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The Baker McKenzie **International Arbitration Yearbook**

Australia

Australia

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A. Legislation and rules

A.1 Legislation

Australia is party to the New York Convention.[4] The New York Convention and the UNCITRAL Model Law ("Model Law") have been implemented through the International Arbitration Act 1974 (Cth) (IAA).[5] The IAA also gives effect to the ICSID Convention.[6]

In 2009 and 2010, significant amendments were made to the IAA. The amendments included the adoption of most of the 2006 revisions to the Model Law, the expansion of the definition of "arbitration agreement" to include electronic communications and verbal agreements, the removal of the ability of parties to opt out of the Model Law, and the enhancement of the court's power to act in aid of arbitration proceedings.

In March 2011, the Australian Centre for International Commercial Arbitration (ACICA) was appointed as the sole default appointing authority (rather than the courts) for the purpose of appointing arbitrators under Articles 11(3) and 11(4) of the Model Law.

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[4] Australian Treaty Series 1975 No 25, entry into force for Australia on 24 June 1975.

[5] Section 16 of the IAA gives the Model Law the force of law in Australia. Part III of the IAA gives effect to the Model Law without amendments.

[6] Australian Treaty Series 1991 No 23, entry into force for Australia on 1 June 1991.

Between 2010 and 2015, all Australian States and Territories (with the exception of the Australian Capital Territory[7]) adopted a uniform Commercial Arbitration Act (CAA), which governs domestic arbitrations. The uniform CAA is based on the Model Law.

In August and October 2015, further amendments were made to the IAA. Section 8 was amended to permit the enforcement of foreign arbitral awards, regardless of whether the award was made in a state that is party to the New York Convention. Section 22(2) was amended to change the confidentiality provisions from "opt in" to "opt out." International arbitrations seated in Australia are now confidential, unless the parties agree otherwise.

A.2 Institutions, rules and infrastructure

Australia has a number of arbitration institutions. The predominant center for international arbitration is ACICA, which updated its arbitration rules with new rules effective from 1 January 2016 ("ACICA Rules"). The ACICA Rules reflect modern international arbitration practice. They include provisions on emergency arbitrators, expedited procedures, interim measures, confidentiality, joinder and consolidation and the allocation of costs. The ACICA Rules are mainly used for international arbitrations, but can also be used for domestic arbitrations.

In 2007, ACICA established the Australian Maritime and Transport Arbitration Commission (AMTAC) to provide specialist arbitration services to the shipping and transport industry.

In 2015, the Australian International Disputes Centre and the Australian Commercial Dispute Centre merged to become the Australian Disputes Centre (ADC). The ADC is based in Sydney. There is also the Melbourne Commercial Arbitration and Mediation Centre and the Perth Centre for Energy and Resources Arbitration.

[7] The Australian Capital Territory introduced a bill to adopt the CCA in 2016, which is yet to be passed.

Also in 2015, the Institute for Arbitrators and Mediators Australia (IAMA) and Lawyers Engaged in Alternative Dispute Resolution (LEADR) merged to become the Resolution Institute. The Resolution Institute adopted the IAMA Arbitral Rules of 2 May 2014, which are mainly used for domestic arbitrations in Australia.

B. Cases

B.1 Constitutional challenge to the IAA

In *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Judges of the Federal Court*,[8] the High Court of Australia upheld the constitutional validity of the IAA. The IAA had been challenged on the basis that it impermissibly vested Commonwealth judicial power in arbitral tribunals and that the IAA substantially impaired the institutional integrity of the Federal Court. The High Court distinguished between the judicial power of the courts and the power of arbitral tribunals in private arbitration. It noted the importance of the consensual basis of private arbitration and that an award was the "ultimate product" of the parties' agreement.[9]

B.2 Stay-of-court proceedings

Australian courts have the power to stay court proceedings in favor of arbitration under Section 7 of the IAA, Article 8 of the Model Law and their inherent jurisdiction.[10] Section 7 provides that the courts must stay court proceedings if there is an arbitration agreement, unless that agreement is null and void, inoperative or incapable of being performed.

The Australian courts have taken a liberal approach to the interpretation of arbitration agreements. In *Comandate Marine Corp v.*

[8] (2013) 251 CLR 533.
[9] *Ibid* 555 at [31] (French CJ and Gagelar JJ), 567 [78] (Hayne, Crennan, Kiefel and Bell JJ).
[10] See, for example, *Vantage Holdings Pty Ltd. v. JHC Developments Group Pty Ltd.* [2011] QSC 155.

Pan Australia Shipping Pty Ltd.[11] ("*Comandate*") the Full Federal Court emphasized that a broad and flexible interpretation should be given to arbitration agreements, with the aim of referring to arbitration as many aspects of the claim as possible. The courts have enforced poorly drafted arbitration clauses where there is a clear intention to refer disputes to arbitration.[12] The courts have also confirmed that it is "only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will [be] held to be non-arbitrable."[13]

However, in two recent cases in 2016, *Rinehart v. Rinehart (No. 3)*[14] and *Samsung C&T Corporation v. Duro Felbuera Australia Pty Ltd.*,[15] a "full merits" review of the arbitration agreement was undertaken. The scope of the arbitration agreement was determined on a balance of probabilities rather than applying the *prima facie* approach used in other Model Law jurisdictions such as Hong Kong,[16] Singapore[17] and Canada.[18] It remains to be seen whether this approach is followed in subsequent cases or restricted to cases where it is argued that the arbitration agreement is null or void, inoperative or incapable of being performed.

B.3 Applicability of Australian Consumer Law to arbitration

The Competition and Consumer Act 2010 (Cth) (CCA) is Australia's antitrust/competition legislation regulating restrictive trade practices.[19]

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[11] [2006] FCAFC 192. This case was applied in *Ansett Australia Ltd. v. Malaysian Airline System Berhad* [2008] VSC 109.
[12] *Robotunits Pty Ltd. v. Mennel* [2015] VSC 268.
[13] *Rinehart v. Welker* [2012] NSWCA 95 at [16] per Bathurst CJ. This approach was recently endorsed in *WDR Delaware Corporation v. Hydrox Holdings Pty Ltd.; In the Matter of Hydrox Holdings Pty Ltd.* [2016] FCA 1164.
[14] [2016] FCA 539.
[15] [2016] WASC 193.
[16] *PCCW Global Ltd. v. Interactive Communications Service Ltd.* [2006] HKCA 434.
[17] *Tomolugen Holdings Ltd. v. Silica Investors Ltd.* [2015] SGCA 57.
[18] *Union des consommateurs v. Dell Computer Corp.* [2007] 2 SCR 801.
[19] The CCA repealed the Trade Practices Act 1974 (Cth) (TPA), which previously governed competition and consumer matters. The CCA commenced on 1 January 2011.

The Australian Consumer Law (ACL) is at Schedule 2 of the CCA. The CCA (including the ACL) is designed to protect consumers from unfair commercial practices and has significant implications for parties doing business in Australia or with Australian companies. Under Australian law, parties cannot agree in a contract to exclude the ACL even if they include a choice of law clause stating that the applicable law is a law other than Australian law.

Since the *Comandate* case,[20] the Australian courts have consistently held that ACL claims, such as claims for misleading or deceptive conduct or unconscionable conduct, are arbitrable, and stayed court proceedings if there is an arbitration agreement and ACL claims are raised.[21]

B.4 Adequacy of reasons in awards

Australian courts have considered the scope and extent to which an arbitral tribunal is to provide reasons in its award, at least in domestic arbitrations. In *Oil Basin Ltd. v. BHP Billiton Ltd.*,[22] the Victorian Court of Appeal held that the standard and explanation of reasons required by an arbitrator in a given case will depend on the nature and circumstances of the case. This approach was confirmed by the High Court in *Westport Insurance Corp. v. Gordian Runoff Ltd*.[23] The High Court also referred to the test of the English courts that, "the arbitrators should set out what, on their view of the evidence did or did not happen and should explain succinctly why, in light of what happened, they have reached their decision and what the decision is."[24] The High Court did not distinguish the requirement for reasons in domestic arbitrations from that requirement in international arbitrations.

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[20] [2006] FCAFC 192.
[21] See, for example, *Amcor Packaging (Aust) Pty Ltd. v. Baulderstone Pty Ltd.* [2013] FCA 253 and *Casaceli v. Natuzzi SpA* (2012) 292 ALR 143.
[22] [2007] VSCA 255.
[23] [2011] HCA 37.
[24] *Bremer Handelsgesellschaft GmbH v. Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130 at 132-133.

B.5 Public policy and breach of natural justice

Public policy is a ground that is often invoked in applications to set aside an award or in challenges to the enforcement of an award. Section 8 of the IAA provides that enforcement of an award may be against public policy if the award was induced or affected by fraud or corruption, or there was a breach of natural justice in making the award.

The Australian courts have consistently exercised judicial restraint when considering challenges to set aside an award or to enforce an award. Specifically, the courts have narrowly construed the public policy ground.[25] In *Castel Electronics Pty Ltd. v. TCL Air Conditioner (Zhongshan) Co. Ltd.*,[26] the Federal Court held that the power to set aside an award for public policy should be exercised sparingly. This is consistent with the intention that arbitration be an effective, enforceable and timely commercial dispute resolution process.

In *Yang v. S & L Consulting*,[27] it was argued that an award should not be enforced where it would give effect to a contract term that was, itself, against public policy. The court enforced the award, finding that the relevant contract term was not unlawful, and had not been entered into for an unlawful purpose. Thus, the term was not inconsistent with public policy.

Recently, there have been many cases where parties have argued that there has been a breach of natural justice because, for example, the applicant was not given an opportunity to present its case or to be heard by the arbitral tribunal. Applying a pro-arbitration approach, the courts have adopted a high threshold when considering a breach of natural justice. In *Gujarat NRE Coke Limited and Jagatramka v. Coeclerici Asia (Pte) Ltd.*,[28] the court enforced an award where the parties had agreed that if certain payments were not made, then the

[25] See, for example, *Hebei Jikai Industrial Group Co. Ltd. v. Martin* [2015] FCA 228.
[26] [2012] FCA 1214.
[27] [2009] NSWSC 223.
[28] [2013] FCAFC 109.

other party could apply to the tribunal for a consent award without further submissions from the parties.

In *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Castel Electronics Pty Ltd.*,[29] the Full Court of the Federal Court of Australia held that for an award to be set aside for breach of natural justice, there must be a real practical injustice or real unfairness. The court confirmed that this should be demonstrated without a detailed re-examination of the factual findings of the arbitration. Further, it observed that natural justice in this context differed from the concept of natural justice in Australian administrative law and that as such, it does not encompass the bias rule, no evidence rule or no hearing rule. Recent cases have followed this approach.[30]

B.6 Enforcement of arbitral awards

In *Traxys Europe SA v. Balaji Coke Industry Pvt Ltd. (No. 2)*,[31] the Federal Court observed that the New York Convention, as reflected in the IAA, had a pro-enforcement bias. The court held that there was no need for the award creditor to show that the award debtor had assets in Australia before an international arbitration award would be enforced. The court's pro-enforcement approach is evident in cases where arbitral awards had been partially enforced[32] and where one party had not been able to participate in the arbitration.[33]

In *IMC Aviation Solutions v. Altain Khuder*,[34] enforcement of the award against IMC Solutions was refused on the basis that IMC Solutions was not a proper party to the arbitration. The arbitration related to a contract between Altain Khuder, a Mongolian mining company, and IMC Mining, a British Virgin Islands company, for an

[29] [2014] FCA 976.
[30] See, for example, *Sino Dragon Trading Ltd. v. Noble Resources International Pte Ltd.* [2016] FCA 1131.
[31] [2012] 201 FCR 535.
[32] See, for example, *Aircraft Support Industries Pty Ltd. v. William Hare UAE LLC* [2015] NSWCA 229.
[33] See, for example, *Uganda Telecom v. Hi-Tech Telecom Pty Ltd.* [2011] FCA 131.
[34] [2011] VSCA 248.

iron ore mine in Mongolia. The tribunal ordered IMC Mining to pay damages to Altain Khuder. It also ordered IMC Solutions, an Australian company affiliated with IMC Mining, to pay the damages "on behalf of" IMC Mining. The award was enforced at first instance.

The enforcement order was set aside on appeal. The appellate court held that where, on the face of the agreement and award, the party against whom the award was made was not a party to the arbitration agreement, the evidential onus falls on the party seeking to enforce the award to prove, on a *prima facie* basis, that: (a) an award has been made by a foreign arbitral tribunal, granting relief to the award creditor against the award debtor; (b) the award was made pursuant to the arbitration agreement; and (c) the award creditor and the award debtor are parties to the arbitration agreement. If this burden is discharged, then the award debtor must show why the court should refuse enforcement of the award.

This approach was not followed by Justice Foster in *Dampskibsselskabet Norden A/S v. Beach Building & Civil Group Pty Ltd. (DKN).*[35] Justice Foster noted that the Victorian court's approach was not consistent with leading English cases. Justice Foster preferred the English approach, where the award creditor is required to produce the award and the arbitration agreement, and it is for the award debtor to show that it was not party to the award.

In the *DKN* case, the award debtor challenged enforcement of an award on the basis that mandatory legislation (Section 11 of the Carriage of Goods by Sea Act 1991 (Cth)) (COGSA) prevented the enforcement of awards. Section 11 limits the ability of parties to contract out of the jurisdiction of the Australian courts in a sea carriage document for the carriage of goods to or from Australia. The award being enforced had arisen out of an arbitration clause in the charterparty. The award was enforced on appeal.[36] It was found that

[35] [2012] FCA 696.
[36] [2013] FCAFC 107.

the charterparty was not a sea carriage document for the purposes of Section 11 of the COGSA.

The benefits of an accelerated arbitration process and the ability of the Australian courts to enforce efficiently an arbitral award in urgent circumstances were demonstrated in *Sauber Motorsports AG v. Giedo Van Der Garde BV & Ors*.[37] The case related to the participation of a race driver in the 2015 Formula One championship commencing in Melbourne on 15 March 2015. A partial award was issued on 2 March 2015 and was enforced on 11 March 2015 by the Victorian Supreme Court. Enforcement was upheld in an appeal heard the next day.

The courts have also been willing to take steps to enforce and execute arbitral awards by, for example, appointing a receiver over the award debtor's assets in Australia.[38]

C. Trends and observations

Australia's approach to the inclusion of investor state dispute settlement (ISDS) in bilateral investment treaties (BITs) and free trade agreements (FTAs) has changed in the last 10 years. In 2010, the Productivity Commission carried out a study of investment treaties and FTAs and recommended that ISDS provisions not be included in future treaties or agreements. In April 2011, the Labor government announced a new policy that ISDS provisions would not be included in newly negotiated FTAs. Notably, there is no ISDS in the Australia-Malaysia FTA that was negotiated at the time.

Australia changed its policy toward ISDS with the election of the Coalition government in September 2013. The inclusion of ISDS is now considered on a case-by-case basis. Since then, Australia has entered into FTAs with Korea, China and Japan that include ISDS provisions. However, note that the investment protections in the Australia-China FTA are limited to national and most favored nation

[37] [2015] VSC 80 and [2015] VSCA 37.
[38] *Gujarat NRE Coke Limited and Jagatramka v. Coeclerici Asia (Pte) Ltd.* [2013] FCAFC 109 and *Ye v. Zeng (No 6)* [2016] FCA 923.

treatment. The parties have agreed to reconsider the scope of the investment protections five years after the FTA comes into force.

Australia has also agreed to the inclusion of ISDS in the Trans-Pacific Partnership (TPP). The TPP has been signed by Australia. The Joint Standing Committee on Treaties recently recommended that Australia ratify the TPP.[39] To date, the TPP has been signed by 11 countries,[40] and ratified by Japan only.[41] However, with the recent comments by President Trump that the United States will not ratify the TPP, there has been new emphasis within the Asia Pacific region on negotiating the Regional Comprehensive Economic Partnership (RCEP).

It is believed that one of the reasons the Labor government adopted a policy excluding ISDS provisions was the commencement of the first investment arbitration against Australia by Philip Morris Asia Ltd. ("Philip Morris") in November 2011. Philip Morris commenced an UNCITRAL arbitration against Australia under the Australia-Hong Kong Bilateral Investment Treaty, claiming that the enactment of plain packing legislation resulted in an expropriation of its intellectual property rights. Australia argued that the tribunal did not have jurisdiction because Philip Morris acquired its shares in the relevant Australian subsidiary in full knowledge that the Australian government had already announced its intention to introduce plain packaging legislation.

On 18 December 2015, the tribunal issued its decision that it did not have jurisdiction to hear the claim.[42] The tribunal found that Philip Morris had committed an abuse of process by undertaking a corporate restructuring, whereby it had transferred shares in Philip Morris Pty

[39] Joint Standing Committee on Treaties, Report 165, *Trans-Pacific Partnership Agreement*, November 2016.
[40] Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam.
[41] Japan.
[42] *Philip Morris Asia Limited v The Commonwealth of Australia*, Decision on Jurisdiction, 18 December 2015, published on 17 May 2016, http://www.pcacases.com/web/sendAttach/1711.

Ltd. (the Australian entity) from a company (Swiss entity) within the Philip Morris International group to Philip Morris Asia. This was because there was no BIT between Australia and Switzerland, but there was a BIT between Australia and Hong Kong. The tribunal held that transferring the shares to take advantage of the investment protections under the Australia-Hong Kong BIT was an abuse of process.

Australia has not been party to any other investment arbitrations at this stage. However, some Australian companies have been parties to investment arbitrations against other states.[43]

[43] *White Industries Australia Ltd v The Republic of India,* Final Award, 30 November 2011, http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.