7(5), *International Arbitration Act* 1974 (Cth). This provision was not affected by the 2010 amendments to the Act.

[83] *AED Oil Ltd v Puffin FPSO Ltd* (2010) 27 VR 22 at [1], [2010] VSCA 37 (hereafter *AED Oil*).

[84] *AED Oil* at [2].

[85] *AED Oil* at [4].

[86] *AED Oil* at [5].

[87] *AED Oil* at [6–7].

upon AED's claim.[88] Puffin counter-claimed. AED sought a stay of Puffin's counter-claim. Under the charter contract, disputes were to be referred to arbitration.[89] Puffin argued that its counter-claim fell within an exception to the arbitration clause. That exception permitted a party to seek "urgent interlocutory or declaratory relief" from a court "where, in that party's reasonable opinion, that action is necessary to protect that party's rights".[90]

The Court of Appeal held that the word "urgent" qualified both "interlocutory" and "declaratory",[91] so that an application for relief in each case must be urgent. The Court held that the relief must be urgent as an objective matter. The party claiming the relief must also have formed the reasonable opinion that this action was necessary to protect its rights.[92] If the right to seek judicial relief was not limited to urgent cases, the parties' intention to submit disputes to arbitration would be frustrated.[93]

AED's claim was urgent as it sought to restrain the appointment of a receiver. By contrast, Puffin's counter-claim regarding signature of the tax returns was not urgent in itself. It could only have derived urgency from AED's claim, but the urgency of AED's claim had ceased with the issue of an injunction.[94] Puffin's somewhat dilatory conduct also suggested that its counter-claim was not urgent.[95] AED's financial position was not such as to make Puffin's counter-claim urgent.[96] The Court granted a stay of Puffin's counter-claim.[97]

10.5 United States Discovery for International Commercial Arbitrations

Under United States federal law a US District Court may order a resident or other person within its District "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal".[98] This provision often arises in United States court proceedings concerning international commercial arbitrations.

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[88] *AED Oil* at [8].
[89] *AED Oil* at [9].
[90] *AED Oil* at [10].
[91] *AED Oil* at [26].
[92] *AED Oil* at [27].
[93] *AED Oil* at [28].
[94] *AED Oil* at [31–32].
[95] *AED Oil* at [33].
[96] *AED Oil* at [34–36].
[97] *AED Oil* at [40].
[98] 28 USC 1782(a). See generally Tyler B Robinson, "The Extraterritorial Reach of 28 USC § 1782 in Aid of Foreign and International Litigation and Arbitration" (2011) 22 *American Review of International Arbitration* 135.

In the *Caratube* case Caratube had entered into an oil exploration and production contract with the government of Kazakhstan. The Kazakh government terminated the contract for an alleged breach. Caratube argued that an internal political dispute was the real reason why the contract was terminated.[99]

Caratube brought ICSID arbitral proceedings under a bilateral investment treaty. Caratube sought discovery under the US federal provision without seeking the prior consent of the tribunal.[100] The arbitral tribunal expressed its disquiet with Caratube's actions in seeking discovery without the tribunal's prior consent.[101] The tribunal reserved its position on whether to accept evidence obtained from the federal court discovery process.[102]

The US District Court denied Caratube's request for discovery. A court is not obliged to grant discovery under the federal provision.[103] The Court considered various factors in deciding whether to grant discovery. The persons from whom discovery was sought where not parties to the arbitration, which was a factor in favour of granting discovery. However, the nature of the tribunal and the character of the arbitration proceedings were factors against granting discovery.[104] The Court was reluctant to displace the parties' agreed expectations regarding the arbitral process.[105]

Caratube had filed its petition for discovery more than a year after the tribunal had issued a schedule for the arbitration. This delay and the lack of prior consultation with the tribunal were factors against granting discovery.[106] The Court considered that Caratube sought to use the federal discovery process to bypass the tribunal's control over the procedure of the arbitration, which weighed against permitting discovery.[107] Under the tribunal's guidelines the tribunal had the power to decide whether to seek discovery in the federal courts.[108]

On 13 February 2013 the United States Court of Appeals for the Fifth Circuit decided a case concerning an arbitration between Ecuador and Chevron.[109] In the *Connor* case the Ecuadorian government brought a suit regarding alleged environmental pollution of oil fields by Chevron. Invoking a bilateral investment treaty, Chevron brought arbitral proceedings under the UNCITRAL Rules.[110]

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[99] *In re Application of Caratube International Oil Co LLP* 730 F Supp 2d 101 at 102 (DDC 2010) (hereafter *Caratube*).

[100] *Caratube* at 102–103.

[101] *Caratube* at 103.

[102] *Caratube* at 106.

[103] *Caratube* at 105. See *Intel Corp v Advanced Micro Devices Inc* 542 US 241 at 264 (2004).

[104] *Caratube* at 105.

[105] *Caratube* at 106.

[106] *Caratube* at 106–107.

[107] *Caratube* at 107.

[108] *Caratube* at 108.

[109] *Republic of Ecuador v Connor*, 708 F 3d 651 (5th Cir 2013) (hereafter *Connor*).

[110] *Connor* at 653.

Ecuador sought federal court discovery from an American company for use in the arbitration. Throughout the arbitration, Chevron had derived considerable benefit from repeatedly arguing that the arbitral panel was a "foreign or international tribunal" under US federal law. When Ecuador sought to rely upon the federal law, Chevron reversed its stance.[111] The Court held that due to its prior position Chevron was estopped from making this argument.[112] The Court asked somewhat sarcastically: "Why shouldn't sauce for Chevron's goose be sauce for the Ecuador gander as well?"[113]

The Court observed that if Chevron was able to prevent discovery by Ecuador on the basis of this argument it would have obtained an unfair advantage over its opponent.[114] Chevron had obtained discovery on this basis on more than 20 occasions.[115] The Court held that it was unnecessary to decide whether the arbitration was a "foreign or international tribunal."[116]

10.6 Enforcement of Awards Under the New York Convention

The New York Convention provides for the recognition and enforcement of foreign arbitral awards.[117] The United Arab Emirates have acceded to the New York Convention which entered into force in that state on 19 November 2006. The Convention has been given effect by legislation in numerous countries, including Australia,[118] the United States,[119] the United Kingdom,[120] Canada,[121] Ireland,[122] New Zealand,[123] India,[124] Malaysia[125] and Singapore.[126]

In the *Yugraneft* case, Yugraneft was a Russian corporation that developed Russian oil fields. Rexx was an Albertan corporation that supplied materials to

[111] *Connor* at 653.

[112] *Connor* at 653.

[113] *Connor* at 654.

[114] *Connor* at 658.

[115] *Connor* at 653.

[116] *Connor* at 658.

[117] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958, 330 UNTS 3, [1975] ATS 25 (hereafter *New York Convention*).

[118] ss 3–14, *International Arbitration Act* 1974 (Cth).

[119] 9 USC 201 to 208.

[120] *Arbitration* (*International Investment Disputes*) *Act* 1966 (UK).

[121] *United Nations Foreign Arbitral Awards Convention Act* (RS, c U-2.4).

[122] s 24, *Arbitration Act* 2010 (Ireland).

[123] s 5 and Sch 3, *Arbitration Act* 1996 (NZ).

[124] ss 44–51, *Arbitration and Conciliation Act* 1996 (India).

[125] ss 38–39, *Arbitration Act* (Act 646) (Malaysia).

[126] ss 27–33, *International Arbitration Act* (cap 143A) (Singapore).

Yugraneft. As a result of a contractual dispute Yugraneft obtained an award against Rexx by a Russian international commercial arbitration body.[127] More than three years later Yugraneft sought to enforce the award in Alberta.[128] Under provincial legislation, a two year limitation period applied to the enforcement of 'remedial orders', while a ten year limitation period applied to the enforcement of judgments or orders for the payment of money.[129]

The Canadian Supreme Court observed that the New York Convention and the Model Law did not impose a limitation period upon the recognition and enforcement of awards. The Convention and the Model Law set out exhaustive lists of grounds upon which enforcement of an award may be refused. Expiry of a limitation period was not mentioned in those lists.[130]

However, the New York Convention also provides that enforcement will take place in accordance with the procedural rules of the place where enforcement is sought.[131] In common law systems limitation periods are generally treated as a matter of procedure, whereas in civil law systems limitation periods are generally regarded as a matter of substantive law.[132]

The Court held that the Convention permitted state parties to apply a limitation period as a national procedural rule.[133] The Convention was drafted against the background of the divergent approaches of common law and civil law systems to the question of whether limitation periods were to be treated as procedural or substantive. The Court considered that the drafters of the Convention had taken a "permissive approach" to this question. States parties to the Convention were permitted to choose which approach to take,[134] so limitation periods could be treated as procedural rules under national law. This permissive approach was also reflected in the practice of states parties regarding limitation periods upon the enforcement of international awards.[135]

Given the exhaustive listing of grounds for refusing enforcement under the Convention, enforcement would not be subject to compliance with limitation periods if they were considered to be substantive. The reason why enforcement could be conditioned upon compliance with a limitation period was that the Convention allowed enforcement to be carried out in accordance with national procedural law.

An intervener had argued that Canadian law considered limitation periods to be substantive in a conflict of laws context.[136] The Court responded that the issue was

[127] *Yugraneft Corp v Rexx Management Corp* [2010] 1 SCR 649 at [2] (hereafter *Yugraneft*).
[128] *Yugraneft* at [3].
[129] *Yugraneft* at [4].
[130] *Yugraneft* at [14].
[131] Art III, *New York Convention*.
[132] *Yugraneft* at [16].
[133] *Yugraneft* at [18].
[134] *Yugraneft* at [20].
[135] *Yugraneft* at [21].
[136] *Yugraneft* at [25–26].

not whether or not Canadian law considered limitation periods to be substantive or procedural, but whether limitation periods could be considered to be a procedural rule under the Convention.[137]

Another intervener argued that the only limitation period which could be applied under the Convention was the longest limitation period for enforcement in any Canadian jurisdiction.[138] The intervener argued that this consequence resulted from the Convention's requirement that the conditions for the enforcement of international awards must not be "substantially more onerous" than those that apply to the enforcement of domestic awards.[139]

The Court held that this argument ignored the Convention's solicitude for the constitutional arrangements of federal states.[140] The Convention recognised that in some federal states jurisdiction for implementation of the Convention would lie with sub national governments.[141] Furthermore, the Convention's reservation for national procedural rules referred to the 'territory' in which enforcement was sought,[142] not the Contracting State that was party to the Convention. In this context 'territory' meant a sub national jurisdiction, not the nation as a whole. To comply with the Convention, the province needed only to subject foreign awards to the same limitation period it applied to domestic awards.[143]

The Court held that the relevant limitation period was the two year period for the enforcement of 'remedial orders'.[144] The limitation period began to run from the date of non-performance of the obligation under the award.[145] Non-performance did not occur on the date that the award was made.[146] The Model Law provides that after it receives the award a party has three months to seek to overturn the award in the domestic courts.[147] Only at the end of that three month period would the award be final. If an award was rendered in a Model Law jurisdiction, the limitation period would not begin to run until the expiration of that three month period.[148]

In this case Russia was a Model Law jurisdiction.[149] The limitation period therefore began to run three months after Yugraneft received the award. More than

[137] *Yugraneft* at [27].
[138] *Yugraneft* at [30].
[139] Art III, *New York Convention*.
[140] *Yugraneft* at [32].
[141] Art XI, *New York Convention*.
[142] Art III, *New York Convention*.
[143] *Yugraneft* at [33].
[144] *Yugraneft* at [48–49].
[145] *Yugraneft* at [50].
[146] *Yugraneft* at [53].
[147] Art 34(3), *Model Law*.
[148] *Yugraneft* at [54].
[149] *Yugraneft* at [55].

two years had passed since that date. The application for enforcement was thus out of time.[150]

The provincial limitation law also provided that the limitation period would only run from the date when the party knew or should have known that its injury warranted bringing a proceeding.[151] This provision encompassed situations such as where a party did not know (and had no reason to know) that the other party had assets in the jurisdiction.[152] However, this provision did not apply here as the contract between the parties had stated that Rexx was an Albertan corporation.[153]

In the *Frontera Resources* case both Frontera and an Azerbaijani state company operated in the oil industry. The parties had entered into an agreement that Frontera would extract oil which would be delivered to the state company. The state company refused to pay for part of the oil. Frontera allegedly exported oil that was required to be sold to the state company. The state company seized oil from Frontera. A Swedish arbitral tribunal found in favour of Frontera, which sought to enforce the award in the United States under the New York Convention.[154]

The Convention set out exclusive grounds for refusing to confirm an arbitral award.[155] The United States Court of Appeals for the Second Circuit held that it could apply a jurisdictional requirement that was not provided for by the Convention.[156] The Convention's list of exclusive grounds concerned matters of substance not procedure. They did not affect the question of jurisdiction over the party against whom enforcement was sought.[157] Jurisdiction over the state company or its property was essential for enforcement of the award.[158]

The Court also considered whether the state company was required to have sufficient contacts with the United States to satisfy constitutional requirements for the assertion of personal jurisdiction by American courts.[159] The due process clause of the United States Constitution protects the rights of 'persons'.[160] The Court held that foreign states were not persons entitled to the protection of the due process clause.[161] The state oil company was an instrumentality of a foreign state. If the

[150] *Yugraneft* at [56].

[151] *Yugraneft* at [60].

[152] *Yugraneft* at [61].

[153] *Yugraneft* at [62].

[154] *Frontera Resources Azerbaijan Corp v State Oil Co of Azerbaijan Republic* 582 F 3d 393 at 395 (2nd Cir 2009) (hereafter *Frontera*).

[155] Art V, *New York Convention*.

[156] *Frontera* at 397.

[157] *Frontera* at 397.

[158] *Frontera* at 398.

[159] *Frontera* at 395.

[160] Amendment V, *United States Constitution*.

[161] *Frontera* at 400.

state exercised sufficient control over the company to make it an agent of the state, the company would not be entitled to due process rights.[162] The Court remanded the case to the lower court to determine whether the company was an agent of the state.[163]

10.7 Reducing Domestic Court Proceedings Regarding International Arbitrations

The most effective way to reduce domestic court interventions in the international arbitral process is through the use of carefully drafted arbitration clauses.[164] A number of precautionary considerations for the drafting of clauses have been suggested.[165] The scope of the matters that may be submitted for arbitration should be as broad as possible.

The place of the arbitration should be stated since the national procedural law of that place governs the procedure of the arbitration. The place chosen should be a party to the New York Convention. A constantly updated list of parties appears on the United Nations website.[166] The international arbitration law of that place should minimise intervention by national judges.[167]

Arbitrations held through arbitral institutions such as the International Court of Arbitration are preferable to arbitrations held under an ad hoc process. The number of arbitrators should be expressly stated. The agreement should also specify the substantive law of the contract and the language of any arbitral proceedings.[168]

10.8 Conclusion

This paper has examined some recent domestic court cases relating to international commercial arbitrations in the resources sector. These cases raised issues concerning the interpretation of the UNCITRAL Model Law, arbitration under bilateral investment treaties, stay of proceedings, discovery under US federal law and the enforcement of awards under the New York Convention.

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[162] *Frontera* at 401.

[163] *Frontera* at 400.

[164] Simon Davis, "The Critical Importance of Carefully Drafting Arbitration Clauses" (2003) 22 *Australian Resources and Energy Law Journal* 161 at 162 (hereafter Davis).

[165] Davis at 166–167.

[166] http://treaties.un.org/pages/ParticipationStatus.aspx (Chapter XXII-1).

[167] Davis at 166–167.

[168] Davis at 166–167.

The Model Law was raised in several cases. In the *CRW Joint Operation* case the Singapore Court of Appeal held that a tribunal had acted in excess of its jurisdiction by issuing a final award without considering the merits of the disputed decision. The Court also set aside the award for breach of natural justice. In the *Cargill* case the New South Wales Supreme Court held that an agreement to conduct the arbitration under specific procedural Rules was not an agreement to opt out of the Model Law as the law of the arbitration. The provision in the Commonwealth Act that allowed parties to opt out of the Model Law has now been repealed.

In relation to bilateral investment treaties, in the second *Occidental Exploration* case the treaty provided that it did not apply to matters of taxation except in relation to the observance of an investment agreement. The English Court of Appeal held that Occidental's claim for reimbursement fell under the investment treaty as it related to the observance of an investment agreement (the exploration and exploitation contract).

The question of whether to stay proceedings under the Commonwealth Act arose in the *AED Oil* case. An exception to the arbitration clause permitted a party to seek "urgent interlocutory or declaratory relief" from a court "where, in that party's reasonable opinion, that action is necessary to protect that party's rights". The Victorian Court of Appeal held that AED's claim was urgent as it sought to restrain the appointment of a receiver. By contrast, Puffin's counter-claim regarding signature of the tax returns was not urgent in itself. The Court granted a stay of Puffin's counter-claim.

Several recent cases examined the use of US federal discovery in relation to international arbitral proceedings. In the *Caratube* case the US District Court denied Caratube's request for discovery. The Court considered that Caratube sought to use the federal discovery process to bypass the tribunal's control over the procedure of the arbitration.

In the *Connor* case the United States Court of Appeals for the Fifth Circuit the Court held that due to its prior position Chevron was estopped from arguing that the tribunal at issue was not a "foreign or international tribunal" under US federal law. If Chevron was able to prevent discovery by Ecuador on the basis of this argument it would have obtained an unfair advantage over its opponent.

Finally, under the New York Convention the Canadian Supreme Court held that enforcement of an international arbitral award was subject to compliance with a national limitation period as enforcement of awards was to take place in accordance with national procedural rules.

Chapter 11
Resource Nationalism: Old Problem, New Solutions

Sam Luttrell

Abstract Energy and resources companies are adventurous investors. They explore and invest in countries that many other businesses might consider unattractive due to the risk of nationalisation, expropriation and other forms of governmental interference. In the past, when faced with such adverse measures, energy and resources companies usually had limited options: they could either sue in the courts of their host state (and run the risk of "home town justice") or ask their home state to intervene on their behalf. Both remedies were defective for different reasons. In response, over the last fifty years, a system of international investment law and arbitration has developed that gives aggrieved foreign investors the right to bring claims against their host state in their own name, in a neutral international forum that the host state does not control. But, to have these rights of recourse, the investor and its assets must usually first be covered by an investment treaty (the other means by which these rights of recourse may be acquired being state agreements and local investment laws, are largely outside the scope of this chapter). This chapter explains how the investment treaty system works, where it came from, and what energy and resources companies need to do to obtain the benefits it provides.

11.1 Introduction

Energy and resources investments are cyclically exposed to what we now call "resource nationalism". This is a new term for an old thing: *resource nationalism* connotes policies or measures adopted by governments for the purpose of asserting control over natural resources for strategic, political or economic reasons. In the

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past, when resources companies had their investments nationalised or expropriated by host governments, they generally turned to their home state governments for assistance. This practice, known as "diplomatic protection", was not always available, let alone effective.[1] Ultimately, due to the need to factor in sovereign risk premiums, the costs of doing business abroad were prohibitive for most investors. Outside colonial trade structures, and with the exception of investments by a small handful of large state-owned (or state-backed) businesses, national markets remained largely isolated from one another.

However, in the second half of the twentieth century, efforts were made to improve conditions for cross-border trade and capital flows. The idea began to circulate that, in order to promote foreign investment in developing countries (many of them newly independent), a system was needed that would allow investors to enforce their rights directly against their host states through binding arbitration. States began to conclude investment promotion and protection agreements—what we now call "investment treaties"—that gave their nationals protection against nationalisation without compensation, and the ability to enforce their rights in their own name. The fundamental intention of these treaties was to reduce the risks of foreign investment, resource nationalism high amongst them, thereby lowering its costs. There are around 3000 of these instruments in force today, most of them being treaties of the bilateral variety (known as **BITs**). Investment treaties effectively allow foreign investors to self-insure against sovereign risk, including risks that fall under the broad-banner of resource nationalism. For large-scale, long-term investors like energy and resources companies this is especially significant: the bigger and longer the project, the more expensive it is to procure sovereign risk insurance for it. Energy and resources companies therefore have a special interest in securing investment treaty coverage for their foreign investments, especially for "too big to insure" projects in developing countries where the risk of resource nationalism is high.

The purpose of this chapter is to identify the (relatively) new solution that is available to respond to the old problem of resource nationalism. To that end, this chapter begins with a summary of the great oil nationalisations of the 20th century—Russia in 1920, Mexico in 1938, Iran in 1951, Libya in 1971–74 and Venezuela in 1976.[2] This historical survey is intended to show how resource nationalism moves in cycles that are essentially political, economic and social, and to illustrate the way the international legal system has evolved to the point where the new solution, being the investment treaty system and the arbitration mechanism that gives it "teeth", has become available. The discussion then moves on to more recent history, dealing with some of the better-known episodes of resource nationalism in the last twenty years. From there, the focus shifts to explaining resource nationalism in its modern forms, and identifying some of the phenomenon's telltale signs. The

[1]Diplomatic protection is, however, still used in claims before the International Court of Justice, most recently in *Ahmadou Sadio Diallo* (*Guinea v Democratic Republic of the Congo*), [2010] ICJ Rep 639. See generally C.F. Amerasinghe, *Diplomatic Protection* (Oxford: OUP, 2008).

[2]For a wider history of international investment law, see Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: CUP, 2013).

discussion closes with the solution itself. In this final section, readers are provided with an overview of the investment treaty system and the process of Investor-State arbitration.

11.2 Resource Nationalism in the 20th Century

There is nothing new about local rulers asserting control over natural resources within their frontiers. The historical record is rich in examples of princes seizing foreign-owned or operated mines to suit their present purposes, which have ranged from the personal to the strategic. The whole field is far too broad to survey here. Rather, what we will focus on in the historical portion in this chapter are the great oil nationalisations of the twentieth century. The first of these occurred in the former Soviet Union, and so we will begin there, on the shores of the Caspian Sea.

11.2.1 Russia

After taking power during the revolution of April 1920, the Bolshevik Government nationalised the resources industry. The nationalisation decree, issued by the Council of People's Commissars of the Russian Soviet Federative Socialist Republic, revoked all private ownership of the earth's crust and invalidated all agreements concerning any such rights.[3] This was a dramatic development because, at the time, Russia was home to the largest oil fields in the world, located at Baku (in present day Azerbaijan). Control of the Baku fields, and the revenue they represented, was essential to the economic and security interests of the revolutionary state.[4]

However, at this time, a number of foreign businesses had interests in the Baku fields. Probably the best known of this group was the Branobel Paraffin Company, established by the Nobel brothers from Sweden. As a result of the nationalisation decree, Branobel had all of its Baku assets expropriated. Without any real prospect of obtaining reinstatement of its rights through proceedings in Russian courts, Branobel could only turn to its home state government. Other foreign investors were in the same boat. In 1921, an international conference was convened at Brussels to discuss the Russian nationalisation. At the Brussels Conference, the affected home governments argued (on behalf of their aggrieved nationals) that Russia's forcible expropriation and nationalisation of foreign-owned assets without compensation was

[3]Alexander Kursky and Andrei Konoplyanik, 'State Regulation and Mining Law Development in Russia from the 15th Century to 1991' (2006) 24(2) *Journal of Energy & Natural Resources Law* 221, 235–6.

[4]Andrew Seek, Safa Mirzoyev, Vagif Nasibov and Fatima Mamedova, 'Azerbaijan: Rediscovering its Oil Potential? A Legal Perspective' (1995) 13 *Journal of Energy & Natural Resources Law* 147, 148.

a breach of international law.[5] Efforts to achieve a settlement with the Bolshevik Government failed, and many of the affected states maintained their view that Russia had breached international law. Diplomatic protection therefore yielded no effective remedy for the aggrieved foreign investors in this case.

Soon after the nationalisations were carried out, the Bolshevik Government realised that foreign expertise and technology would be required to maintain and expand production from the Baku fields. Essentially, the need for technology forced the Bolshevik Government to reconsider its position on foreign investments in the Russian oil industry. It was resolved that foreign investors would be granted limited and specific access to the Russian oil industry. However, having experienced revolutionary resource nationalism, foreign investors demanded new forms of protection. Crucially, the returning investors negotiated arbitration agreements with their counter-parties, these being the Russian State agencies responsible for the newly nationalised oil industry.[6] The practice of requiring arbitration clauses may be taken both as evidence of the investors' dissatisfaction with the results of the diplomatic process conducted at the Brussels Conference, and as an early sign of the changing position of private entities in international law and relations.

The Russian oil industry then settled into life as a component of the centrally-planned, Soviet command economy. However, the tide turned dramatically when the Soviet Union collapsed in 1991. Following the formation of the Russian Federation, the cash-strapped government needed to rebuild its export base quickly, and this meant opening up its oil industry to foreign investment. To that end, it enacted the Law on Foreign Investment—a law that was heavy on regulation, and light on incentive.[7] It was soon recognised that specific rules were needed for the oil industry. The real objective was modernisation: after years of Soviet isolation, the government of the newly-formed Russian Federation was desperate to modernise its oil industry (the only sector of its economy that had any significant export potential at the time), and it needed foreign majors to achieve this objective.[8] In order to solve this problem, the new government introduced a specific law relating to Production Sharing Agreements (**PSAs**).[9]

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[5]Amir Rafat, 'Compensation for Expropriated Property in Recent International Law' (1969) 14(2) *Villanova Law Review* 199, 208.

[6]An example can be found in the concession agreement signed between the All-Union Oil Trading Syndicate (*Neftesindikat*) and the American company Barnsdall Corporation. Under the terms of the concession, in which Barnsdall undertook to deliver 20 rotary drilling rigs in return for 20 % of all oil produced, *Neftesindikat* and Barnsdall agreed that they would resolve disputes under the contract by arbitration.

[7]Arina Shulga, 'Foreign Investment in Russia's Oil and Gas: Legal Framework and Lessons for the Future' (2001) 22(4) *University of Pennsylvania Journal of International Economic Law* 1067, 1082.

[8]Jason Waltrip, 'The Russian Oil and Gas Industry After Yukos: Outlook for Foreign Investment' (2008) 17 *Transnational Law and Contemporary Problems* 575, 576.

[9]Arina Shulga, 'Foreign Invesment in Russia's Oil and Gas: Legal Framework and Lessons for the Future' (2001) 22(4) *University of Pennsylvania Journal of International Economic Law* 1067, 1085.

The PSA law was promulgated during a period in which the Russian economy was almost totally reorganised,[10] and oil prices were low.[11] The PSA law and the 1999 Foreign Investment Law were intended to reassure foreign investors that long-term investments in Russia would be secure.[12] At least for these purposes, these laws were effective, and a number of PSAs were soon entered into with foreign oil companies. In this process, Russia obtained the facilities needed to explore remote locations, acquire new technology, and deliver the large-scale infrastructure projects required to modernise its oil industry.[13]

However, under the PSA law, the government retained the power to revoke a PSA on certain grounds, including if the investor failed to comply with applicable environmental obligations. Before too long, the government threatened to exercise (and eventually *did* exercise) this right against a number of foreign investors, including BP, Royal Dutch Shell and Exxon Mobil.[14] It is no coincidence that these threats were made at a time when oil prices had recovered, and were on the rise. Of these cases, probably the best known is that which related to the Sakhalin II project in Pacific Russia. In 2006, the Gazprom (the Russian state-owned oil company) gained a controlling interest in the Sakhalin II project after the government cancelled Shell and Exxon Mobil's PSA for alleged breaches of environmental obligations. Since then, Gazprom has enjoyed a dominant position in the Russian oil and gas sector.

These experiences, and the uncertainty that surrounds the web of laws and regulations currently applicable to the oil industry, has led many to conclude that Russia's sovereign risk profile makes it unattractive as an investment destination.[15] Indeed, the risk of investing in Russia has been heightened by the fact that, since the end of the Cold War, energy has become the main instrument for Russian foreign policy (especially with respect to the European Union, the main buyer of Russian gas). There is of course nothing new about states fighting *over* natural resources, but fighting *with* natural resources is a somewhat more recent development. As the European Union and the United States seek to isolate Russia in retaliation for its incursion into Ukraine, Russian energy policy has turned to the east. The recent announcement that Russia and China have entered into a USD 400 billion, 30-year gas supply agreement confirms this, and shows that this discrete form of trade war is an important part of Russian foreign policy. Russia therefore provides an interesting illustration of *offensive*, rather than defensive, resource nationalism.

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[10]Jason Waltrip, 'The Russian Oil and Gas Industry After Yukos: Outlook for Foreign Investment' (2008) 17 *Transnational Law and Contemporary Problems* 575, 577.

[11]Ibid, 579.

[12]Ibid, 585.

[13]Ibid,577.

[14]Ibid, 585–591.

[15]Arina Shulga, 'Foreign Invesment in Russia's Oil and Gas: Legal Framework and Lessons for the Future' (2001) 22(4) *University of Pennsylvania Journal of International Economic Law* 1067, 1068.

11.2.2 Mexico

The next major episode of resource nationalism occurred in Mexico. After the Mexican Revolution in 1917, the Mexican Government began to take steps to limit the involvement of foreign businesses in its natural resources sector. In 1938, President Lazaro Cardenas, in response to disagreements over labour and taxation laws, expropriated all foreign-owned oil companies in Mexico. This led to the creation of the state-controlled entity Pemex, which until recently was the only company that was permitted to produce oil in Mexico.[16] Additionally, an article was added to the Mexican Constitution that provided Mexico with "exclusive ownership of all subsoil resources."[17]

In keeping with the practice of the time, the aggrieved foreign investors sought diplomatic protection, this being their only remedy other than claims in Mexican courts. The United States Government sought compensation for the taking of properties owned by American companies.[18] Diplomatic correspondence was exchanged for a number of years until an agreement was finally reached in 1942, under which Mexico agreed to pay USD 24 million in compensation (a poor result for the United States, considering that Mexico faced American claims totalling $260 million).[19] The UK and Netherlands governments took similar steps on behalf of their nationals. In 1946, the Mexican Government agreed to pay USD 81.5 million to settle the British and Dutch claims.[20]

The Mexican nationalisation is useful for two reasons. First, it shows how resource nationalism can have lasting effects: since 1938 Pemex has held a monopoly over Mexican oil and gas production. It is only very recently that the Mexican government has announced that it is considering re-opening its hydrocarbons sector to foreign investment. Second, in contrast to the largely failed efforts of the aggrieved states against Russia, the Mexican case study shows diplomatic protection working, albeit in varying degrees.

11.2.3 Iran

The next episode of resource nationalism occurred in Iran, where the Anglo-Iranian Oil Company (**AIOC**, now BP) enjoyed an unusually privileged position. Between March and May 1951, two laws were passed in Iran: one relating to the

[16]Martin Miranda, 'The Legal Obstacles to Foreign Direct Investment in Mexico's Oil Sector' (2009) 33 *Fordham International Law Journal* 206, 213.

[17]Ibid, 214.

[18]Amir Rafat, 'Compensation for Expropriated Property in Recent International Law' (1969) 14(2) *Villanova Law Review* 199, 204.

[19]Ibid, 209.

[20]Ibid.

nationalisation of the oil industry and the other concerning the enforcement of the nationalisation law.[21] These laws solely affected the AIOC, which in 1933 had been awarded a concession agreement that essentially gave it control over the entire Iranian oil industry.[22] The AIOC concession was supposed to remain in force until 1993.[23] The then Prime Minister of Iran, Mohammad Mossadegh, wanted a bigger share and was buoyed by the knowledge that, in Saudi Arabia and Venezuela, 50/50 profit splits (between the State and the foreign investor) were in effect. In strikingly nationalistic terms, the Prime Minister declared that the nationalisation law was intended to 'eradicate foreign influence and agents in [Iran] and thus take charge of the destiny and ensure the political independence of the country', and to improve economic conditions generally.[24]

The UK Government then entered into negotiations with the Iranian Government on the issue of compensation, and whether there was any possibility of AIOC maintaining a position within the Iranian oil industry.[25] Once it became clear that the Iranian Government intended to fully implement the nationalisation law, and that it would not abide by its agreement to arbitrate the dispute (this agreement being contained in a clause of the AIOC concession contract), the UK Government exercised its right to extend diplomatic protection to the AOIC.

The measures taken by the UK Government included moving a squadron of Royal Navy cruisers into the Gulf in an apparent attempt to intimidate the Iranian government. This measure, which was essentially a blockade, was complemented by litigation in the courts of the surrounding British territories. For example, in July 1952, British warships intercepted an Italian oil tanker (the *Rose Mary*) that was carrying Iranian oil (lifted by the newly-formed National Iranian Oil Company, **NIOC**), and forced it into the port of Aden, then a British protectorate. In an action for wrongful detention of goods before the Aden prize court, the AIOC successfully argued that it was the owner of the cargo of the Rose Mary.[26]

The UK also commenced proceedings against Iran before the International Court of Justice (**ICJ**).[27] However, in a famous decision, the ICJ determined that it lacked

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[21] *Anglo-Iranian Oil Co Case (United Kingdom v Iran)* [1952] ICJ Rep 93, 102.

[22] Amir Rafat, 'Compensation for Expropriated Property in Recent International Law' (1969) 14(2) *Villanova Law Review* 199, 216.

[23] Charles Harding, 'The Iranian Situation' (1951) *American Bar Association: Mineral and Natural Resources Law Proceedings* 15, 16.

[24] Amir Rafat, 'Applicability of the Public-Purpose Principle to Cases Arising under International Law from Expropriation of Alien Private Property' (1965) 43 *University of Detroit Law Journal* 375, 376–7.

[25] Ibid, 218.

[26] *Anglo-Iranian Oil Co Ltd v Jaffrate (The Rose Mary)* [1953] 1 WLR 246 (Supreme Court of Aden). The *Rose Mary* case stands as authority for the proposition that recognition of the expropriation of property by the government of a foreign country may be refused as contrary to forum public policy if the expropriation was unlawful under public international law on account of the absence of prompt, adequate and effective compensation.

[27] *Anglo-Iranian Oil Co Case (United Kingdom v Iran)*, Preliminary Objections [1952] ICJ Rep 93, 102.

jurisdiction, and declined to hear the UK's substantive claims.[28] Additionally, the AIOC brought a number of national court actions against Iran and the NIOC around the world.[29] Ultimately, a settlement was reached when, in 1954, a Consortium Agreement was entered into between the UK, Iran and several American, Dutch and British oil companies.[30] The Consortium Agreement established rules for reinstating foreign participation in the Iranian oil industry and provided for the payment of compensation for the expropriation carried out under the 1951 nationalisation laws. In the settlement, the AIOC received £25 million as compensation for the expropriation of its physical assets and approximately £214 million as compensation for loss of anticipated profits.[31]

Probably the most interesting aspect of the Iranian case is that it is one of the more egregious examples of "gunboat diplomacy": the UK could not accept the risk of resource nationalism in Iran, and in 1953 it used its intelligence services (acting in concert with the United States) to foment the coup against Mossadegh that led to the restoration of the Shah, whose fate is well known. More importantly for present purposes, the Iranian case shows the beginning of a subtle but effective change in strategy on the part of the oil companies. Where previously the main (if not *only*) remedy for nationalisation was diplomatic protection, the AIOC used a combination of litigation and home-state assistance to defend its interests. In subsequent nationalisations, this strategy would be expanded to include international arbitration.

11.2.4 Libya

In 1968, the annual oil production of Libya was 950 million barrels.[32] One year later, a revolution led by Muammar Kaddafi overthrew the Libyan monarchy, and the tide quickly turned against foreign investors.[33] Kaddafi took power as a socialist, and part of his program of reform was the nationalisation of the oil

[28]Ibid, 114.

[29]See 'National Jurisdiction: Recognition of Effects of Acts of Foreign State' (1968) 6 *Digest of International Law* 1, 4–11; including: *Anglo-Iranian Oil Co v Jaffrate* (1953) 20 ILR 316 (Supreme Court of Aden); *Anglo-Iranian Oil Co v SUPOR* (1953) 22 ILR 19 (Civil Court of Venice); *Anglo-Iranian Oil Co v SUPOR* [1955] ILR 23 (Civil Court of Rome), *Anglo-Iranian Oil Co v Idemitsu Kosan Kobuski [Kabushiki] Kaisha* (1953) 20 ILR 305 (High Court of Tokyo).

[30]Amir Rafat, 'Compensation for Expropriated Property in Recent International Law' (1969) 14(2) *Villanova Law Review* 199, 230.

[31]Ibid, 232.

[32]Joel Fisher, Albert Golbert and Bahram Maghame, 'British Petroleum v Libya: A preliminary comparative analysis of the international oil companies' response to nationalization' (1975) 7 *Southwestern University Law Review* 68, 69.

[33]Robert von Mehren and P. Nicholas Kourides, 'The Libyan Nationalizations: *TOPCO/CALASIATIC v Libya* Arbitration' (1979) 12(2) *Natural Resources Lawyer* 419, 419.

industry, Libya's main source of revenue.[34] Earlier, in 1955, the Libyan Petroleum Commission had awarded concession agreements to 17 international oil companies, and, shortly after taking power, Kaddafi indicated that he intended to change the conditions of these agreements.[35] In September 1970, Occidental Petroleum's local subsidiary (Occidental of Libya) agreed to the new terms, which included increasing the price it paid for oil lifted under its concession.[36] Occidental was the first international oil company (**IOC**) to settle with the new Libyan government, and it only did so after being threatened with full and complete nationalisation of its assets. Within a month, most of the other IOCs engaged in Libya agreed to their host government's terms.

However, on 7 December 1971, the Libyan Government announced that it had nationalised the assets of BP, supposedly in retaliation for the UK's failure to prevent the occupation of certain islands in the Persian Gulf by Iran, which was at the point still within the UK's sphere of influence (an early example of *offensive*, rather than defensive, resource nationalism).[37] The Libyan government stated that compensation would be provided subject to the determination of the value of BP's assets by a committee of three Libyan nationals (with no appeal).

This gave rise to two main substantive legal issues: first, whether the expropriation of BP's assets was discriminatory (and whether or not the taking was for a public purpose); second, whether the compensation offered by the expropriating government was adequate.[38] Relying on the arbitration clause in its concession, BP commenced arbitration against Libya. The appointing authority (the President of the ICJ) appointed Swedish Judge Gunnar Lagergren as sole arbitrator.[39] Ultimately, Judge Lagergren determined that Libya had not provided adequate compensation (or indeed *any* compensation) and that the expropriation violated international law.[40]

Two years later, the Libyan government announced the nationalisation of 51 % of the interests of nine other IOCs.[41] In February 1974, the remaining interests of

[34]Joel Fisher, Albert Golbert and Bahram Maghame, 'British Petroleum v Libya: A preliminary comparative analysis of the international oil companies' response to nationalization' (1975) 7 *Southwestern University Law Review* 68, 69.

[35]Ibid, 69–70.

[36]Ibid, 76.

[37]G. Winthrop Haight, 'Libyan Nationalization of British Petroleum Company Assets' (1972) 6 *International Lawyer* 541, 541.

[38]Ibid, 544–5.

[39]Joel Fisher, Albert Golbert and Bahram Maghame, '*British Petroleum v Libya*: A preliminary comparative analysis of the international oil companies' response to nationalization' (1975) 7 *Southwestern University Law Review* 68, 80.

[40]*BP Exploration Company (Libya) Ltd v Government of the Libyan Arab Republic* (1974) 53 ILR 297.

[41]Robert von Mehren and P. Nicholas Kourides, 'International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases' (1981) 75 *American Journal of International Law* 476, 476.

three of these foreign companies (being Texaco Overseas Petroleum (**TOPCO**), California Asiatic Oil (**Calasiatic**) and the Libyan American Oil (**LIAMCO**)) were nationalised, such that their investments were expropriated in full.[42] Again, the affected IOCs had arbitration clauses in their concessions, and so they were able to bring claims directly against Libya, without the need to rely on the remedy of diplomatic protection. The arbitrations that followed, known collectively as the "Libyan Nationalisation Cases", would play a key role in shaping modern international investment law—a role that modern practitioners continue to acknowledge to this day.[43]

In the LIAMCO arbitration, Libya was ordered to pay USD 80 million in damages.[44] In the TOPCO/Calasiatic arbitration, the Libyan government challenged the claims and refused to acknowledge that there was a dispute requiring resolution.[45] Although it did participate initially, once the arbitrator was appointed, Libya did not file any further pleadings or appear in the arbitration.[46] The award handed down by the sole arbitrator, Professor Rene-Jean Dupuy, was to become a seminal decision in the "construction of the modern international law of foreign investment."[47] This was due mainly to Professor Dupuy's decision that the concession agreements on which TOPCO and Calasiatic relied were "within the domain of international law", and that international law was part of the legal order that governed them.[48]

Prior to this, contracts between foreign private parties and sovereign states were understood as being linked to (and generally governed by) the domestic law of the state party, rather than international law.[49] However, TOPCO/Calasiatic had three clauses in their concession contracts that changed the equation: first, the governing law clauses of the concessions called for the application of both Libyan law and "principles of international law"; second, the contracts contained stabilisation clauses (in which Libya effectively undertook not to nationalise for a certain period); and third, the contracts contained international arbitration clauses.[50]

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[42]Ibid.

[43]Ibid.

[44]*Libyan American Oil Company (LIAMCO) v Libya* (1977) 62 ILR 140.

[45]Robert von Mehren and P. Nicholas Kourides, 'The Libyan Nationalizations: *TOPCO/CALASIATIC v Libya* Arbitration' (1979) 12(2) *Natural Resources Lawyer* 419, 421.

[46]Jonathan Wallace, 'Litigating an International Oil Dispute' (1980) 2 *New York Law School Journal of International Comparative Law* 253, 257.

[47]*Texaco Overseas Petroleum Company v Libya* (1977) 53 ILR 389. See Julien Cantegreil, 'The Audacity of the Texaco/Calasiatic Award: Rene-Jean Dupuy and the Internationalization of foreign investment law' (2011) 22 *European Journal of International Law* 441, 442.

[48]Ibid, 445–6.

[49]These principles were set out by the Permanent Court of International Justice (the predecessor to the ICJ) in its decisions in *Serbian Loans (France v Serbia)* (1928) PCIJ Ser A No 20 *and Brazilian Loans (France v Brazil)* (1929) PCIJ Ser A No 21.

[50]Robert von Mehren and P Nicholas Kourides, 'The Libyan Nationalizations: *TOPCO/CALASIATIC v Libya* Arbitration' (1979) 12(2) *Natural Resources Lawyer* 419, 426.

Professor Dupuy deduced from these clauses that the concession contracts were linked to the *international* legal order—in this matrix, Libyan law applied unless it was inconsistent with international law. In substance, applying this body of rules, the arbitrator found that the nationalisation of TOPCO and Calasiatic's assets was an expropriation that violated one key principle of international law: *pacta sunt servanda*.[51] Professor Dupuy held that although a host state has the right to nationalise foreign-owned property in the exercise of its sovereign prerogatives, this right must be exercised in a manner that conforms to any contractual obligations that the host state may owe to the relevant foreign owners at the time (the relevant obligation being, in this case, Libya's undertaking not to nationalise, expressed in the stabilisation clauses of the concession contracts).[52] Professor Dupuy ordered Libya to specifically perform its contractual obligations under the concession agreements.[53] Eight months after Professor Dupuy's decision, the Libyan government, TOPCO and Calasiatic reached a settlement, under which Libya agreed to provide the companies with compensation in the form of oil valued at USD 152 million.[54]

The Libyan experience fundamentally changed the way oil companies, and their lawyers, dealt with nationalisation. TOPCO/Calasiatic's lawyers wanted to "lift" the contracts out of Libyan law and up onto the plane of international law, and they succeeded. The TOPCO/Calasiatic decision was pivotal in its approach to the governing law of an investment contract, with the arbitrator finding, in essence, that it was possible for a state to agree to contractual terms that invested its foreign *private* counterparties with international legal personality, and made their contract subject to international law. This may seem like an academic point, but it had an important practical result: if Libyan law alone governed the claims being made by the IOCs, then the State's conduct would have been judged by reference to laws and norms of its own making (such that the unilateral actions it had taken in breach of the stabilisation clauses could have been lawful). In other words, Libya's conduct would have been self-judging. Applying international law effectively broke this circle. But, more than anything, the Libyan experience made it clear that international arbitration could be effective.

11.2.5 Venezuela

Much like Russia, Venezuela's experience with resource nationalism is a story of revolving doors. Oil production began in Venezuela in the early 20th century.

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[51]Ibid, 425.

[52]Jonathan Wallace, 'Litigating an International Oil Dispute' (1980) 2 *New York Law School Journal of International Comparative Law* 253, 258.

[53]Robert von Mehren and P. Nicholas Kourides, 'The Libyan Nationalizations: *TOPCO/CALASIATIC v Libya* Arbitration' (1979) 12(2) *Natural Resources Lawyer* 419, 433.

[54]Ibid.

However, it was not until World War Two that Venezuelan production reached significant levels (by the end of the war, the country was producing around 1 million barrels per day, largely to meet Allied demand). In 1943, sensing the shift in bargaining power, the Venezuelan government introduced the Hydrocarbons Law, under which the State was entitled to 50 % of the profits of all oil exploitation activities, including those carried out by IOCs. This was the first ever 50/50 split, and awareness of it is thought to have emboldened other oil producing states (including Iran) to push for better terms of their own.

The resource nationalist trend continued in Venezuela in the following decades. On 21 August 1975, Venezuela implemented the 'Organic Law Reserving the Oil and Gas Industry for the State'. The Organic Law was designed to confer rights to the State's petroleum resources on the citizens of Venezuela.[55] As a result of the Organic Law, all of the then-current concession contracts were terminated, the State was given exclusive rights to oil and gas operations and exports, a national oil company (Petroleos de Venezuela SA or **PDVSA**) was formed to own and manage all hydrocarbon assets, and compensation was to be paid to affected private investors.[56] However, the Organic Law still allowed the state to enter into 'association contracts' with private companies in certain circumstances and provided that the contracts were consistent with the national interest.[57] As we will see, in the decades that followed the introduction of the Organic Law, Venezuela developed a complex, and at times fractious, relationship with the IOCs.

11.3 Resource Nationalism—Recent Episodes

The early history of resource nationalism is essentially a story of oil companies versus governments (with or without the assistance of home-state governments). In more recent years, there have been a number of episodes of resource nationalisation, and the effects of these events have not been confined to the oil industry. A much broader range of businesses, including mining companies, have had to defend themselves against hostile foreign governments. In some of these cases, the relevant measures have led to investment treaty claims—the new way of resolving disputes arising out of resource nationalism. To be clear, the case studies offered below are by no means the complete universe of examples. Instances of resource nationalism have occurred in many other countries—developing and developed—and the list continues to expand.

[55]Luis Cuervo, 'The Uncertain Fate of Venezuela's Black Pearl: The Petrostate and its Ambiguous Oil and Gas Legislation' (2010) 32 *Houston Journal of International Law* 637, 642–3.

[56]Ibid, 644.

[57]Ibid, 645.

11.3.1 Indonesia

It is apt to begin in Australia's neighbourhood, in Indonesia. From relatively humble beginnings, Indonesia is now the largest economy in South East Asia. The country has experienced steady growth of approximately 6 % since 2005, and that rate of growth is predicted to continue.[58] In addition to significant oil and gas reserves, the country is one of the world's largest copper, nickel and aluminium producers. Unsurprisingly, Indonesia's abundant natural resources have attracted investors from around the world, particularly in recent years. In 2013, the Indonesian government reported that foreign direct investment increased by 27 % in the first quarter to a record 65.5 trillion rupiah, or nearly USD 7 billion.

The issue of foreign participation in key sectors of the economy is attracting particular attention from Indonesian legislators. In the most recent election cycle, the mining and energy sectors have been targeted specifically. In 2012, the government enacted laws which provide for the gradual divestment of majority interests in foreign-owned resources projects to Indonesian companies or individuals. In 2013, new rules regarding foreign ownership of Indonesian companies were introduced, along with "value-adding" rules requiring the onshore processing of minerals extracted in Indonesia. These rules are complicated, and are best explained by example. In the case of bauxite, since January 2014, it has been illegal to export bauxite unless the exporter can show that there has been local value-adding through additional processing—either of the intermediate product (alumina) or of the finished product (aluminium). Thus, the Indonesian value-adding rules do not constitute a blanket ban on the export of ores; rather, export is conditional upon the ore being put through some form of local processing (refining, in the case of bauxite). The policy rationale is simply for the host state to capture more of the value-chain, such that the country's industrial capacity is diversified and local people have more job opportunities—goals that many arbitrators would see as legitimate. However, for the affected miners, these rules have the potential to change the economics of their projects. As an example of the claims that Indonesia may face, Newmont Mining Corporation (operator of the Batu Hijau copper and gold mine) has recently requested ICSID arbitration against Indonesia, alleging that the imposition of new export rules violates its Contract of Work and the Indonesia-Netherlands BIT.[59]

In parallel to these value-adding measures, the Government has closed certain parts of the resources sector to foreign participation. Under the "negative list" of April 2014, foreign investment in onshore oil and gas drilling, operation and maintenance services, gas pipeline construction, and upstream onshore oil and gas activities is prohibited.[60] While these are certainly more subtle resource nationalist measures, they nonetheless pose a risk to foreign businesses with energy projects in

[58]OECD (2012) OECD Economic Surveys: Indonesia September 2012, OECD.

[59]"NNT Takes Indonesia to Arbitration Court", Jakarta Globe, 1 July 2014.

[60]See *Presidential Regulation 39 of 2014 Concerning Lists of Business Fields that are Closed to Investment and Business Fields that are Conditionally Open for Investment*.

Indonesia. To be sure, there is risk for the host state too: the oil and gas sector might be deprived of the foreign capital and technology that it needs to remain competitive and deliver the biggest return to the Indonesian treasury.

11.3.2 Venezuela

Returning to Venezuela, in 1990, the State was experiencing difficulties in developing the oil fields in the Orinico Belt, thought to be home to one of the world's largest crude reserves. The Orinico Belt is divided into four main areas: Machete, Hamaca, Zuata and Cerro Negro. The government needed investment from foreign oil companies that could provide capital, technology and requisite experience to develop these areas.[61] However, because of the unattractive regime created by the Organic Law, such investment was difficult to attract.

In order to overcome foreign investors' concerns—chiefly as to the risk of expropriation—the Government agreed to provide contractual and legal protections against measures that may expropriate, harm, or discriminate against any foreign companies' investments.[62] In its agreements with foreign IOCs, PDVSA also guaranteed that it would indemnify the foreign participant for any 'expropriation or seizure' of its interests or any other discriminatory measures imposed by the Government that may cause a 'materially adverse impact' on the cash flow of the project.[63] In other words, Venezuela's need for technology and capital was such that through PDVSA it had to accept stabilisation clauses in the contracts it signed with the returning IOCs.

One of the IOCs that invested in Venezuela in this period was Mobil. Mobil was approached to invest in production of oil from the Cerro Negro region of the Orinoco Belt. As Mobil's interests had been expropriated by the Venezuelan government in 1975, it required more than the usual comfort from its host state. Through its subsidiary Mobil Cerro Negro (**Mobil CN**), the company entered into an Association Agreement with PDVSA, and this agreement included a stabilisation clause of the kind described above. Under the stabilisation arrangements, the amount of compensation was to be determined under a contractual formula listed in the Schedule to the Agreement. The Joint Venture between Mobil CN and PDVSA Cerro Negro (**PDVSA CN**, a subsidiary of PDVSA) began operating in 1997.

Subsequently, there was a change in government in Venezuela. In 2001, late President Hugo Chavez issued a new Organic Law of Hydrocarbons, replacing the previous Organic Law and removing legal incentives and protections for foreign investors. It did not take long for the impact of these measures to be felt by the IOCs. By 2004, Mobil faced a number of measures that it claimed were

[61] *ConocoPhillips v PDVSA* (17 September 2012) Final Award, ICC No. 16848/JRF/CA [24].
[62] Ibid.
[63] Ibid.

discriminatory.[64] These included a new royalty rate tax, an increased taxation rate, restrictions on production and exports and withdrawals of certain protections afforded to Mobil CN under the Agreement with PDVSA CN. In 2007, the Venezuelan Government expropriated Mobil CN's interest in the project and transferred it to a PDVSA subsidiary. Mobil CN claimed that PDVSA failed to adequately compensate it for these measures (in accordance with the stabilisation clause), and commenced arbitration at the International Chamber of Commerce (**ICC**) under the Association Agreement.[65]

The ICC tribunal declared that both PDVSA and PDVSA CN were jointly and severally liable for breaching the Guaranty (from PDVSA) and Association Agreement (with PDVSA CN),[66] and ordered PDVSA to pay damages amounting to more than USD 746 million, an amount close to that which Mobil invested in the project. Given that this was less than 10 % of what Mobil claimed, the market rightly perceived this is a good result for Venezuela (not least of all because the State had apparently earlier offered to pay USD 1 billion to settle the case).[67]

ConocoPhillips found itself in a similar situation to Mobil. It too had entered into a number of Association Agreements with PDVSA subsidiaries for the development of fields in the Orinoco Belt.[68] ConocoPhillips' contracts contained stabilisation clauses similar to those contained in the Mobil Association Agreement. Ultimately, the same measures that affected Mobil CN also affected ConocoPhillips. Between September and December 2006, the Venezuelan Government announced that it would reduce its oil production levels by up to 500,000 barrels per day,[69] a reduction that adversely impacted the economics of the Hamaca and Petrozuata projects in which ConocoPhillips was a participant. Then, on 1 May 2007, PDVSA took over the operation of projects in the Petrozuata and Hamaca regions of the Orinico Belt. ConocoPhillips initiated arbitral proceedings against PDVSA on 30 December 2009 at the ICC, claiming compensation for losses incurred for the expropriation of its interests in the Hamaca and Petrozuata projects. The ICC tribunal found that PDVSA was not liable for its Guaranty in relation to the Hamaca project.[70] But, in relation to Petrozuata project, the tribunal held that the PDVSA Guaranty did include obligations to indemnify, and ordered the Venezuelan party to pay approximately USD $66 million in damages.[71]

In addition to these proceedings, Venezuela has faced a wave of treaty claims as a result of the measures taken by the Chavez administration. The claimants in these

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[64]Ibid.

[65]*Mobil Cerro Negro Ltd v PDVSA* (23 December 2011), Final Award, ICC No. 15416/JRF/CA [5].

[66]Ibid.

[67]"Exxon wins less than expected from Venezuela dispute", Reuters, 1 January 2012.

[68]*ConocoPhillips v PDVSA* (17 September 2012) Final Award, ICC No. 16848/JRF/CA [45].

[69]Ibid, [77].

[70]Ibid, [333].

[71]Ibid.

actions include a number of other top-tier IOCs and other oil and gas investors. Perhaps surprisingly, several IOCs have continued to invest in the Orinoco belt, with Chevron and Repsol signing deals in 2010 for new multibillion-dollar projects.[72]

11.3.3 Argentina

Moving south, Argentina has recently faced a high value claim as a result of its own experience with resource nationalism. The claim related to YPF, an Argentinean company that was privatised in 1993. By 2011, YPF was the second largest company in Argentina, being majority-owned by Spanish company Repsol SA.[73] In 2011, Repsol announced that YPF had discovered a very large shale gas reserve in the Vaca Muerta region of Argentina.[74] On 16 April 2012, Argentine President Cristina Fernandez de Kirchner announced that a Bill would be presented to the Senate that would provide for the expropriation of 51 % of Repsol's 57 % interest in YPF. After the announcement, Repsol's management team were removed from YPF and the company was placed under Government control. Repsol then commenced arbitration against Argentina pursuant to the Spain-Argentina BIT.[75]

In June 2013, YPF rejected a settlement offer from Argentina for USD 5 billion, instead pushing ahead with its claim for losses of USD 10.5 billion. But, on 25 February 2014, Repsol announced that its board of directors had resolved to accept Argentina's offer of USD 5 billion compensation. As part of the settlement reached, Repsol accepted Argentine government bonds in lieu of cash, on the condition that the bonds could be easily monetised (at the time of writing, most of the bonds have already been sold).

While Argentina has faced dozens of investment treaty claims in the past, and may therefore have been motivated to settle the YPF case purely as a means of avoiding further proceedings, commentators have reported that Repsol's decision to accept the settlement was influenced by the desire of its home state (Spain) to maintain diplomatic relations with Argentina.[76] If this is right, then the YPF case shows that, while the investment treaty system is advantageous in the sense that it gives investors standing to make claims without the need for formal diplomatic protection, government-to-government relations can still influence the outcome of the proceedings.

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[72]"Exxon wins less than expected from Venezuela dispute", Reuters, 1 January 2012.

[73]Pablo Fernandez, 'Valuation of an expropriated Company: The case of YPF and Repsol in Argentina' (2013) Working Paper, IESE Business School, 3–4.

[74]Victor Mallet and Sylvia Pfeifer, 'Repsol announces big shale oil find in Argentina' (7 November 2011) *Financial Times*.

[75]Jude Webber, 'Repsol sues Argentina over YPF seizure' (15 May 2012) *Financial Times*.

[76]Stanley Reed and Raphael Minder, 'Repsol in $5 Billion Settlement with Argentina' (25 February 2014) *New York Times*.

11.3.4 Russia

Returning to Russia, the well-known case of the Yukos Oil Company provides an interesting illustration of modern resource nationalism. Yukos was a large privately-owned Russian company that controlled three subsidiaries with extensive assets. After Vladimir Putin was elected President of the Russian Federation in 2000, he implemented a new policy that essentially required the 'super rich' in Russia to give back to society.[77] In 2003, Yukos agreed to merge with Sibneft—a transaction that would have made Yukos the fourth largest energy company in the world. However, this merger was never completed because, in October 2003, the CEO of Yukos (Mikhail Khodorkovsky) was arrested for tax fraud. Yukos was then subjected to a number of audits, freezing orders, tax rulings, auctions and other measures. The collective effect of these measures was that Yukos' main assets were expropriated and put to auction, with the main assets eventually falling under the control of Rosneft (a Russian state-owned company).[78]

Russia has faced a series of international claims as a result of the actions it took against Yukos; indeed, it has been reported that the Yukos affair has resulted in as many as 300 actions being brought before 15 different international tribunals. Significantly, these actions have included shareholder claims against Russia under the Energy Charter Treaty (**ECT**, discussed below).[79] Russia has resisted these ECT claims on the basis that it signed but never ratified the treaty. In spite of that, in a landmark decision rendered on 30 November 2009, an ad hoc tribunal sitting at The Hague ruled that, by virtue of Russia's provisional application of the ECT, the country is bound by the treaty.[80] This decision allowed the majority shareholders of Yukos to go ahead with their ECT action against the Russian Federation, in what is widely considered to be the largest monetary claim ever submitted to international arbitration.[81] On 18 July 2014, the tribunal hearing the claims of Hulley Enterprises, Veteran Petroleum and Yukos Universal (which together owned 70 %

[77]Paul B Stephan, 'Taxation and Expropriation—the destruction of the Yukos Oil Empire' (2013) 35 *Houston Journal of International Law* 1, 16.

[78]Ibid, 26.

[79]See, for example, *Hulley Enterprises Limited v The Russian Federation* (PCA Case No. AA226), *Yukos Universal Limited v The Russian Federation* (PCA Case No. AA227), *Veteran Petroleum Limited v The Russian Federation* (PCA Case No. AA228).

[80]*Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case No. AA 227), UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

[81]Proceedings were also brought by various Yukos entities in the arbitration court of the Stockholm Chamber of Commerce (**SCC**) and the ICC, with related assistance and enforcement actions in national courts around the world.

of Yukos) unanimously found in favour of the claimants and ordered Russia to pay over USD 50 *billion* in damages.[82]

The Yukos case shows how the strategy for responding the resource nationalism has evolved in the past century. Where diplomatic protection was essentially the only remedy available to the victims of the Bolshevik nationalisations in 1920, by the time Yukos was dismantled, foreign investors had a web of bilateral and multilateral treaties (namely the ECT) on which they could rely to bring their claims against Russia on the international plane and in their own names.

11.3.5 Guinea

A sub-Saharan example of resource nationalism can be found in Guinea, home to what is thought to be the world's largest untapped iron ore resource, located in the Simandou Range in the south east of the country. In 1997, the Guinean Government awarded Anglo-Australian miner Rio Tinto the right to develop four of the tenements comprising the Simandou deposit.

However, in 2008, following the death of Guinean President Lansana Conté, a *coup d'état* occurred. The junta that took control, headed by one Captain Camara, proceeded to expropriate Rio Tinto's rights to mine two out of four of the blocks it then controlled. The Guinean military government then awarded these two tenements to an Israeli company, BSG Resources, which in turn sold them to Rio Tinto's rival, Brazilian iron ore major Vale. In 2010, elections were held and the junta relinquished power to the victor, Alpha Condé. Under President Condé, various actions taken by the previous military government were placed under review. In April 2014, a government inquiry found that the award of the tenements to BSG Resources had been tainted by corruption. On the changing tide, the rights of BGS Resources and Vale were subsequently revoked. Then, on 26 May 2014, it was announced that Rio Tinto had signed an agreement with Guinea to settle the dispute.[83]

Under the terms of the agreement, Guinea will reportedly hold a 15 % stake in the Simandou project. Rio Tinto and its joint venture partners—which include the World Bank's International Finance Corporation—will pay a 3.5 % royalty on all iron ore exported, along with a 30 % income tax rate (with an eight-year tax holiday running from the date the mine opens). Significantly, the joint venture will also be required to spend 0.25 % of its turnover on local communities. The USD 21 billion

[82]See *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (PCA Case No. AA226), Final Award, 18 July 2014; *Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case No. AA227), Final Award, 18 July 2014; *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (PCA Case No. AA228), Final Award, 18 July 2014.

[83]"Rio Tinto seals $20bn iron ore development project with Guinea", *Financial Times*, 26 May 2014.

project also includes plans for a 650 km railway line and multi-purpose port on Guinea's Atlantic coast.

Vale and BSG Resources, who have denied all allegations of improper dealing, are apparently preparing for arbitration against Guinea. While no public treaty claim was ever made by Rio Tinto against Guinea, it is telling that the company is amongst a group of major miners that are pushing the Australian government to include Investor-State arbitration clauses in future investment treaties, including the Trans-Pacific Partnership Agreement.[84]

11.4 Signs of Resource Nationalism

What should be apparent to the reader by now is that resource nationalism comes in many different forms, ranging from what we might call "classical nationalisations" (in the form of direct expropriation of foreign-owned or controlled natural resource assets), to discriminatory changes in the laws and regulations that govern foreign investment in the natural resources sector (sometimes labelled "creeping" or "indirect" expropriation).

The other point to take from the case studies provided above is that the phenomenon also takes different forms for different industries. For example, where the oil industry is concerned, resource nationalism is now more likely to take the form of contractual interference rather than wholesale revocation of title. Recent experience suggests that oil companies increasingly face measures that purport to modify the terms of their participation in a particular project, such as measures that adjust or tighten the cost recovery regime under their PSC (thereby reducing their share of the off-take). In this scenario, the IOC may retain the legal right to lift oil from the field, but the economics of doing so may well have fundamentally changed.

In the mining sector, resource nationalism tends to be more subtle, often taking the form of measures targeting levels of the value-chain beneath that of extraction. Tax measures are also common. Indeed, for the host state, these are an attractive option because tax measures are sometimes more difficult to use as a foundation for an investment treaty claim (some investment treaties contain express carve-outs for taxation, the ECT being a notable example). So the phenomenon is not uniform.

The question for investors and their advisors is how to spot these measures before they are imposed on them or the levels of the value chain in which they have interests. But, in order to see the telltale signs of resource nationalism, the causes of the phenomenon must first be understood. This is a complex field, and a full study is outside the scope of this chapter. However, for present purposes it can be said that, generally speaking, the drivers of resource nationalism are social, political and

[84] "Rio, BHP seek protection for foreign investments", *Australian Financial Review*, 22 May 2014.

economic. This diversity of causes means that the signals of resource nationalism may come from a number of different directions, some local and some international.

Probably the first sign that a host country may be prone to resource nationalism is that the rule of law is not well established. In particular, countries that do not have open and transparent processes for the award and administration of licenses to prospect for and exploit natural resources tend to be fertile ground for resource nationalism. Similarly, where the laws and regulations that govern activity in the resources sector (including the establishment and operation of companies, the extraction of the resources themselves, and their export abroad) are outdated or underdeveloped, it is easier for governments (national and regional) to use the legal system to their advantage. Into this category fall a number of former European colonies in Africa and Asia. To use the example of Indonesia, uncertainties as to title have triggered claims by foreign resources companies,[85] and continue to be seen as one of the main risk factors for foreign investors across many sectors of the Indonesian economy (not just natural resources).

Regarding the political signal, where the host state has a democratic system of government, there is often a correlation between resource nationalism and local election cycles. The policies that we associate with resource nationalism are often "vote winners": after all, foreign investors cannot vote, and so the immediate political threat they pose to an incumbent government in campaign mode is often limited. The same is true of parties standing for election, who have even less to lose by proposing such "vote winning" policies. Further, it usually takes time for the treasury to feel the effects of scaring off foreign investors, and so the immediate economic risks of resource nationalism are not always understood by voters. So, as a general rule, the closer the host state government is to an election, the more likely it is to propose policies or measures that are against the interests of foreign investors.

Although authoritarian political systems may not necessarily display the same cyclical political risk as open democracies, as the case studies above show, they too are prone to resource nationalism. Indeed, the early warning signs of resource nationalism are often harder to spot in non-democratic countries than they are in states with open political systems. As the Yukos case shows, things can change very quickly where power is concentrated in the hands of a small group. The 2008 *coup d'état* that preceded the expropriation of Rio Tinto's interests in the Simandou project is another example. The investor will need to understand the dynamics of the ruling elite, and their relationship with other factions, in order to be in any position to anticipate policy changes. However, in keeping current with local politics, the investor will need to develop and maintain relationships with the key players. This can present a problem because, in so doing, the investor must take care not to align itself too closely with the ruling faction, lest the political tide turns against them and the investor shares their fate (as seems to have happened to BSG Resources and Vale in Guinea). The other difficulty is that, in order to keep its intelligence current, the

[85]See for example *Churchill Mining Plc & Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40).

foreign investor may face demands for illicit payments from local officials. In order to preserve its ability to prosecute claims before an international tribunal, it is essential that the investor refrain from any such dealings. International tribunals quite rightly take a dim view of investments tainted by corruption.

Related to the political signal, certain characteristics of the society of the host state may also predispose it to resource nationalism. For example, where the country in question has a young, fast-growing population, the government's need for money to pay for essential public services and infrastructure may drive it to demand the renegotiation of the terms on which major resource assets are exploited by foreign investors. If these renegotiations fail to achieve the result the treasury seeks, an expropriation may occur. There are obviously a large number of developing countries in this category, and the demographic risk they pose is difficult to manage. One way of approaching the issue is to treat it as a question of jobs. Experience suggests that the more local people the foreign investor employs the less exposure it will have to demographic-driven resource nationalism. As part of this, care should be taken to ensure that no one ethnic group is over-represented in the investor's local work force.

Finally, in purely economic terms, the more the host state's economy depends on natural resources, the more likely it is that foreign investors in that state will be susceptible to resource nationalism. This is analogous to business concentration risk. Russia and Venezuela are examples of countries that are close to "oil monocultures", but there are many other countries where royalties earned on the exploitation of energy and resources assets represent the vast majority of the government's tax base. Where the resource in question is fully commoditised, the host government may be motivated to take measures purely as a means of capitalising on the higher traded price of the relevant commodity. Investors need to be aware of the inherent risk of doing business in a state that is overly dependent upon its natural resources, and take steps to ensure that enforceable international recourse is available in the event adverse changes in law or policy occur.

11.5 The Investment Treaty System

Turning now to the solution, we have seen how the strategy for responding to resource nationalism evolved over the course of the 20th century, from essentially "no other option" reliance on diplomatic protection in the first half of the century to contractual remedies (enforced through the process of international arbitration and related asset-chasing litigation in national courts) in the 1970s, and finally to use of the investment treaty system. It is important, therefore, to understand what investment treaties are, and how they work in practice. This again is an expansive subject and so, to an extent, the discussion that follows must deal in generalisations.

Investment treaties are agreements between two or more States in which each Contracting State agrees to promote and protect investments made in its territory by investors of the other Contracting State (or States). As we have seen, by numbers

the vast majority of investment treaties are *bilateral*, meaning they are between two states only. However, there are a growing number of multilateral investment treaties, such as the ECT (referred to in the above discussion of the Yukos affair). As a further note on terminology, when we hear the term "international investment law", we are talking about the complex system of investment treaties that link world markets together, and the secondary principles that international tribunals are developing as they apply these written instruments to specific cases.

We hear these terms—"BIT", "investment treaty", "international investment law"—more and more because, in the last decade or so, there has been an exponential increase in the use of investment treaties by multinational businesses, particularly as a means of protecting their investments in developing countries and responding to resource nationalism. As a result of the growing use by investors of the Investor-State arbitration mechanisms available under these treaties, the secondary principles of international investment law are becoming more elaborate. As we shall see, relying on this expanding corpus of rules, it is now possible for covered foreign investors to use the substantive protections of investment treaties (many of which are similarly worded, if not identical) to resist and seek redress for a wide range of host State acts, including outright expropriations and (more commonly) changes in the laws and regulations applicable to the foreign investor and its investments. In other words, in international investment law, the focus has recently shifted from protecting against expropriation to protecting against *adverse regulation*. It is no coincidence that this shift has occurred at the same time as the more subtle forms of resource nationalism described above have displaced outright expropriation as the primary expression of the phenomenon.

(i) Typical scheme of an investment treaty

Although their terms vary, investment treaties tend to have a relatively uniform scheme. To start with BITs, these are usually short (between seven and twelve pages) and comprised of a series of provisions that establish some or all of the following rules:

(i) Neither contracting state will expropriate, nationalise, or otherwise take over, investments made by nationals of the other contracting state in its territory, unless it does so in accordance with due process of law, for a public purpose, and with the payment of prompt and adequate compensation.

(ii) Each contracting state will treat investors and investments from the other contracting state just as it would treat its own nationals and their investments (the so-called "national treatment" standard).

(iii) Each contracting state will extend to investors from the other contracting state any greater benefit that it grants to an investor from a third country (the "Most Favoured Nation" rule). So, where country A signs a BIT with country B, and later signs a BIT with country C that gives investors from country C more favourable treatment than country A gave investors from country B, investors from country B are entitled to the same treatment as

investors from country C. In practice, Most Favoured Nation clauses can be used to import more favourable provisions from other investment treaties that the respondent host state has entered into.

(iv) Each contracting state will accord investors/investments from the other contracting state 'fair and equitable treatment' (**FET**) and 'full protection and security' (**FPS**), the latter standard being concerned mostly, though not exclusively, with physical protection.[86] As we shall see, FET is probably the most important standard in contemporary Investor-State arbitration.

(v) In the event of a dispute between an investor and either contracting state, or a dispute between the two contracting states, the relevant parties will submit to binding arbitration in accordance with an agreed set of rules (the options often including arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the **ICSID Convention**), which established the International Centre for Settlement of Investment Disputes (**ICSID**), the leading venue for Investor-State arbitration.

Increasingly, these rules are being included in multilateral treaties, including Free Trade Agreements (**FTAs**). While the investment protection provisions of FTAs vary significantly, they are usually not as favourable to the investor as those found in BITs (particularly BITs dating from the early 1990s). For example, some FTAs exclude specific sectors of economic activity from the scope of the treaty (or limit foreign participation in them).[87] It is also relatively common to see carve-outs that immunise the host state against claims for measures enacted in the interests of public health, security and environmental protection.

Finally, it should be noted that some countries have national investment laws that contain provisions similar to an investment treaty. These national laws may include provisions under which the State provides its consent to various forms of

[86]While FPS claims are not usually associated with resource nationalism, there may be situations in which the FPS standard becomes relevant, an example being where local parties attack the foreign investor or its assets in an expression of popular sentiment. For an illustration of an FPS claim, see *Asian Agricultural Products Ltd v Sri Lanka* (ICSID Case No. ARB/87/3). In this case, the ICSID tribunal considered a claim under the Sri Lanka-UK BIT by a foreign investor whose property had been damaged as a result of armed combat between Sri Lankan troops and insurgents. In its decision, the tribunal held that the host state was liable under a FPS provision if the damages suffered were attributable to that State's failure to act with "due diligence". The practical result of this finding is that the foreign investor does not have to prove bad faith by the host state, but simply that the host state failed to take all reasonable measures to protect the foreign investment.

[87]A relevant example for the oil industry is the North American Free Trade Agreement (**NAFTA**). NAFTA Annex 602.3 reserves for the Mexican State activities relating to the exploration, exploitation, refining, processing and pipelining of crude oil, natural gas and basic petrochemicals. Similarly, in terms of their access rules, FTAs are more likely than BITs to include what are known as "denial of benefits" clauses, these being provisions that limit the ability of investors to acquire treaty protection simply by incorporating a company in one of the contracting states, requiring instead that the investor have "substantial business activities" in the state from which it derives its nationality. The ECT contains such a provision.

international arbitration. Examples of national laws that contain arbitration provisions (effectively standing offers to arbitrate foreign investment disputes) include the investment codes of the Central African Republic and Côte d'Ivoire. Where an investor is covered by such a law, it will be able to bring claims against its host state in much the same way as it would if it was relying on a modern investment treaty. In a world where BITs get the most press, these national laws are often overlooked.

(ii) Qualification criteria

In order to qualify for protection under an investment treaty (or the investment chapter of an FTA), a person or company will usually need to satisfy two criteria: first, the person or company will need to satisfy the definition of an "investor" under the treaty; and second, the person or company's interest in the host state will need to satisfy the treaty's definition of an "investment".

The typical definition of an "investor" extends to both nationals of, and companies incorporated in, a contracting state. Nationals of third countries are often able to structure their investments so that they acquire the protection of an investment treaty, a process known variously as "nationality planning".[88] When it makes a treaty claim, in establishing that it qualifies as a national (or covered "investor") under the applicable treaty, the investor must either show its passport or, in the case of a juridical person, proof of its incorporation in the state whose nationality it claims.

The definition of "investment" is usually broad and based on a (normally *inclusive*) list of examples, common items including movable and immovable property, shares and stock and other forms of interest in a company, rightful claims to money or to any performance under a contract having financial value, intellectual property rights and business concessions (such as licenses and permits). The language used to define "investment" in a BIT will often be lifted from the template treaty (or Model BIT) of one of the countries involved, usually the capital exporting state. Multilateral treaties sometimes contain more elaborate "investment" lists, but the language will generally still reflect the BIT-practice of the member states. To use the example of the ASEAN Comprehensive Investment Agreement (**ACIA**), in this multilateral treaty the term "investment" is defined to include "claims to money or to any contractual performance related to a business"[89]; "rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts"[90]; and "business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources".[91] The ACIA

[88]For an overview of the nationality planning process, see M. Skinner, S. Luttrell and C. Miles, 'Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping' (2010) *Journal of World Energy Law and Business* 3.

[89]ACIA Article 4(c)(iv).

[90]ACIA Article 4(c)(v).

[91]ACIA Article 4(c)(vi).

definition of "investment" therefore captures the instruments and interests normally associated with a natural resources project.[92]

In order to determine whether there is an *investment* for the purposes of the treaty, it will be a largely factual question of whether the asset or interest in question is within the class of assets or interests covered by the express words of treaty. This is often relatively straightforward, although in marginal cases it may be necessary for the tribunal to interpret the treaty's definition of "investment" to determine whether the asset or interest is within its scope, and in this process questions of law (treaty interpretation) may arise. However, the legal arguments on whether or not there is a qualifying investment become somewhat more involved when the claim is brought before an ICSID tribunal. This is because, at least historically, ICSID tribunals have tended to require that the claimant investor satisfy certain additional criteria, namely that the relevant investment was for a certain duration of time (i.e. more than a one-off sales transaction); included a regularity of profit and return; entailed an assumption of risk; and made a substantial contribution to the economic development of the host state (good examples being tax payments, technology transfers and local employment). These elements are collectively known as the "*Salini* criteria"[93] and much ink has been spilt on them. Although the *Salini* criteria are more commonly understood as being applicable only in proceedings under the ICSID Convention (and even there, their formulaic application is now somewhat out of fashion), non-ICSID tribunals do sometimes take them into account.[94]

Finally, it should be noted that some treaties impose additional qualification rules, such as a requirement that the investment be admitted or approved in accordance with the host state's foreign investment law.[95] Indonesia's BITs often contain such rules. An example of typical Indonesian language can be found in Article 9 of the Belgium-Indonesia BIT:

> [I]n the territory of the Republic of Indonesia only to investments which have been approved by the Government of the Republic of Indonesia pursuant to the stipulations contained in the Foreign Investment law No. 1 of 1967 or other relevant laws and regulations of the Republic of Indonesia […][96]

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[92]It is important to note that, under this definition, the instruments that underpin the investment may themselves qualify as investments. To put this in a practical context, where the cost recovery rules of a PSC are unilaterally modified by the host state (or the contracting party that represents it in the agreement), the foreign investor may be able to resist or seek compensation for that measure through a claim for indirect expropriation or breach of FET. This is because the PSC itself qualifies as an "investment".

[93]This name comes from the seminal case of *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* (ICSID Case No.ARB/00/4), Decision on Jurisdiction, 23 July 2001.

[94]See for example *Romak SA v The Republic of Uzbekistan*, UNCITRAL (Switzerland-Uzbekistan BIT, PCA Case No. AA280).

[95]See for example the United Kingdom-Indonesia BIT, which requires that the asset or interest must first have been "granted admission in accordance with the [Indonesian] Foreign Capital Investment Law No. 1 of 1967, or any law amending or replacing it".

[96]For an example of more detailed local admission/approval rules, see Article 3 of the UK-Thailand BIT, which provides as follows: "*The benefits of this Agreement shall apply only in cases*

In order to enjoy treaty protection under a treaty like this, the investor will have to satisfy these local law requirements as well as the "investor" and "investment" criteria. In practice, these kinds of local-law admission requirements can provide fertile ground for the host state to resist a treaty claim: it is often relatively easy for the host state to find some imperfection in the paperwork that surrounded the approval of the investment, and then use this is a basis for arguing that the gateway criteria of the treaty are not satisfied. Investors going in under these types of treaty should therefore take steps to ensure that they are properly advised (by local specialists) when they apply for foreign investment approval, and that all of their dealings with the host state (and its responsible agencies) in this phase are properly documented. The case of *Yaung Chi Oo Trading Pte Ltd v Myanmar*[97] shows what can happen where the investor is unable to prove that it satisfied the applicable local admission/approval requirements.

(iii) Substantive protections and standards of treatment

Nearly all investment treaties contain provisions that protect covered investors from expropriation without fair compensation. However, classical expropriations are relatively rare these days. While the reasons for this are complex, certainly one of the factors has been the export of the international rule of law: now that it is clear that the Investor-State arbitration system works, most governments know that they can no longer be so flagrant in their treatment of foreign businesses. Rather, for resource nationalism to be defensible, a more sophisticated, layered approach is required.[98] This is why adverse changes in applicable laws and regulations are the most common form of government action, and the most common cause for complaint in investment treaty actions today.

Generally speaking, such regulatory measures may form the subject of a treaty claim for indirect (or "creeping") expropriation if they can be shown to have

(Footnote 96 continued)
where the investment of capital by the nationals and companies of one Contracting Party in the territory of the other Contracting Party has been specifically approved in writing by the competent authority of the latter Contracting Party. Nationals and companies of either Contracting Party shall be free to apply for such approval in respect of any investment of capital whether made before or after entry into force of this Agreement. When granting approval in respect of any investment, the approving Contracting Party shall be free to lay down appropriate conditions.

[97] *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar* (ASEAN ID Case No. ARB/01/1), Award of 31 March 2003. This was a claim brought under the ASEAN Investment Guarantee Agreement, Article II(3) of which required that the investor obtain the express written approval of the host State before its investment would enjoy the protection of the treaty. The tribunal found that the investment had *not* been specifically approved and registered in writing after the treaty entered into force for Myanmar. The result was that the claimant's interest did not qualify as an "investment" under the treaty, and the tribunal held that it did not have jurisdiction over the merits of the dispute.

[98] While, in some cases, this increase in sophistication has been organic (for example, acquired as a result of the State's experience in defending treaty claims), in many other countries foreign law firms have played a significant role. It is now relatively common for a country to take advice from foreign counsel before it takes measures that fall under the heading of resource nationalism.

destroyed the value of the covered investment. It does not matter that the expropriation was not necessarily for the obvious economic benefit of the host state—what matters is that the measures "*had the effect of depriving the owner, in the whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property*."[99] Similarly, the way the measures are packaged will not usually save them from classification as treaty breaches: in the words of one tribunal, "*the form of the measures of control or interference is less important than the reality of their impact*."[100] However, due to the need to satisfy elements such as causation and substantial loss of value, indirect expropriation claims are often difficult to prosecute. The more effective frame for such measures is as a claim for violation of the FET standard of the treaty. This explains why, in current Investor-State arbitration practice, FET is the most widely invoked standard of treatment. An example of a "garden variety" FET clause is as follows:

> Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.[101]

For lawyers, few words are as laden with possibility as the word "equitable". The open texture of the FET standard means it can be used to capture a fairly wide range of conduct by the host State. For example, the FET standard has been held to include:

(i) the protection of the "basic expectations that were taken into account by the foreign investor to make the investment"[102];
(ii) a requirement that the host State maintain a transparent, stable and predictable legal and regulatory environment for the investment; and
(iii) a requirement that the host State refrain from treating the investor or its investments in a manner that is discriminatory, arbitrary, or unfair.

In current ISA practice, "legitimate expectations" are the dominant element of the FET standard.[103] To use a simple example, if a mining company invests in a project that is next to a forest reserve, and prior to the making of the investment the

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[99]*Metalclad Corporation v United States of Mexico* (ICSID Case No. ARB (AF)/97/1), Final Award, 30 August 2000, paragraph 103.

[100]*Tippets, Abbet, McCarthy & Stratton v TAMS-AFFA Consulting Engineers of Iran and the Islamic Republic of Iran* (Iran-United States Claims Tribunal, 1983), IUSCTR 219, 216.

[101]This example is drawn from Article 3(2) of the United Kingdom-India BIT.

[102]*Técnicas Medioambientales Tecmed SA v The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Mexico-Spain BIT, Award, 29 May 2003, paragraph 154 (***Tecmed***). In recent years, the *Tecmed* decision has been criticised for what what some have seen as its overly expansive approach to legitimate expectations. Many arbitrators see the 2006 award in *Saluka v Czech Republic* as the better authority where legitimate expectations are concerned. See *Saluka Investments BV v Czech Republic*, UNCITRAL/PCA (Netherlands-Czechoslovakia BIT), Partial Award, 17 March 2006.

[103]Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours" (2014) 12 *Santa Clara Journal of International Law*, 1, 7.

host State represents that the forest reserve will not expand to take in the miner's tenement, then the miner will arguably have a corresponding legitimate expectation that it can enforce through the FET provision of the treaty under which it invested. So FET, especially when run in conjunction with a claim for indirect expropriation, tends to provide the most effective means for responding to regulatory forms of resource nationalism.

On the other hand, the host state is far from defenceless against such claims: those who have litigated against States know that it would be a mistake to underestimate the arsenal of defences available to the sovereign under international law (which includes various forms of immunity, including immunity execution of the arbitral award as a last resort). For example, as long as the treaty claim relates to a measure that is *bona fide* and non-discriminatory, the host state tends to have a reasonable chance of successfully defending against an expropriation claim. There is a wealth of authority for the proposition that a State may lawfully expropriate foreign investments which are necessary to safeguard an essential interest against a grave or imminent threat. As to whether the State must still pay compensation even where it successfully invokes the necessity defence/exception, there are authorities going both ways (*CMS v Argentina*[104] being a well-known authority *for* the obligation to compensate notwithstanding necessity, and *LG&E v Argentina*[105] being authority *against*). Similarly, where the State faces a claim for violation of FET, there is a stream of jurisprudence on which it can rely to raise the bar in its favour (for example, the State may argue that the test for a violation of FET is whether the conduct in question was 'egregious and shocking'—an obviously higher threshold for the claimant investor to clear).

Significantly, these and other relevant defences are now being written into the treaties themselves. We see this in multilateral contexts especially, where states are pushing for more sophisticated, balanced rules than those normally found in BITs. For instance, it is not uncommon for FTAs to contain special rules for the qualification of a state measure as an act of expropriation. The ASEAN-Australia-New Zealand Free Trade Agreement (**AANZFTA**) is one such treaty. The investment chapter of AANZFTA contains an Annex on Expropriation and Compensation. Paragraph 2(b) of this annex clarifies that the expropriation provision includes situations "*where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure*." This is indirect expropriation. However, paragraph 4 of the annex provides:

> [n]on-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b).

[104] *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/08), Award of 12 May 2005).

[105] *LG&E Energy Corp & Ors v Argentine Republic* (ICSID Case No. ARB/02/1), Award of 3 October 2006.

While it may be possible for the investor to manage the impact of the less favourable provisions of an FTA through arguments based on the "Most Favoured Nation" rule, the specific rules of the treaty carry significant weight with arbitrators.[106]

(iv) **Practical impact of treaty coverage**

How then does investment treaty protection impact on a project? First and foremost, at the planning and financing stages of the project, where an investment is covered by a trade or investment treaty, sovereign risk is reduced. Because the investment has lower risk, it is easier to sell to banks, and this means that the finance costs of the project will (or *should*) be lower. While the precise finance-cost reduction that the investor enjoys will vary depending on a range of factors (including the scale of the project and the sovereign risk profile of the host state involved), having treaty coverage at least puts the investor in a good position to *negotiate* with its lenders for lower rates. It might take specialist lawyers to get the point across, but top-tier lenders (or at least their counsel) tend to know enough about the treaty system to understand the benefits it offers.

Similarly, where the investment is treaty-covered, the need to take out sovereign risk insurance is reduced. The investor may, for example, insure the project for a limited period (or up to a limited value) and, with the comfort of enforceable treaty protection, manage the balance of the risk itself. In so doing, the costs of insuring the investment are reduced, and sometimes eliminated outright (although the ideal combination is to have both sovereign risk cover and treaty protection).

In the operational phase of a project, the benefits of treaty protection may be realised in different ways. Certainly, if the asset is seized or nationalised, the investor will have a treaty claim. But, as has been noted, direct expropriations of this kind are relatively rare these days. Rather, as has been observed above, the more common scenario is one in which the investment is subjected to adverse changes in the law and regulations applicable to its activities in the host state, and these measures impact on the project economics in a way that causes the investor to suffer loss. The host state may also take steps that interfere with the terms of the contracts that underpin the investment or govern the foreign investor's participation in the relevant project, as we have seen in a number of the oil-related case studies above. In these situations, the investor may be able to resist the relevant measures, or claim compensation for the losses they have caused it to suffer, through an FET

[106] Although their substantive provisions are often less "investor friendly" than a BIT, FTAs (and multilateral *investment* treaties) do offer certain advantages. In particular, FTAs tend to produce more durable, balanced trade relationships than BITs. As such, for long term investments such as those often made by resources companies, FTAs may provide more reliable project coverage. Recently, this point has been brought into focus by Indonesia's decision not to renew its BIT with the Netherlands, and reports that it intends to terminate all of its other BITs (Indonesia is yet to confirm this, or take any further action). While the termination of a BIT implicates the host state's relations with only one country, withdrawal from an FTA implicates the host state's standing and trade relations with an entire bloc of nations.

claim. Where the value of the project has been substantially reduced (or destroyed) by the measures, the investor may also have a claim for indirect expropriation.

In all of these situations, the main practical impact is that the investor will be able to initiate the dispute resolution process under the applicable treaty and, if negotiations fail, commence the Investor-State arbitration process.

11.6 Investor-State Arbitration

Almost all investment treaties contain dispute resolution clauses, and most of these allow the parties or their citizens (whether natural persons or corporations) to commence arbitration in the event of a breach of their treaty rights. These Investor-State Arbitration provisions are critical because they allow the investor to enforce its treaty rights directly against its host state, in a neutral forum that the state does not control, without the need for diplomatic protection. In other words, Investor-State arbitration provisions are what give investment treaties "teeth".

(i) **The arbitration process**

Investor-State arbitration proceedings usually take place before a tribunal of three arbitrators, one appointed by the claimant investor, one appointed by the respondent state, and the third (presiding) arbitrator appointed by either the agreement of the parties (or their arbitrators) or, failing that, a neutral appointing authority. The right of each party to appoint an arbitrator of its choice is a key feature of the Investor-State arbitration system, and one from which investors and states alike derive confidence.

The most important international agreement for the law and practice of Investor-State arbitration is the ICSID Convention, which governs proceedings at ICSID. ICSID is a creation of the World Bank, headquartered in Washington DC. At least in contrast to other forms of Investor-State arbitration, ICSID is relatively well known because ICSID awards are often published and general information on cases is put up on the ICSID website. However, only parties from ICSID Convention member states may resort to ICSID arbitration, and only against other ICSID Convention member states. In ICSID arbitration, the main phases of the proceedings are as follows:

(i) Commencement: this is done by filing what is known as a "Request for Arbitration" (**RFA**) with ICSID. This can be a very short document (normally between 10 and 20 pages). The RFA's purpose is largely informational: it identifies the parties, briefly sets out the background to the dispute, explains why ICSID has jurisdiction over the dispute and (on a preliminary basis) says what relief the claimant seeks (which the claimant can subsequently change or expand). As soon as the RFA is received by ICSID, a copy will be dispatched to the respondent state through the diplomatic channels of the ICSID Secretariat. ICSID will then conduct a cursory examination of the RFA and,

provided the basic elements of jurisdiction are not *manifestly lacking*, ICSID will register the case.

(ii) Formation of the Tribunal: ICSID tribunals are typically made up of three arbitrators. If, after 90 days from the date of registration of the RFA, one or more arbitrators remain to be appointed, either party may ask ICSID to appoint the missing arbitrator. It is not unusual for the constitution process to take more than three months. Once all three arbitrators are appointed, the ICSID tribunal is deemed "constituted", meaning that it takes over the conduct of the arbitration (and from that point, the role played by the ICSID secretariat is largely administrative).

(iii) Jurisdiction: in order for the ICSID tribunal to be able to move on to hear and decide the investor's substantive claims, it must first have jurisdiction over the dispute. When a jurisdictional objection is made by the respondent state, the arbitration will often be split (or "bifurcated") such that the issue of jurisdiction is heard and determined in a preliminary phase. There will then be written and oral phases: the written phase will involve the State filing a detailed statement of the grounds on which it objects to jurisdiction, a detailed reply from the claimant investor, and possibly a further round of (shorter) replies from both sides. The oral phase will usually involve a hearing.[107] Although legal experts are sometimes used to provide opinions on fine issues of jurisdiction, the jurisdictional phase does not usually involve much witness evidence on factual matters.

(iv) Merits: assuming jurisdiction is established, the tribunal will move on to the merits phase of the proceedings. This is where the substantive claims and defences are presented by the parties, and determined by the tribunal. In circumstances where the monetary claim is large, the tribunal may split this phase into liability and quantum (such that complex arguments on things like the value of the affected investment are deferred until the State's liability to pay compensation has been established).[108]

The ICSID Convention contains its own "appeal" mechanism, in which the award may be submitted to an ICSID Annulment Committee for (limited) review. Under Article 52 of the ICSID Convention, the grounds upon which a party may request annulment are:

(a) that the tribunal was not properly constituted;
(b) that the tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the tribunal;

[107]In ICSID arbitration, the tribunal has no national seat, meaning national courts do not control or supervise the proceedings; rather, the arbitration takes place on the plane of international law (governed by the ICSID Convention and public international law). The parties can agree to hold the hearing anywhere, but in the absence of any agreement to the contrary, the venue of the hearings will be Washington DC.

[108]In non-ICSID arbitration, this review function is usually performed by the courts of the seat, which will normally be the state in which the arbitration was conducted.

(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

As a rule, these grounds of appeal are strictly construed, such that the party requesting annulment will usually have a difficult task on its hands

(ii) Enforcement of arbitral awards

The ICSID Convention contains a favourable enforcement framework. However, not all counties are signatories to the ICSID Convention (notable examples of non-ICSID states include India and Vietnam). For investment treaty claims against non-ICSID states, other arbitration mechanisms will need to be used. Typically, the treaty options will include ad hoc arbitration in accordance with the arbitration rules of the UN Commission on International Trade Law (**UNCITRAL**), and arbitration at a recognised international institution (such as the ICC in Paris, or the SCC in Stockholm, the latter being most common in treaties involving Communist or former-Communist countries). In such cases, the jurisdictional and merits phases of the proceedings are much like they are in ICSID arbitration.

While a full comparison is a matter for another day, probably the main differences between ICSID and other forms of Investor-State arbitration are that, in a non-ICSID arbitration (be it ad hoc or institutional), the national courts of the seat play a supervisory role (minimal intervention being the norm), and the enforcement framework is that of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the **New York Convention**), the treaty that applies to the enforcement of awards rendered in international commercial arbitration generally. In contrast to ICSID proceedings, ad hoc arbitration does offer certain advantages. For one, ad hoc proceedings can be private and fully confidential (although UNCITRAL has recently introduced new rules for transparency); also, there are good arguments that the *Salini* criteria do not apply to ad hoc claims, and so "borderline" investments (such as short-term contracts) are sometimes seen as better suited to non-ICSID arbitration.

At present, the New York Convention has 149 member states; over 150 states have signed and ratified the ICSID Convention. The Investor-State arbitration system therefore includes the overwhelming majority of the community of nations. One of the great advantages of the Investor-State arbitration system is that a successful claimant does not need to enforce the award in the territory of the host state. The two main enforcement treaties allow an award-creditor to enforce against the state debtor anywhere it has assets, subject to the ability of the award-creditor to overcome any defences of sovereign immunity that the state may raise (in accordance with the local law of the state in which enforcement is sought). This strategy of pursuing enforcement against host state assets in other countries is sometimes referred to as "Hot Oil Litigation", an expression that comes from the satellite actions brought following the Libyan nationalisation cases discussed above. It should be stressed however that resort to these formal enforcement mechanisms is

by no means the norm. States tend to respect arbitral awards. This is because in most cases the economic costs of disobedience are higher than compliance. When a state flouts an ICSID award, its ability to access World Bank funding may be restricted (or at least its standing as a World Bank borrower will be adversely impacted). Even in non-ICSID contexts, disobedience of the award will impact on the state's sovereign risk rating, which will in turn increase its borrowing costs.

11.7 Conclusion

Resource nationalism has changed a great deal since the heady days of the Russian revolution. Where politics used to be the main driver, the causes of the phenomenon are increasingly social and economic. Similarly, the phenomenon itself is more diverse in its expressions. While they certainly still occur, outright takings of foreign property are now the exception, rather than the rule. Governments today are more likely to pay at least lip service to the rule of law, and execute resource nationalist policies in legislative—rather than executive—form. But, as the risk has evolved, so have the means of managing it. Although the mechanism of diplomatic protection remains in place, modern international businesses have other cards to play, the highest of these being direct action under an investment treaty. Twentieth century experience also shows that, outside the legal realm, energy and resources companies have two other things they can use as leverage against their host states: capital and technology. While these may not stop the doors closing, in the end, the need for foreign capital and technology will surely see them reopen.

In order to maximise the protections and advantages that the global web of trade and investment treaties offers, planning is required. While investors will often be able to structure their investments in a way that places them under an investment treaty, this must be done in advance, and at least before a dispute with the host state arises. And the game is changing. The political tide is, at least in some places, turning against investment treaties, particularly BITs. The emerging preference of trading nations is for the conclusion of multilateral agreements that give governments more room to move in their relations with foreign investors. It is no coincidence that resource nationalism is on the rise at the same time. While there are likely to be many BITs in force for many years to come, the days of bilateral treaties being the instruments of choice may soon be behind us. Companies making long-term natural resources investments would be well advised to consider structuring their interests so that they enjoy the protection of multilateral treaties, as these instruments are likely to provide a more durable means by which the cyclical risk of resource nationalism can be managed.

Chapter 12
Mining Projects in OHADA: The Legal and Judicial Climate

Bruno Zeller

Abstract This chapter addresses the importance of engaging with the OHADA group of nations with a view to invest in mining projects. The question of risk and protection of the investment is an important issue and hence knowledge of the legal landscape is important. OHADA, formally created in 1993, introduced nine uniform Acts which override domestic legislation. This chapter investigates the role played by arbitration in the resolution of disputes. Three documents govern any arbitration in the OHADA group of nations. First the OHADA Treaty, secondly the Uniform Act on Arbitration adopted in 1999 which deals with ad hoc arbitrations (UAA). Thirdly, the Arbitration Rules of the Common Court of Justice and Arbitration (CCJA) (Arbitration Rules) which are institutional rules. Furthermore, in some States but not all, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is also applicable. The author concludes that OHADA offers a moderately predictable legal system. This chapter argues that an institutional arbitration under the CCJA offers the least problems and ought to be the preferred option when writing a contract with an OHADA business partner.

12.1 Introduction

It is well known that Africa offers immense opportunities for direct investments into the mining sector. The problem in many African States is that there is an uncertain legal and judicial system in place as well as the presence of political uncertainties. However, it is recognised that West Africa has an untapped mineral wealth and the question which needs to be asked is whether Australian miners can afford to stay out of the "investment race" in Africa. Price waterhouse Coopers, in their 2012 outlook noted that "we expect that Africa will increasingly become a more viable M&A geography with growth market buyers in particular, driving substantial

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acquisition volumes."[1] Africa has been the focus of many Chinese companies. It appears that Chinese buyers are looking beyond mere mining projects and are offering packaged investment projects. The IMF noted:

> Normally in packaged projects, the natural resource part is equity financed by Chinese entities as Foreign Direct Investment (FDI) and their infrastructure part is debt-financed usually by the Import-Export Bank of China (EXIM Bank) on concessional terms. … In many cases, packaging can help Sub-Saharan African Countries to export natural resources to China. Indeed there is quantitative evidence that FDI and economic cooperation often go hand in hand and higher FDI from China is associated with greater concentration of exports to China.[2]

This fact, of course, does not help Australian miners exporting Australian minerals to China. It is argued that African mining investments are to be looked at seriously as from a company's point of view it does not matter whether minerals are exported to China from Australia or Africa as long as the Australian miner remains competitive.

The question remains what risk is acceptable and what is the investment climate in the chosen African state. Importantly, high commodity prices, investor competition from China and less policy pressure from donors helped to shift the negotiations leverage to African Governments.[3]

> Now as the concept of State Capitalism takes hold across the world, African governments are keen to increase their participation in mining projects, typically through parastratals [and] the days of 80+% ownership and near total control over corporate governance for multinational in Africa may be coming to an end.[4]

The result is that profits need to be shared and ventures might not be as profitable as before and hence will affect the risk/cost ratio. This is important as it is well known that in the resources sector the investment protection rationale is different to other sectors of the economy. In the resource seeking phase the bargaining power between the State and the miner arguably is equal. However, once established, the bargaining strength shifts to the State; the costs are sunk and have no alternative value. The State always has an opportunity to renege on its commitments as seen in the recent China-Libya example.

Therefore, the question is: in which region is the protection of investments acceptable taking note of the political, legal and judicial systems in place? This paper will argue that the West and Central African nations not only have untapped mineral wealth; they also offer a relatively cohesive legal system. This is possible as 16[5] mostly French speaking nations created the Organisation for the Harmonisation

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[1]On The Road again? Global Mining 2011 Deals Review and 2012 Outlook, PwC March 2012, at 3. [www.pwc.com/ca/miningdeals].

[2]IMF Working Paper "FDI from BRICs to LICs: Emerging Growth Driver?" Mlachilla Montford, Takebe, Misa, July 2011.

[3]Divya Reddy, Eurasian Group in On the Road again, above n 1, 41.

[4]Ibid.

[5]The Democratic Republic of Congo is seeking admission.

of Business Law in Africa (OHADA) and introduced supranational uniform laws.[6] It must be noted that pursuant to article 42 of the OHADA Treaty[7] French is the working language and all documents presented to any court must be in French.[8]

Before analysing the legal landscape it is worth remembering the economic issues in relation to mineral deposits. The available 2010 data indicates the importance of OHADA. As an example, the Gold output was one quarter of the total African output and 5 % of total world production. The projected OHADA output for 2017 is one third of the total African output. Most importantly, gold output will double between 2010 and 2017.[9] The data presented by the U.S. Geological Survey indicates furthermore that most commodities follow this trend.[10]

12.2 OHADA: The Legal Landscape

When investing in another country the discussion always turns to the question of how the investment is protected against the host governments raising their demands, or at worst expropriating the investment. Any investment disputes can only be resolved through two avenues. The first option is to enliven the dispute resolution clause in a Bilateral Investment Treaty (BIT) or a Free Trade Agreement (FTA) between Australia and the host State. This avenue allows the investor to retain a degree of bargaining power as it allows "protected entities to bargain in the shadow of the law".[11]

The second avenue—and generally absent the first option—is that an aggrieved investor has to rely on the domestic laws of the host state. Hence both options are discussed below with reference to the OHADA only.

12.2.1 Bilateral Treaties

This avenue is blocked as the Australian Government has not entered into any BIT's or FTA's with any of the OHADA nations, nor any African State for that matter. Even if the Governments would enter into an agreement in future it would

[6]Bissau-Guinea is Portuguese speaking, Equatorial-Guinea, Spanish and Cameron speaks French and English.

[7](OHADA stands for: *Organisation pour Harmonisation en Afrique du Droit des Affaires*).

[8]Article 31 UAA.

[9]2010 Mineral Yearbook Africa [Advanced Release] USGS, U.S. Department of the Interior and U.S. Geological Survey, August 2012.

[10]Ibid.

[11]Kurtz, J., Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication. *ICSID Review,* Vol 27, No 1, 65, 69.

not currently include investor-State dispute resolution procedures. The Gillard Government in April 2011 on the advice of the Productivity Commission announced this shift of policy.[12] The advice was given to the government despite the Commission recording the steep growth of overseas investments by the Australian mining sector from 2001 to 2008.[13] The Commission though noted that in the alternative political risk insurance offered by government and other providers will act as a tool to mitigate the risk of loss to investments and importantly underlying market conditions will drive the flow of investments.[14] In sum, the only avenue is to rely on the domestic law of the host country.

12.2.2 Domestic Legal Landscape

OHADA was formally created in 1993 with the signature of the Port-Louis Treaty in 1993. The idea was generated by the political will to strengthen the legal system which was driven by the aim to harmonise business laws of the signatory states and to establish common rules which are simple, modern and are adaptable to be introduced in all Member States.[15] Indeed the preamble to the Treaty states the aim as:

> making progress toward African unity and creating a climate of trust in economic systems of the contracting States with a view to creating a new centre of development in Africa.[16]

In 2008[17] the original treaty was amended by the Treaty of Quebec and came into force in 2010.

The meeting in Québec aimed to reinforce the OHADA and to perpetuate its actions by improving its institutions and its financing. The three issues discussed during the meeting were:

(i) the treaty amendment of the OHADA Treaty;
(ii) the "Arrangements of N'Djamena[18]"; and
(iii) the financing of the OHADA.

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[12]Australian Government, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* 14 (April 2011).

[13]Productivity Commission, *Research Report: Bilateral and Regional Trade Agreements*. (November 2010) at 33.

[14]ibid 240.

[15]Keba Mbaye, L'Histoire et les objectifs de l'OHADA, Petites affiches, 4 (n 205, 13 Octobre 2004) at 4.

[16]Preamble of the Treaty of 1993.

[17]October 17, the meeting took place in Quebec.

[18]The meeting in Quebec terminated the transitional arrangement signed in N'Djamena.

At the end of the meeting, the heads of state and of governments had:

(i) adopted the Treaty of Quebec bearing the amendment to the OHADA Treaty;
(ii) decided to put an end to the transitional measures defined by the "Arrangements of N'Djamena"; and
(iii) charged the ministers of finance of each of the Member States to take all of the necessary measures for the effective application, as of January 1, 2009, of the mechanism of independent financing of the OHADA pursuant to *Regulation N°002/2003/CM dated October 18, 2003 relating to the mechanism of independent financing of the OHADA*.[19]

It is beyond doubt that the ensuing Uniform Acts are the core of the OHADA project.[20] As of today nine Uniform Acts have been introduced and adopted by the Council of Ministers, namely:

Uniform Act on General Commercial Law
Uniform Act on Commercial Companies and Economic Interest Groups
Uniform Act on Securities
Uniform Act on Collective Proceedings for the Clearing of Debts
Uniform Act on Simplified Recovery Procedures and enforcement Measures
Uniform Act on Accounting for companies' private Account and also for combined and consolidated accounts
Uniform Act on Arbitration
Uniform Act on Contracts for the Carriage of Goods by Road
Uniform Act on Cooperatives.[21]

The Uniform Acts are directly applicable and override domestic laws of the individual countries.[22]

It should also be noted that OHADA regulations sit on top of an already complex set of regional organisations forming other cooperative law initiatives to which OHADA adheres to.[23] These grouping are not always composed of all the OHADA states as individual states can form their own alliances. As an example, the West African Economic and Monetary union (UEMOA) has six of the OHADA group of nations as members and the Economic Community of West African States (ECOWAS) is comprised of nine OHADA states and six non OHADFA members. As one would suspect, the regulatory power of all the organisations can easily

[19]http://www.blakes.com/english/view.asp?ID=2828.

[20]Beauchard, R. and Vital Kodo, M.J., Can OHADA increase Legal Certainty in Africa? Justice and Development Working Paper (2010) the World Bank 15.

[21]Martor, B., et al., Business Law in Africa: OHADA and the Harmonisation process. 16 (2nd ed GMB Publishing Ltd.,) 2007.

[22]Article 10 of the OHADA Treaty adopted at Quebec 2008/10/17.

[23]Beauchard, R. and Vital Kodo, M.J. above n 20, 13.

overlap if not directly being in conflict especially if OHADA extends its reach of Uniform Acts.[24]

12.3 Governing Bodies

As the Uniform Acts are supranational in character, specialised bodies need to be put in place. The main institutions are the Permanent Secretary located in Cameron, the Regional School for training of lawyers and judges in Benin (Porto-Novo) and the Common Court of Justice and Arbitration (CCJA). This court is the key institution and is situated in Abidjan, Ivory Coast and has a dual function.[25] It is a supranational court as well as an arbitration institution.[26] It serves as a court of appeal and is tasked with achieving uniform judicial interpretations of the treaty and uniform acts. Its second task is to serve as a forum for international arbitration and a court of last resort for judgements and arbitral awards rendered within Member States.[27]

Litigation concerning the interpretation and enforcement of uniform laws including the arbitration act are settled in the 'first instance and on appeal within the courts and tribunals of the Contracting States.'[28]

However, Article 14 of the revised version notes that:

> The Common Court of Justice and Arbitration is responsible for the uniform interpretation and uniform application of the Treaty, of the regulations promulgated to further the Treaty's implementation, of the Uniform Acts, and of other actions.
>
> The Court may be consulted by any Contracting Party, or by the Council of Ministers, on any question within the scope of the prior paragraph. The same ability to request consultative advice from the Court shall belong to national courts hearing a case pursuant to Article 13, above.[29]

It has been argued that the creation of a supranational court "avoids the risk of conflicting interpretations of Uniform Acts as well as the regulations passed for the application of the Uniform Acts by the supreme courts of the various Member States."[30] However, in practice, the separation and authority of judicial power between State courts and the CCJA is not always in accordance with the stated principles set out in the relevant legal documents.

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[24]Ibid 14.

[25]Kodo, J., Harmonisation of Business law: the experience of Africa. In Andenas & Andersen, (eds) Theory and Practice of Harmonisation, Elgar Publishing (2011), 252.

[26]Onyema, E., Arbitration under the OHADA regime. (2008) International Arbitration Law Review, 206.

[27]Beauchard, R. and Vital Kodo, M.J. above n 20, 11.

[28]Article13 above n 12.

[29]Article 14 revised article.

[30]Martor, B., et al. above n 21, 9.

The aim to harmonise business law in OHADA is further strengthened by the creation of the Regional Training Centre for Legal Officers (ERSUMA).[31] The role of ERSUMA is to train the judges and court employees on OHADA legislation and structure in order to harmonize the justice administration in all member states.[32]

12.4 The Arbitration Landscape

Three documents govern any arbitration in the OHADA group of nations. First the OHADA Treaty, secondly the Uniform Act on Arbitration adopted in 1999 which deals with ad hoc arbitrations (UAA). Thirdly, the Arbitration Rules of the CCJA (Arbitration Rules) which are institutional rules. Furthermore, in some States but not all, the New York Convention is also applicable.[33] In all other states, enforcement and recognition is subject to the relevant applicable arbitration law. However, Article 34 of the UAA notes that:

> Awards made on the basis of rules different from those provided by this Uniform Act shall be recognised as binding within the member States under the conditions provided by international agreements possibly applicable and failing which, under the same conditions as those provided in this Uniform Act.

The first point to make is that all the arbitration laws are based and take their authority from Treaty law. Hence, pursuant to Article 14 of the Treaty law the CCJA is charged with the interpretation of all Treaty law. As such courts in member states are tied to the CCJA if there is a dispute as to the interpretation of an arbitration issue which has its source in the OHADA Treaty.

The OHADA Treaty devotes Title IV to Arbitration. The Treaty rules provide for institutional arbitration under the auspices of the CCJA. Articles 22 and 24 deal exhaustively with the duties of arbitrators, including their appointment, replacement and challenges as to their suitability. An important point to note is that Article 24 states that any award rendered by arbitrators must be submitted to the CCJA "which may suggest any formal amendments to such a decision."[34] The issue is that the court has an oversight over arbitrations and pursuant to Article 14 of the Treaty also has an appellate jurisdiction in litigated cases. Arguably the role of the court not only in arbitral matters but also in litigation could suggest that a methodological cross over between arbitration and litigation can influence the utility of arbitration.

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[31]Ibid 12.

[32]Rudahindwa, J., International Commercial Arbitration in Africa: The Organisation for Harmonisation of Business Law in Africa (OHADA) sets the tone. Master of Law Thesis, Indiana University of Law, 12.

[33]They are Benin, Burkina Faso, Cameroon, Central African Republic, Gabon, Guinea, Mali, Niger and Senegal.

[34]Article 24 of the Treaty.

Given the CCJA has the authority not only to check arbitral awards but also to conduct arbitrations, the Treaty and the Arbitration Rules must be read together. This is because the Treaty document defines the functions not only of the CCJA but also includes rules as to the conduct of arbitration. This interrelationship of rules is clearly defined in Article 1 of the Arbitration Rules which notes that the court "shall perform the functions of administering arbitration with the domain devolved upon it by article 21 of the Treaty under the conditions hereafter defined."[35]

Article 21 of the Treaty defines the applicability of the right to arbitrate in the OHADA countries. It notes that the arbitration clauses or out of court settlements can be enlivened by any "party to a contract … either because it has its domicile or its usual residence in one of the Contracting States, or if the contract is enforced or to be enforced in its entirety or partially in the territory of one or several contracting States." It is clear that this is a standard clause pointing to the fact that the forum in essence needs to be in any contracting states in order to rely on the OHADA arbitral regime whether the foreign country initiates arbitration or an aggrieved OHADA party.

However, the Treaty in Article 21 stipulates further that the CCJA does not itself settle disagreements but takes over the naming and confirmation of arbitrators, needs to be informed of the progress of the arbitration and, as noted above, examines the decisions of the arbitrators.[36] This is in line with requirements of institutional arbitration. The difference with any other institutional arbitration as an example with the ACICA rules is that the secretariat is a court and not a private organisation removed from the court system.

The UAA as noted above supplies the basic rules in ad hoc arbitrations. The act is influenced by the UNCITRAL Model Law on International Commercial Arbitration. Furthermore the UAA superseded the existing national laws but is subject to the provisions of national laws which do not conflict with the UAA.[37] Simply stated, it is subject to the Treaty law which influences rules contained within the UAA. As an example, Article 25 of the UAA notes that an award is final but "the decision of the competent judge in a member State can only be set aside by the Common Court of Justice and Arbitration."

As briefly indicated there are legislative differences in ad hoc versus institutional arbitration and the OHADA rules are no exception in this regard.

12.5 Arbitration Under the UAA

As noted above, the UAA relies heavily on the UNCITRAL Model Law and hence there are no great divergences between the two documents. All the important points such as arbitrability, selection and challenges of arbitrators, the power of the

[35]Article 1.1, Arbitration rules.

[36]Article 21 of the Treaty.

[37]CCJA decision 001/2001/EP, 30 April 2001.

arbitrators and the question of the selection of the substantive law to mention a few are basically the same as in the UNCITRAL Model Law. However, variations do exist specifically in the area of enforcement of arbitral awards.

To start with, Article 1 states that "the UAA applies to any arbitration when the seat of the Arbitral Tribunal is in one of the Member States" and, secondly, arbitration is invoked by either a natural person or a corporate body.[38] It is obvious—and follows other legal traditions—the domestic law that is the UAA applies to both ad hoc and institutional arbitration and takes on the role as a gap filler. Furthermore, Article 2 makes it clear that the UAA does not make any distinction between domestic and international arbitration.

As far as arbitrability is concerned the OHADA Treaty in Article 2 gives a very broad definition of what constitutes matters dealt with under "Business law regulations" and hence arguably the definition would cover all investment and commercial transactions.[39]

Despite the fact that arbitration takes place with court supervision there is nevertheless a clear indication that judges and arbitrators are not co-equals as each enjoys exclusive jurisdiction over his own sphere of authority.[40] It is interesting to note that Article 24 gives the arbitrator power to "grant provisional enforcement of the award." This must be read liberally as indicating that the arbitrator can give the party the right to enforce an award but the enforcement in the end lies with the courts as arbitrators generally lack coercive power; it rests within the domain of competent judges.

It is also worth noting that Article 23 suggests that once an award is made, it prevents the case to be reopened unless pursuant to Article 26 a petition for nullity has been upheld by the courts. Arguably, therefore, the courts are bound to enforce arbitration agreements subject of course to the exception listed in Article 23.

In order to enforce an award the OHADA rules vary from the UNCITRAL procedural rules. Pursuant to Article 30 it can only be enforced by a written authority (*exequatur*) issued by the competent judge in the member State. The point is that a judge needs to sight the original award accompanied by the arbitration agreement.[41] A judge can only refuse to issue a written authority to enforce the award if the award is manifestly contrary to international public policy of the member States.[42] The issue is that legislation includes public policy of States and not a State. The conclusion is that it is basically impossible to refuse enforcement as public policy applicable to all OHADA countries must be so wide that it is hard to define and importantly difficult to implement. However, it can also be argued that a judge in a member State will look at his own public policy and refuse to sign the

[38]Article 2 UAA.

[39]Onyema, above n 26, 210.

[40]Ibid 212.

[41]Article 31 CAA.

[42]Article 31 UAA.

relevant authority. The safety valve however is contained in Article 32 which notes that a refusal can be set aside by the CCJA. Furthermore, as far as enforcement is concerned the UAA provides only the default rule.

12.6 Appeals to the CCJA

The issue is how does a party who had their enforcement blocked appeal to the CCJA? It must be noted that this section does not apply to institutional arbitration as only the CCJA has the authority to suggest formal amendments to decisions reached by arbitrators pursuant to Article 24 of the Treaty.

Two situations potentially need to be looked at. First the issue is simply a breach or non-compliance of a rule contained within the UAA or, secondly, the issue relates to the regulations contained with the Treaty.

In the original Treaty the category of people who might apply to the CCJA was restricted to any "Contracting State or by the Council of Ministers"[43] on questions relating to the application of the Uniform Act. The fact was that no individual could approach directly the CCJA. However, as a preliminary question individuals and legal entities could request that the court seized with the merits could refer the matter to the CCJA.[44] The parties however have no recourse if the original state court does not refer the matter to the CCJA and

> I know from experience that, faced with such a situation, trying to reach the CCJA through the Minister of Justice is fruitless, as, according to the Minister, 'consulting the CCJA is useless as the country has enough legal professionals to deal with this interpretation issue.[45]

Article 14 was amended by the Quebec version of the Treaty. The "Contracting State" was changed to "Contracting Party" and a new sentence was added, namely "The same ability to request consultative advice from the Court shall belong to national courts hearing a case"[46] The question is of course whether a change from "State" to "Party" has widened the category of people being able to access the CCJA. With the addition of the inclusion of state courts as a separate category, it can be argued that "Party" must include contracting parties; hence a plaintiff should arguably be able to appeal directly to the CCJA.

The second incident is when only the application of rules contained within the UAA are in dispute. The important article in that respect is Article 32 which notes that if a court refuses to issue a written authority to enforce the award it can only be set aside by the CCJA. Nothing in the UAA however indicates who can access the CCJA. It is of interest to observe that Article 32 also states that "the ruling granting

[43]Original Version OHADA Treaty article 14.

[44]Negre, C. Legal Uncertainty is an obstacle to the efficiency of OHADA law, International Business Law Journal, 2008, 6, 757, 758.

[45]Ibid 758.

[46]Article 14 Quebec version.

the exequatur is not subject to any recourse." It suggests at first reading that the person enforcing the award can appeal however the other party has no such recourse as the decision is final.

It is still questionable whether recourse to CCJA is automatic or requires recourse to the treaty. It is argued that this is not the case as all relevant articles of the UAA such as Article 31 combined with Article 32 clarify this point. Article 31 notes:

> Recognition and exequatur of the award presupposes the fact that the party wishing to rely on it shall establish the existence of the award.[47]

Therefore, it is a logical conclusion that the party who had the issue of the authority rejected can appeal directly to the CCJA pursuant to Article 32.

In addition, some authors[48] have suggested that the UAA contains mandatory language as the word "shall" appears in many articles. From that point of view it can be argued that any ad hoc arbitration is best undertaken with the UAA in mind and not any other institutional rules in order to avoid the question of which articles are mandatory.

Article 10, however, does allow parties to choose the rules of arbitration and therefore opens the possibility to opt for the rules of a named institution.[49] Article 14 also notes that parties may determine the arbitration procedure and "may subject this procedure to a procedural law of their choice"[50] It can therefore be argued that the mandatory rules of the UAA are applicable in the first instance and the chosen rules of the parties merely fill the gap.

12.7 Arbitration Under the CCJA

As an initial observation and to put the arbitration work of the CCJA into context, it is useful to mention that in 9 years from 2001 to 2010, 8.4 % of the overall decisions rendered by the CCJA affected arbitrations.[51] It can be argued that arbitration is not insignificant and, hence, worthy of consideration.

The OHADA Treaty in Title IV establishes the framework for arbitration in general but specifically in relation to institutional arbitration. In Article 21 the Treaty, as noted above, points out that the CCJA is the body charged with functions pertaining to arbitration but notes that the court does not itself adjudicate disputes but is charged with naming and confirming the arbitrators, be informed of the

[47]Article 31 UAA.

[48]See Onyema above n 26.

[49]Ibid 211.

[50]Article 14 UAA.

[51]Beauchard, R. and Vital Kodo, M.J. above n 20, 20.

progress of the proceedings, and examine decisions, in accordance with Article 24.[52] Article 24 stipulates:

> Before signing a partial or final award, the arbitrator shall submit the proposed decision to the Common Court of Justice and Arbitration, which may suggest any formal amendments to such a decision.[53]

It suggests that the CCJA retains oversight throughout the arbitral process. It is clear that contrary to other countries the court system is far more intrinsically linked to arbitration.

The Treaty in Article 26 also establishes that separate regulations of the CCJA shall be laid down by the Council of Ministers under the conditions in Article 8. The regulations are contained in the Arbitration Rules of the CCJA. Article 10 of the Arbitration rules notes that any party which chooses institutional arbitration also subjects itself to the provisions in Part IV of the OHADA Treaty. Furthermore, Article 9 of the Arbitration Rules makes it clear that prima facie only the CCJA rules can be used. In all other cases the Article notes that where:

> There is no arbitration agreement between the parties referring to the application of these arbitration rules, if the defendant declines the arbitration of the Court or does not respond within forty five days …the Secretary General [will inform the applicant] to have [the Court] rule that the arbitration cannot take place.

Simply stated the CCJA reserves the right to reject offers to administer arbitral proceedings if they are dissatisfied that the reference has any connection to its rules which is not unusual as other Institutional bodies have done so in the past.[54] Interestingly however the parties can decide on the seat of arbitration either within the agreement or at a later stage. Only when the parties have not determined a seat will the Court nominate a seat.[55]

Jurisdiction to access CCJA arbitration—as with any other arbitration in the OHADA group of nations—is restricted to parties who have their domicile or usual residence in a Member country or where the contract is to be performed fully or partially in a Member State.[56] The function of the CCJA is defined in Article 2 of the Arbitration Rules. First, pursuant to Article 2.2 "the Court shall not itself settle disputes." The court will appoint or confirm arbitrators, scrutinise arbitral awards and decide to recognise and enforce awards.[57] This Article in effect reinforces Article 21 of the OHADA Treaty.

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[52]Article 21 OHADA Treaty.

[53]Article 24 OHADA Treaty.

[54]Onyema notes that the Swiss Chamber of Commerce rejected requests for Arbitration under its rules see Onyema fn 125, above n 26, 215.

[55]Article 13 Arbitration Rules.

[56]Article 21 OHADA Treaty.

[57]Article 2.2 Arbitration Rules.

Secondly, "the court shall deal with questions related to arbitral proceedings supervised by it within the framework of the Treaty and article 1 of these arbitration rules."[58]

The most important difference between arbitration under the CCJA and the UAA is the enforcement of an arbitral award. Under the UAA an enforcement order is required from the national court where the enforcement is sought whereas under the CCJA the enforcement order is issued by the CCJA which then is enforceable in all Member States.[59]

12.8 Arbitral Principles Common to Both Ad Hoc and Institutional Arbitration

It is worth noting that ad hoc and institutional arbitration share common principles. As explained above, the OHADA Treaty envisaged that pre dispute and post dispute agreements are necessary in order to enliven arbitration. In effect Article 23 of the Treaty notes that any national court lacks jurisdiction to hear a case when parties are bound by an arbitration agreement.

However, as pre and post dispute agreements can lead to arbitration, the reverse can also be possible. Under the UAA rules the choice of arbitration is broadened as even when litigation has been initiated the parties can mutually agree to terminate the court proceedings and commence arbitration.[60] It can be reasonably assumed that the parties can agree on an institutional or ad hoc arbitration which, of course, has the effect to move the proceedings from a State court to the CCJA.

The effect of Article 4 of the UAA also suggests that, if an arbitration clause is part of the contract and a court would need to refer the parties to arbitration, they can only do so if the parties do plead to be bound by arbitration. The parties can simply insist to commence litigation as a result of the post-dispute agreement and Article 4 also states that the validity of the [arbitration] agreement "is assessed according to the intention of both parties without necessary reference to a State Law."[61]

It must be noted that this is only possible with ad hoc arbitration. If institutional arbitration pursuant to the Arbitration rules is the preferred dispute resolution mechanism, arbitration pursuant to Article 5 of the Arbitration Rules can only commence if the request contains amongst other requirements an arbitration containing the seat of arbitration, the applicable laws, the language and the substance of the claim.[62] "Failing such agreement the wishes of the applicant for arbitration on

[58]Article 2.3.

[59]Beauchard, R. and Vital Kodo, M.J. above n 20, 13.

[60]Article 4 UAA.

[61]See Footnote 60.

[62]Article 5(e) Arbitration Rules.

the different points expressed" need to be sent to the Secretary General who will forward the request of the claimant to the defendant.[63]

12.9 Institutional Challenges in the OHADA

It can be argued that the efforts of introducing supranational legislation and courts combined with an education program would have assisted in harmonising the OHADA Uniform Act. OHADA Institutions have for the most part delivered what they promised.[64]

However, that might be true on the surface but it has been shown that the "teething problems" of an introduction of Uniform Acts has not yet been overcome as the relatively easy task of producing formal law needs to be followed by actual application and enforcements. At the supranational level the problem is mainly centred on the CCJA coordinating with other supranational bodies as well as managing the challenges at the national level. A big issue is that the CCJA is constantly understaffed, under-resourced and has now a significant backlog of cases.[65]

National judges do indeed contribute towards the building of a new harmonised law where a vacuum exists but the legitimacy of giving the CCJA power is questioned as in effect it diminishes the power of national judges.[66] Unfortunately, the CCJA was turned into a *Cour de Cassation* by the drafters instead of a Supreme Court resulting in administrative difficulties.

It is uncontroversial that arbitration cannot exist in a vacuum and depends on a legal system. It follows that challenges and weaknesses of the legal system will impinge on the effectiveness and successes of arbitration. It must be acknowledged that the concept of harmonising business law within and between groups of independent nations was an ambitious project. OHADA member states are lower tiered countries and have been subject to military coups, humanitarian crises and numerous other calamities.[67] However, the success and problems need to be measured against realistic yard sticks.

The problem or weakness of the OHADA Treaties lies in its application rather than its content.[68] As noted above, the OHADA treaties have created an interlocking relationship between state courts and the CCJA. Whether this relationship works in arbitral issues, relevant data unfortunately are not readily available.

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[63]Article 5(b) and (e) of the Arbitration Rules.

[64]Beauchard, R. and Vital Kodo, M.J. above n 20, 18.

[65]See Minutes of meeting of the Council of Ministers of June 16/17, 2011, see http://web.ohada.org/actualite-cm.

[66]Kodo, above n 25, 254.

[67]Beauchard, R. and Vital Kodo, M.J., above n 20, 5.

[68]Negre, above n 44, 757.

However, in litigation several problems have emerged, namely the intervention of a State in litigation and the restricted access to references to interpretation to the CCJA.[69] The Niger Supreme court as an example ruled that pursuant to Article 18 of the OHADA Treaty the exclusivity of the jurisdiction of the CCJA cannot be given primacy in all cases over the Highest National Courts. The court implied that the CCJA only has jurisdictions in appeals when the issue is solely based on the interpretation of an OHADA provision or primarily on the interpretation of uniform laws.[70]

Arguably the same problems can also be an issue in arbitration specifically when an ad hoc arbitration relies on Treaty interpretation which in essence lies within the domain of the CCJA. One issue could clearly apply to arbitration specifically when a timely enforcement of an award is an issue. As an example in litigation, judges who were asked to close preventative settlement proceedings deferred their decisions for several years instead of handing down a decision within four months pursuant to the Uniform Act Organising Collective Proceedings.[71] Issuing an exequatur within a timely fashion could be a problem specifically if a perceived public policy issue needs to be taken into consideration.

Another problem is based on an interpretation of Article 14 of the OHADA Treaty which lists the category of persons able to apply to the CCJA for an interpretation of OHADA Laws which includes the Arbitration Part of the Treaty.

However, the CCJA faces problems which are not confined to arbitration but can affect the utility of arbitrating in the OHADA group of nations specifically relating to the substantive issues within arbitration. Two examples are sufficient to understand the issues. First, the abrogation process has not been completed. Article 10 of the Treaty makes it clear that Uniform Acts are directly applicable and are mandatory hence overrule domestic law. However, the issue has not been settled yet as the language of Article 10 has two meanings: first it only affects domestic legislation on the same topic or secondly it affects only domestic legislation which is contrary to the uniform acts.[72]

The second point is the resistance and sometimes outright refusal of domestic courts to apply OHADA statutes.[73] This has taken place on two levels first by a challenge of domestic courts of mandatory laws contained in the Uniform Acts and secondly "a prevalence of the will of parties over Uniform Acts and a refusal to implement them."[74]

It needs to be said that national courts indeed do settle cases involving the Uniform Acts and most of the court decision apply the correct law except they are

[69]Ibid.

[70]Niger Sup. Ct., Aug 16, 2001, RBD 2002, 121 ff.

[71]Negre above n 44, 757.

[72]Beauchard, R. and Vital Kodo, M.J. above n 20, 26.

[73]See Footnote 72.

[74]Kodo, M.J. above n 25, 254.

not made by the correct court which is the CCJA.[75] Arguably therefore a certain level of confidence can be assumed by litigants that the court system is arriving at correct or, at least reasonable decisions, despite the still persistent teething problems. This view is confirmed as precedent shows that a tendency is emerging whereby National Courts are referring matters relating to Uniform Laws to the CCJA. Kodo notes several cases where national courts refer matters dealing with Uniform Acts to the CCJA such as the Court of Appeal of Abidjan, the Supreme Court of Cameroon and the attitude of the Supreme Court of Niger has also changed as several cases have been transferred to the CCJA.[76]

Arguably a better integration of OHADA uniform laws into the various member states of OHADA requires more time and a clear understanding where domestic legislation has to yield to the uniform laws will eventuate. Also as noted above, there was always the danger that courts in individual states will view with hostility a supranational court like the CCJA as well as mandatory uniforms laws.

12.10 Conclusion

Understanding that the mineral sector is a critical component of outbound Australian capital, it is not protected by BIT's or FTA's in case of arising disputes due to the government's commitment to exclude investor-state dispute resolution procedures in any possible upcoming treaties. In essence, the government is arguing that each corporation needs to make their own assessment in relation to sovereign risks. Furthermore, contracts containing a dispute resolution clause—as seen above—which are governed by OHADA domestic legislation are by no means an alternative to treaty protection. However, it is possible that in the event of a change in government later in 2013 a strong centre-right government could scrap the policy and include again investor state dispute settlement clauses into new BIT's or FTA's.[77]

It can be argued that it appears to be likely that the combination of introducing a supranational court which requires the assistance of domestic courts as well as supervising not only ligation but also arbitration will pose challenges. However, it can be said that the OHADA Treaty and its associated arbitration laws provide an effective machinery to instil confidence in the modern and to some extent novel provisions of the arbitration laws. There are encouraging signs of success not at least the increasing membership of OHADA. The Democratic Republic of Congo is in the final steps of accession and Burundi, Cape Verde, Djibouti, Ethiopia,

[75]Ibid 260.

[76]Ibid 262–263.

[77]Kurtz above n 11, 84.

Madagascar, Mauritius, Rwanda and San Tome and Principe have expressed an interest in joining OHADA.[78]

As the World Bank working paper correctly notes:

> Ultimately, however, a set of modern uniform laws will not suffice to generate trust among countries with judiciaries crippled by backlogs, corruption, lack of planning, and waste. Being thus unable to generate the essential climate of trust within their own societies, the judicial system of OHADA members will not likely be judged favourably by those inside or outside the OHADA region.[79]

Despite a less than favourable outlook, a potential investor would need to ask whether the lack of a moderately predictable legal system outweighs the potential profits. In any case it can be argued that an institutional arbitration under the CCJA offers the least problems and ought to be the preferred option when writing a contract with an OHADA business partner. The reason simply is that the sovereign risk is best managed by institutional arbitration managed by the CCJA as a supranational body.

Above all, like with any other foreign ventures, local legal advice needs to be sought and given the possible closeness of the legal profession with the local courts an alternative solution could indeed be an ad hoc arbitration. This is important as the CCJA is geographically not in the best location. As in many cases domicile during proceeding in the Cote D'Ivoire (the location of the CCJA) is required.

[78]Beauchard, R. and Vital Kodo, M.J. above n 20, 18.

[79]Ibid 32.

Chapter 13
International Arbitration and the Client's Perspective

Greg Steinepreis and Eu-Min Teng

Abstract The benefits of any dispute resolution process can be considered both objectively and based on perception. This chapter explores international arbitration from the viewpoint of the client, in particular, the client who is involved in the resources, energy and construction sectors. This is examined by taking into account a number of recent international arbitration surveys and reflecting on recent procedural initiatives aimed at improving the efficiency and effectiveness of the arbitration process. Some suggestions are made regarding how international arbitration might better satisfy the client's expectations.

13.1 Users' Perception of International Arbitration

Efficiency and effectiveness are high on the list of desirable characteristics of any dispute resolution process. International arbitration has attracted mixed user perceptions in these respects. This paper focuses on the corporate and public sector users or '*clients*' of international arbitration, particularly those who are involved in the resources, energy and construction sectors.

There is an absence of Australian statistics on the perception of clients involved in international arbitration. So it is necessary to consider client satisfaction surveys conducted in other countries.

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In a 2008 survey on international arbitration by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London,[1] the views of corporate counsel who were surveyed (from both common law and civil jurisdictions) were reported to be that:

- the enforceability of arbitral awards, the flexibility of the procedure and the depth of expertise of arbitrators were seen as the major advantages of arbitration; and
- the length of time and the costs of international arbitration were seen as the disadvantages.

65 % of respondents believed international arbitration to be more expensive than transnational litigation and 23 % believed it to be as costly as transnational litigation.

The negative time and cost perceptions arising out of the 2008 Queen Mary University survey were reinforced in a 2010 study of the Corporate Counsel International Arbitration Group which found that 100 % of participants believed that arbitration '*takes too long*' and also '*costs too much*.'[2]

Despite the concern of corporations over the time and cost of arbitrations, the most recent international arbitration users' survey conducted in 2013 concludes that the overall picture is that corporations continue to have a preference for using arbitration over litigation for international disputes. The Queen Mary University survey of 2013 is the 5th survey by this institution and is entitled *Corporate choices in international arbitration: Industry perspectives.* The research was conducted between March and December 2012. Respondents were general counsel, heads of legal departments or in-house counsel, on the authority of general counsel. They were chosen from the Energy, Finance and Construction industry sectors, in order to compare results within and across these sectors. The general aim of the survey was to provide insights into how arbitration can continue to meet the changing needs of the business community.

Of relevance to the resources sector is the overall finding that Energy and Construction clients prefer arbitration to litigation for transnational disputes. In the Energy sector, 56 % of respondents preferred international arbitration and in the Construction sector, the figure was 68 %.[3]

[1]International arbitration: Corporate Attitudes and Practices 2008, Queen Mary University of London/Price Waterhouse Coopers.

[2]Lucy Reed, 'More on Corporate Criticism of International Arbitration', on Walters Kluwer Law & Business, Kluwer Arbitration Blog (16 July 2010) http://kluwerarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/.

[3]2013 International Arbitration Survey: Corporate choices in International Arbitration—Industry Perspectives, Queen Mary University of London/PwC, 4.

The respondents were also asked to rank the advantages or benefits of arbitration and the detriments or disadvantages. Overall results showed that the key perceived benefits were:

- expertise of the decision-maker;
- neutrality of the decision-maker;
- confidentiality of the process;
- ease of enforcement (under the New York Convention); and
- flexibility of the process.

The key disadvantages, not surprisingly, were stated to relate to time and costs. One important additional finding was that availability (or more accurately, non-availability) of the arbitrator was not cited as a most important factor. Rather, counsel surveyed felt it was more important to choose the right arbitrator best suited to the dispute.

In relation to time (duration of the arbitration process), in its earlier 2010 survey, Queen Mary University found that the aspects of arbitration proceedings that contributed the most to delay are disclosure of documents, written submissions, constitution of the tribunal and hearings.[4]

Additional reasons for increased delay and expense in international arbitration proceedings include the increased size and complexity of matters submitted to arbitration[5] and usage of litigation-style practices and interlocutory motions in arbitration proceedings.[6] Other reasons that are perceived to cause increased delay and cost are lack of control of procedure and the proceedings by arbitral institution[7], arbitrators who may be overcommitted, unprepared and reactive[8], failure of the tribunal to narrow issues, evidence and argument, leading to parties and counsel feeling the need to cover all bases[9], and excessive concern for due process over efficiency.[10]

In 2012, Queen Mary University's survey focused on arbitration practice and process.[11] In this survey, the views of arbitrators and private practitioners as well as in-house counsel were canvassed. The results showed that the IBA Rules on the Taking of Evidence in International Arbitration were used in 60 % of arbitrations. The survey revealed that fast track arbitration was regularly cited as a prime method

[4]2010 International Arbitration Survey: Choices in International Arbitration, Queen Mary University of London/White & Case LLP, 3.

[5]Nicholas C Ulmer, 'The Cost Conundrum' (2010) 26 (2) *Arbitration International*, 221, 224.

[6]Ibid; Jose Maria Abascal Zamora, 'Reducing Time and Costs in International. Arbitration, Modern Law for Global Commerce' (paper delivered to the Congress to Celebrate 40th Annual Session of UNCITRAL, Vienna, July 2007).

[7]Reed, above n 2.

[8]Ibid.

[9]Ibid.

[10]Ibid.

[11]2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, Queen Mary University of London/White & Case LLP.

of cost control but was rarely used. It was perceived that the most effective methods of expediting arbitration were early identification by the arbitral tribunal of the issues, the appointment of a sole arbitrator and restricting discovery of documents. The survey also found that the most effective methods of expediting arbitral proceedings are (in order): identification by the tribunal of the issues to be determined as soon as possible after constitution, appointment of a sole arbitrator, and limiting or excluding document production.[12]

The 2013 Queen Mary University survey showed that respondents expressed strong concerns over the '*judicialisation*' of arbitration, the increased formality of proceedings and their similarity with litigation, along with associated costs and delays. It was found that in-house counsels value the features of the arbitration process that distinguish it from litigation.[13]

In relation to costs, a 2011 survey conducted by the Chartered Institute of Arbitrators (UK) found as follows:

- 74 % of party costs were spent on external legal advisers (lawyers and barristers);
- 48 % of parties spent no more than £250,000 on claims for £1,000,000 or less;
- 44 % indicated that the average expenditure on claims between £1,000,000 and £10,000,000 was no more than £1,000,000;
- For 50 % of parties, for claims between £10,000,000 and £50,000,000 the expenditure was no more than £15,000,000; and
- Party costs averaged £1,348,000 in common law countries.[14]

However, costs may not be the overriding consideration in determining whether to actually commence arbitration proceedings. According to the most recent (2013) Queen Mary University survey, "respondents did not rank costs amongst the most important factors when deciding whether to initiate arbitration proceedings. Costs are a concern but on their own are not usually a deterrent to initiating arbitration proceedings."[15] The survey also stated:

> In deciding whether to commence arbitration, the most important factors were the strength of an organisation's legal position, followed by the strength of available evidence, and thirdly, the amount of recoverable damages. While the costs of arbitration are a repeated concern, the prospect of high legal fees was not cited as an important factor in deciding whether to commence arbitration.[16]

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[12]2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, above n 11, 2.

[13]2013 International Arbitration Survey: Corporate choices in International Arbitration—Industry Perspectives, above n 3, 5.

[14]Costs of International Arbitration Survey 2011, Chartered Institute of Arbitrators.

[15]2013 International Arbitration Survey: Corporate choices in International Arbitration—Industry Perspectives, above n 3, 21.

[16]Ibid, 8.

The co-chair of the task force who prepared the report stated that:

> But it was not our intention when drafting the report to make suggestions for the conduct of the arbitral proceedings which, if followed, were likely to prejudice either party's prospects of achieving a successful outcome in the case. On the contrary, the suggestions in the report are intended to help parties, counsel and arbitrators to find ways of managing arbitral proceedings efficiently, without prejudicing any party's right to have a fair opportunity to present its case and respond to that of its opponent.[17]

These surveys support the view of commentators that oft-cited benefits of international arbitration, such as reduced time and cost, have been '*compromised*'[18] or diluted,[19] and that users of international arbitration are thereby becoming increasingly frustrated.[20] Because of today's subdued global economic environment, the focus within companies is now more than ever on cost reduction, including within their legal departments. Legal departments, like other departments, need to work within a budget. Against this backdrop, anecdotally, arbitration is being considered as too expensive.[21]

But international arbitrators and other stakeholders in international arbitration have taken heed of these criticisms while also noting that courts have improved their own efficiency by better case management. There have been reforms to arbitration-related rules and strong encouragement to stakeholders to do things differently.

13.2 Recent Initiatives to Control Time and Cost

13.2.1 Reforms

In response to concerns about the time and cost of international arbitration, various stakeholders have taken heed of the criticisms of the international arbitration process and taken initiatives to address the issues.

In 2007, the International Chamber of Commerce (ICC) published a report entitled Techniques for Controlling Time and Costs in Arbitration (ICC Report). The ICC Report is now into its second edition and provides an extensive range of techniques aimed at reducing time and costs in arbitration. The purpose of these

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[17]Christopher Newmark, in Lawrence W Newman and Richard D Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (JurisNet, 2nd ed, 2008), 81.

[18]Jean E Kalicki, 'Controlling Time and Costs in Arbitration: A progress report (Part 1 of 2)' on Walters Kluwer Law & Business, *Kluwer Arbitration Blog* (21 November 2011) http://kluwerarbitrationblog.com/blog/2011/11/21/controlling-time-and-costs-in-arbitration-a-progress-report-part-1-of-2/.

[19]Jean-Claude Najar, 'Inside Out: A user's perspective on challenges in international arbitration' (2009) 25 (4) *Arbitration International* 515, 515.

[20]Kalicki, above n 18.

[21]Najar, above n 19, 517.

techniques is to '*create a new dynamic at the outset*'. The following are some notable techniques recommended in the report:

- Keeping arbitration clauses simple and clear to avoid uncertainty and disputes over their meaning and effect;
- Utilisation of fast-track procedures;
- Selection of counsel with experience and available time;
- Setting out the case in full early in the proceedings;
- Consider limiting the length of submissions;
- Consider limiting discovery;
- Minimising length and number of hearings;
- Prompt completion of awards; and
- Consider agreeing on an agenda and timetable for all hearings, with an equitable division of time between each of the parties, including use of chess clock techniques to monitor the allocation of time.

These are just suggestions and largely depend on the agreement of the parties and also a level of pro-activity by the arbitrator.

There have been attempts at institutional reforms amongst the most prominent arbitration institutions. Notable among these are the following[22]:

- **New Rules**: The Centre for Effective Dispute Resolution (CEDR) issued the CEDR Rules for the Facilitation of Settlement in International Arbitration in 2009. These rules are designed to facilitate joint efforts of arbitrators, counsel and parties to settle the case before its natural conclusion. They encourage early management conferences and client participation, and allow for settlement windows and alternative dispute resolution;
- **Rule Changes**: The ICC Task Force published the ICC Report and amended the ICC Arbitration Rules, which took effect on 1 January 2012 (2012 ICC Rules). There have also recently been changes to UNCITRAL Rules (in 2010) and changes to the IBA Rules on the Taking of Evidence (in 2010); and
- **Protocols**: In 2010 in the United States, the College of Commercial Arbitrators (CCA) prepared Protocols for Expeditious, Cost-Effective Commercial Arbitration.

The following is an illustration of the level of rule changes. The ICC Report resulted in amendment to the ICC Rules, namely, by the inclusion of Articles 22–24 and Appendix IV of the 2012 ICC Rules. Article 22(1) places an explicit obligation on both the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute. Article 22(2) empowers the arbitral tribunal, in the absence of agreement of the parties, to adopt appropriate procedural measures to ensure effective case management. Article 24(1) requires the arbitral tribunal to convene a case management conference to consult the parties on appropriate

[22]Michael McIlwrath, 'Faster, Cheaper: Global Initiatives to Promote Efficiency in International Arbitration' (2010) 76 *Arbitration* 568, 568.

procedural measures to be adopted pursuant to Article 22(2). It is expressly stated that those measures may include one or more of the techniques described in Appendix IV.

Article 37(5) of the 2012 ICC Rules provides that, in making decision as to costs, the arbitral tribunal may take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. Article 30 provides a time limit of 6 months for the arbitral tribunal to render its final award.

The UNCITRAL Rules, which were revised in 2010, are typically used in non-institutional arbitrations. The 2010 UNCITRAL Rules contain the following features that have a bearing upon time and cost[23]:

- Article 17 provides that the arbitral tribunal may conduct the arbitration as it considers appropriate, and, in exercising such discretion, "shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute". This Article also allows, on request, joinder of parties who are parties to the same arbitration agreement; and
- Article 20 requires "[t]he legal grounds or arguments supporting the claim" to be included in the statement of claim, and provides that the statement of claim, "should as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them". This encourages the parties to define the matters in issue at an early stage.

The ACICA Arbitration Rules, which are based on the UNCITRAL Rules and the Swiss Rules of International Arbitration,[24] do not contain a general provision requiring the arbitral tribunal to conduct the proceedings so as to avoid unnecessary delay and expense, unlike the 2012 ICC Rules[25] and 2010 UNCITRAL Rules.[26] The ACICA Arbitration Rules contain a regime for presentation of statements of claim and defences which is similar to that contained in the UNCITRAL Rules, although the ACICA Arbitration Rules merely state that the parties 'may' annex all relevant documents or refer to them in their pleadings, whereas the 2010 UNCITRAL Rules state that the parties 'should' include or refer to relevant documents.

ACICA has also promulgated the ACICA Expedited Arbitration Rules, which provides that its overriding objective is to "provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved" (Article 3.1).

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[23]See generally, Justice Clyde Croft, 'The Revised UNCITRAL Arbitration Rules of 2010: A Commentary' (Speech delivered at AMINZ/IAMA Conference, Christchurch. August 2010).

[24]Professor Doug Jones, 'International Commercial Arbitration and Australia' (Speech delivered at the Australian-European Lawyers Conference, Canberra, March 2007).

[25]Article 22.1 (the obligation is also stated to be on the parties).

[26]Article 17.1.

In addition to new rules, rule changes and the development of protocols, there has been a greater awareness and use of new procedural techniques. The 2012 Queen Mary University survey found that most of the surveyed arbitrations had time limits imposed for oral submissions and examination of witnesses, and most respondents preferred some form of time limit.[27] One form of time limit management is the 'chess clock' technique. This involves estimating the total amount of 'hearing time' available to the parties, and allocating that time equally between the parties. It is then up to the parties to determine the best use of their allocated time.[28]

Measures such as the 'chess clock' technique have the benefit of requiring legal teams to narrow their cases and abandon marginal and poor arguments. They also provide an incentive for parties to be concise in the presentation of their case.[29]

It has been observed that while the 'chess clock' technique is part of a range of tools available to the parties and the arbitrator to promote efficiency, it is not an end in itself, and should not be applied automatically and routinely in all arbitration hearings. The 'chess clock' technique is more likely to be appropriate and effective where the parties have a roughly equal number of witnesses, who are represented by similarly sophisticated counsel who are well-prepared for the hearings and are able to suitably allocate the limited time allocated to them.[30]

One commentator has observed that the suggestions in the ICC Report are good, but are just suggestions, and largely depend on agreement between the parties and the level of pro-activity and organisation of the arbitrator.[31] These will of course vary from one arbitration proceeding to another.

The following are some additional methods counsel representing parties might consider adopting to make the arbitration process more efficient and, hence, save cost:

- When drafting arbitration clauses, consider whether to adopt an ad hoc or administered process. The ad hoc process can be efficient where the arbitrator is experienced in case management and the parties are cooperative. Administered arbitrations can save time, especially where the timelines are set out in the rules. Arbitrators appointed by an institution are motivated to be efficient in order to keep their names on the panel of arbitrators. Reputable arbitral institutions will also seek to protect their reputation and will want to ensure that arbitrators in their panel are not only sound and experienced, but also efficient in case management;
- Consider having a sole arbitrator instead of three arbitrators, unless the disputes are likely to be complex;

[27]Ibid.

[28]Ulmer, above n 5, 242.

[29]Andrew Stephenson, 'Creating Efficient Dispute Resolution Processes: Lessons Learnt from International Arbitration' (2004) 20 *BCL* 151, 158.

[30]Ulmer, above n 5, 242.

[31]Ibid, 230.

- Adopt techniques to reduce costs such as use of witness statements, meeting of experts to narrow issues in dispute, using video conferencing for witnesses where appropriate, and use of chess clock procedures to limit the time of hearing. Counsel should remember that the hearing is not a trial in court and should avoid litigation techniques, such as unnecessary objections, that may unnecessarily prolong the hearing and try the patience of the arbitrators. Interlocutory applications may be necessary for strategic reasons, but should be avoided if they are unproductive and likely to lead to additional costs and delays in the substantive hearing;
- Counsel could consider carrying out an early assessment of the case, and assist the client to do a cost-benefit analysis with possible scenarios. Counsel and the client can work together to formulate a strategy to obtain the best outcome in the most efficient manner. This could include negotiation and mediation at appropriate stages, including using techniques to undermine the opposing party's case early to force them to the negotiating table at an early stage of the proceedings. Too often, parties would seriously look at settlement only days before the arbitration hearing, by which time the parties would have already incurred substantial legal costs. If documents are well drafted and claims and defences are accompanied by supporting documents, opposing counsel would be able to evaluate the strengths of the case and weaknesses of their own case and, presumably, it might facilitate settlement discussions; and
- Counsel should cultivate a good professional working relationship with opposing counsel to facilitate reaching agreements on procedural matters as far as reasonably possible.

Although fast-track arbitration is regularly cited as a prime method of cost control, in practice it is not commonly used.[32] The vast majority of respondents to the 2010 Queen Mary University survey who were asked about fast-track arbitration had no experience of it, but most respondents expressed a willingness to use fast-track arbitration in the future.

13.2.2 Disconnect Between Source of Delay and Perceived Solution: The Clients' Fault

There is a perception that measures to reduce costs should be aimed at a reduction in costs of the tribunal. However, empirical data shows that by far the largest proportion of cost in an arbitration proceeding is attributable to the cost of parties presenting their case. As shown in a report by the President of the ICC Court (Pierre Tercier) based on a survey of cases that went to award in 2003 and 2004 under the

[32]2010 International Arbitration Survey: Choices in International Arbitration, above n 4.

ICC Rules, the costs incurred by the parties in presenting their case were by far the largest part of the problem.

Therefore, it seems there is a fundamental disconnect between the root causes of delay and cost on the one hand, and the steps taken and users' expectations of a solution on the other. In this regard, there is incongruence between the perceived mischief and the actual source of increased cost.[33]

This incongruence is also reflected in the findings of the 2010 Queen Mary University survey, the relevant finding being that the main causes of delay are within the control of the parties, but corporations feel that the arbitrators and arbitration institutions are best placed to reduce delay.

13.2.3 The Insufficiency of Institutional Reform

It has been pointed out that institutional reforms are insufficient for any genuine improvements, without the involvement of all stakeholders in each arbitral proceeding. To bring about genuine improvements, these institutional initiatives must be put into practice by all participants involved in the proceedings, arbitrators, counsel and parties.[34]

13.2.4 The Need for Clients to Be More Involved in Arbitrations

In-house counsel have traditionally been more involved in negotiating agreements and advising business people, while litigation was outsourced to law firms. However, the 2013 Queen Mary University survey shows that corporations are increasingly investing in and embedding, into their internal legal teams, arbitration and dispute resolution functions.[35] They are tending to appoint more in-house lawyers who specialize in dispute resolution, including arbitration.

In-house counsels have been encouraged to be more involved in arbitrations and to identify, anticipate and prevent potential risks.[36]

Private practitioners should reach out to their clients to encourage them to be more involved in arbitration. Practitioners need to communicate that the presence of in-house counsel can help the optimal resolution of the dispute and that their absence

[33]See generally, Najar, above n 19.

[34]McIlwrath, above n 22.

[35]2013 International Arbitration Survey, Corporate choices in International Arbitration—Industry Perspectives, above n 3, 1.

[36]Najar, above n 19.

could lead to sub-optimal outcomes and higher costs.[37] Private practitioners can also promote efficient and expeditious proceedings, by disciplining their approach to proceedings, for example, by utilising methods proposed in the ICC Report.

13.3 Implementation of Efficiency Measures

It can be concluded from the various surveys and anecdotal evidence from authors in the field of international arbitration that there is a high level of satisfaction with international arbitration in the resources sector. However, corporate clients say there is still much room for improvement.

It is salutary to recall the remarks of senior corporate counsel at GE[38] (echoed by similar remarks of counsel at Exxon Mobil)[39] who advocates robust case management and makes some salient points in relation to international arbitration. His points are as follows. Firstly, what is good for international business is good for international arbitration. Secondly, international arbitration needs to do more than merely enacting rule changes. Thirdly, the reforms need to become effective by developing a culture that encourages issues to be dealt with early. Fourthly, arbitration has slipped from its promise of a better and more efficient dispute process. Fifthly, business treats the ability to reach rapid and accurate decisions as a basic competency. Sixthly, it is a competency that international arbitration is capable of delivering, but it needs to be implemented more often and more effectively.

The powers and the tools to improve the efficiency and effectiveness of international arbitration are there; they just have to be used.

[37]Ibid.

[38]Michael Mcilwrath, Roland Schroeder, 'The View from an International Arbitration Customer: in Dire Need of Early Resolution' (2008) 74 (1) *Arbitration* 3.

[39]Andrew Clarke, 'International Arbitration: Current Corporate Concerns (2009) 20 (2) *ICC International Court of Arbitration Bulletin* 1, 8.