

THE FUTURE OF INTERNATIONAL ARBITRATION IN AUSTRALIA

ALBERT MONICHINO QC*

The International Arbitration Act 1974 (Cth) is a Commonwealth Act that implements Australia's obligations to enforce and recognise foreign arbitration agreements and arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959. The avowed purpose of the reforms was to position Australia as an attractive seat for arbitration in the Asia-Pacific region. Given the elapse of time since the amendments, it is opportune to reflect on how far Australia has come in that time, and the challenges and opportunities going forward. Undoubtedly, there has been a shift in the attitude of Australian courts towards greater judicial support and less judicial intervention in the arbitration process. Based on an extensive discussion of a particular dispute, TCL v Castel, the paper highlights that the High Court's judgment confirms Australia is an arbitration-friendly jurisdiction. Had the decision gone the other way, it may have sounded the death knell for international arbitration in Australia.

I INTRODUCTION

It has been almost five years since the Australian arbitral legislative regime was substantially amended. The avowed purpose of the reforms was to position Australia as an attractive seat for arbitration in the Asia-Pacific region. It is opportune to reflect on how far Australia has come in that time, and the challenges and opportunities going forward. It is well appreciated that the formal infrastructure of a jurisdiction is highly influential in determining its attractiveness as a potential seat for international dispute resolution.¹ This includes its arbitration legislation, and the reputation and attitude of its courts. In this paper I will concentrate on those matters instead of broader considerations that impact on the future of international arbitration in Australia.²

II BACKGROUND

Australia has a bifurcated legislative regime governing arbitration matters. This is a product of the Australian federal system of government. The *International Arbitration Act 1974* (Cth) ('IAA') is a Commonwealth Act and governs *international* commercial arbitrations. It implements Australia's obligations to enforce and recognise foreign arbitration agreements and arbitral awards under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959* ('New York Convention').³ The IAA also gives the force of law to the *UNCITRAL Model Law on International Commercial Arbitration* ('Model Law')⁴ as the primary arbitral law that governs the conduct of international arbitrations seated in Australia.

* LLM (Cambridge); FCI Arb; FACICA; Barrister, Arbitrator and Mediator; President of the Australian Branch of the Chartered Institute of Arbitrators. This article is based on a paper presented at the AMINZ and ICC International Arbitration Day, Auckland, 18 February 2015, entitled 'The Future of International Arbitration in Australia'.

¹ PricewaterhouseCoopers and Queen Mary University of London School of International Arbitration, *International Arbitration: Corporate Attitudes and Practices 2006* (2006) 14.

² In that regard, see John Wakefield and Katrine Narkiewicz, 'Australia's New Arbitration Regime: Five Years On' (2015) 2(1) *New South Wales Law Society Journal* 72.

³ *Convention on the Recognition and Enforcement of Arbitral Awards 1958*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

⁴ *UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (21 June 1985) annex 1, as amended by UN GAOR, 61st sess, Supp No 17, UN Doc A/61/17 (7 July 2006) annex 1.

On the other hand, domestic arbitrations in Australia are governed by a compact of commercial arbitration Acts enacted by the parliaments of the six States and two Territories (collectively the ‘Uniform Acts’).⁵ The Uniform Acts were enacted in about 1984 and were progressively reformed until about 1990, such that as at 2010 they had uniform status (although there were some subtle nuances between them).⁶

The Uniform Acts were not drafted to apply only to domestic arbitrations. They made no distinction between *domestic* and *international* arbitrations. Rather, they purported to apply to all arbitrations seated in the jurisdiction of the relevant State or Territory. However, when the arbitration was *international* in nature, the *IAA* was attracted and, by reason of s 109 of the *Commonwealth Constitution*, the *IAA* overrode the operation of the relevant Uniform Act to the extent of any inconsistency.⁷

Unlike the *IAA*, the Uniform Acts did not adopt the *Model Law*. Instead, they were largely modelled on the *Arbitration Act 1979* (UK), which permitted greater scope for judicial intervention in the arbitral process.

In November 2008, the then Commonwealth Attorney-General, Mr Robert McClelland, released a discussion paper that addressed reform of the *IAA*.⁸ It had not been amended for some 20 years. The discussion paper raised particular topics for discussion, including, controversially, whether the Federal Court of Australia should have conferred upon it exclusive jurisdiction to deal with all matters under the *IAA* – as well as inviting other comments as to the proposed reform of the *IAA*.⁹ Substantial debate ensued. Some 18 months later, the *International Arbitration Amendment Act 2010* (Cth) (*‘IAA Amendment Act’*)¹⁰ received royal assent, specifically on 6 July 2010. It is beyond the scope of this paper to detail the amendments that were made to the *IAA*.¹¹ However, two points deserve mention.

First, the *IAA Amendment Act* did not implement the proposal to invest exclusive jurisdiction under the *IAA* in the Federal Court of Australia. Rather, the *IAA* (as amended) confers concurrent jurisdiction on matters under the *IAA* in the Federal Court and the six State and Territory Supreme Courts (a total of nine superior courts), with appeals flowing to Australia’s apex court, the High Court of Australia.

Second, the most important amendment contained in the *IAA Amendment Act* was to amend s 21 of the *IAA* to provide that parties could no longer opt-out of the *Model Law* and choose an alternative arbitral procedural law – usually a State or Territory domestic arbitration Act. Section 21 had created difficulties in the past – particularly in relation to the infamous *Eisenwerk* decision.¹² In *Eisenwerk*,¹³ the Queensland Court of Appeal held that by adopting the *Rules of Arbitration of the International Chamber of Commerce* (*‘ICC Rules’*),¹⁴ the parties had opted out of the *Model Law* for the purposes of s 21. That decision has been universally criticised on the grounds that parties’ choice to adopt procedural rules of arbitration in an arbitration agreement is different in character and nature from, and has no direct bearing on, the choice of arbitral law.¹⁵ The other purpose of the new s 21 was to remove the uncertain application of the previous Acts¹⁶ to international arbitrations seated in Australia.¹⁷

⁵ *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA).

⁶ Ibid see generally .

⁷ See *American Diagnostica v Gradipore Ltd* (1998) 44 NSWLR 312, 323.

⁸ Commonwealth of Australia, *Review of the International Arbitration Act 1974* (2008) <<http://www.ag.gov.au/Consultations/Documents/ReformstotheInternationalArbitrationAct1974/Review%20of%20the%20International%20Arbitration%20Act%201974%20Discussion%20Paper.pdf>>.

⁹ The Federal Court was established in 1996. It did not exist at the time that the *IAA* (as it is now known) was first enacted as the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth). Curiously, it was not until 2009 that the Federal Court was conferred any jurisdiction under the *IAA*, notwithstanding that international commercial arbitration is a matter that has nationwide significance.

¹⁰ *International Arbitration Amendment Act 2010* (Cth).

¹¹ See Albert Monichino, ‘Arbitration Reform in Australia: Striving for International Best Practice’ (2010) 29(1) *Arbitrator and Mediator* 29.

¹² *Eisenwerk v Australian Granites Pty Ltd* [2001] 1 Qd R 461.

¹³ Ibid.

¹⁴ *Rules of Arbitration of the International Chamber of Commerce* (ICC, 2012).

¹⁵ See also *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262, where the Singaporean courts fell into similar error.

¹⁶ *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA).

¹⁷ In that regard, see *American Diagnostic Inc v Gradipore* (1998) NSWLR 312.

Commensurate with the reform of the *IAA*, the arbitration Acts in each State and the Northern Territory were updated.¹⁸ The most noteworthy feature of the revised Uniform Acts is that, like the *IAA* (as amended), they adopt the 2006 revision of the *Model Law* as the arbitral procedural law. Unlike their predecessors ('the Old Uniform Acts'),¹⁹ the revised Uniform Acts make clear that they apply only to *domestic* commercial arbitrations.

Significantly, s 2A of the current Uniform Acts provides that in the interpretation of those Acts, regard is to be had to the need to promote (as far as practicable) uniformity between the application of those Acts to domestic commercial arbitrations and the application of the provisions of the *Model Law* to international commercial arbitrations. The undoubted objective is to promote the development of a single body of jurisprudence regulating commercial arbitration (both domestic and international) in Australia. Whilst Australia does not have a uniform legislative system applying to domestic and international arbitrations (like Hong Kong, for example), it now has a harmonious one.

To add to the momentum, on 3 August 2010, the Australian International Dispute Centre ('AIDC'), was established in Sydney.²⁰ Additionally, a new centre in Melbourne, the Melbourne Commercial Arbitration and Mediation Centre ('MCAM'), was added in March 2014.²¹ There is also talk of establishing a dispute centre in Perth, moving towards a national dispute resolution grid.²²

III SHIFT IN JUDICIAL ATTITUDES

Undoubtedly, over the past five years there has been a shift in the attitude of Australian courts towards greater judicial support and less judicial intervention in the arbitration process. As noted by two prominent Australian judges, 'Australian courts are moving towards a significantly more positive pro-arbitration position.'²³ It is beyond the scope of this paper to examine the recent Australian jurisprudence in any detail. However, a snapshot provides some instruction:

Table 1. *Arbitration-related court proceedings: 2010 – 2015*

Type of matter	2010/2011 ²⁴	2011/2012 ²⁵	2012/2013 ²⁶	2013/2014 ²⁷	2014/2015 ²⁸
International	14	10	6	10	17
Domestic – new CAA	3	5	9	6	17
Domestic – old CAA	18	21	11	12	6
Total	35	36	26	28	40

¹⁸ Commencing with the enactment of the *Commercial Arbitration Act 2010* (NSW), which came into force on 1 October 2010. Only the Australian Capital Territory remains to update its arbitration Act; *Commercial Arbitration Act 1986* (ACT).

¹⁹ *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA).

²⁰ See Virginia Harrison, 'Dispute Centre: Primed to Tap into World Market', *The Australian* (Sydney) 20 August 2010, 33–4.

²¹ See Melbourne Commercial Arbitration and Mediation Hub, *About Us* (11 December 2013) <<http://www.mcamh.com.au/about-us/>>.

²² Marilyn Warren CJ of the Supreme Court of Victoria first raised the concept of a national arbitration grid at the ACICA Conference in December 2009. See Marilyn Warren, 'The Victorian Supreme Court's Perspective on Arbitration' (Speech delivered at the International Commercial Arbitration Conference: Efficient, Effective, Economical, Melbourne, 4 December 2009).

²³ James Allsop and Clyde Croft, 'Judicial Support of Arbitration' (Paper presented at the APRAG Tenth Anniversary Conference, Melbourne, 28 March 2014) 4. See also James Allsop and Clyde Croft, 'The Role of the Courts in Australia's Arbitration Regime' (Paper presented as part of Commercial CPD Seminar Series, Monash University, 11 November 2015) 2. 2.

²⁴ See A Monichino, 'International Arbitration in Australia – 2010/2011 in Review' (2011) 22 *Australasian Dispute Resolution Journal* 215.

²⁵ See A Monichino and A Fawke, 'International Arbitration in Australia – 2011/2012 in Review' (2012) 23 *Australasian Dispute Resolution Journal* 234.

²⁶ See A Monichino and A Fawke, 'International Arbitration in Australia – 2012/2013 in Review' (2013) 24 *Australasian Dispute Resolution Journal* 208.

²⁷ See A Monichino and A Fawke, 'International Arbitration in Australia – 2013/2014 in Review' (2014) 25 *Australasian Dispute Resolution Journal* 187.

²⁸ See A Monichino and A Fawke, 'International Arbitration in Australia – 2014/2015 in Review' (2015) 25 *Australasian Dispute Resolution Journal* 192.

What may be deciphered from the above table is that in the last five years there has been a reasonable number of arbitration-related cases in the Australian courts, which is reflective of the arbitral activity in Australia. Whilst there has not been any significant upward trend in the number of international arbitration cases, court activity in this area has been steady. What is clear is that the number of cases before the courts concerning the Old Uniform Acts is decreasing. At the same time, the number of cases before the Australian courts involving interpretation of the *Model Law* is increasing. Thus, in the past two years the majority of arbitration cases before the courts have involved application of the *Model Law* (whether under the *IAA* or under the revised Uniform Acts).

A significant proportion of the recent case law involves applications to enforce international arbitral awards. Not surprisingly, the Federal Court has emerged as a significant player (given its extensive territorial reach, as compared with the more limited territorial reach of the Supreme Courts of the various States and Territories). Two particular recent cases deserve mention. They both fall out of the notorious *TCL v Castel* saga. It is worthwhile to refer to them as illustrating the new enlightened judicial approach to arbitration in Australia. It might be compared to the old judicial approach, which has been described extra-curially by a current member of the High Court as ‘two steps forward, one step back.’²⁹

A *TCL v Castel: The Background*³⁰

TCL, a Chinese air-conditioning manufacturer, and Castel, an Australian distributor, entered into an exclusive distributorship agreement in 2003 under which they agreed to refer disputes under their agreement to arbitration, seated in Melbourne, according to Victorian law. Arbitration proceedings were commenced in July 2008, and in 2010 an arbitral tribunal awarded Castel about AUD 3 million plus costs. Castel sought to enforce the award in the Federal Court of Australia. TCL contested that the Federal Court did not have jurisdiction to do so.

In a judgment handed down on 23 January 2012, a single judge of the Federal Court held that the Federal Court is a ‘competent court’ for the purposes of enforcing an international arbitral award under art 35 of the *Model Law*.³¹ Having determined that the court had jurisdiction, in April 2012 the same judge (Murphy J) heard an application by Castel to enforce the awards, and also an application by TCL to set them aside on the basis that they were contrary to the public policy of Australia. In particular, TCL argued that a breach of the rules of natural justice had occurred in connection with the making of the awards. The applications were heard over three days. I will return to the detail of the attack later. On 2 November 2012, Murphy J handed down a second judgment in which he enforced the awards.³² An appeal from that judgment was dismissed. The appeal judgment is discussed below.

B *TCL v Castel: High Court Challenge*³³

In the meantime, TCL brought an application in the original jurisdiction of the High Court on the issue of constitutional writs of prohibition and *certiorari* directed to the judges of the Federal Court. TCL sought first, to restrain the judges from enforcing the arbitral awards, and second, to quash the first judgment which held that the Federal Court had jurisdiction to enforce the awards.

Reflecting the importance of the case, the Solicitor-General of the Commonwealth and the Attorneys-General of New South Wales, Victoria, Western Australia and South Australia intervened in the High Court proceeding. Further, Australia’s peak arbitration bodies, the Australian Centre for International Commercial Arbitration (‘ACICA’), the Institute of Arbitrators and Mediators Australia (‘IAMA’) and the Australian Branch of the Chartered Institute of Arbitrators (‘CI Arb’), made a joint submission as *amici curiae* in opposition to the constitutional challenge.³⁴

²⁹ Patrick A Keane, ‘The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House, Our Rules’ (2013) 79(2) *Arbitration* 195.

³⁰ *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209.

³¹ Ibid. Unfortunately, the *IAA* does not specify which courts are the competent courts for the purpose of art 35.

³² *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (No 2) [2012] FCA 1214 (2 November 2012).

³³ *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533.

³⁴ ACICA, IAMA, CI Arb Australia, ‘Joint Submissions as Amici Curiae, Submission in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*, S178, 26 October 2012.

It is not overstating matters to say that there was some considerable angst amongst the Australian arbitration community about the impending High Court decision. Two years earlier, the High Court had handed down an important arbitration judgment in *Westport Insurance Corporation v Gordian Runoff Limited* ('*Westport*').³⁵ Whilst the decision concerned the interpretation of the Old Uniform Acts, the interveners in *Westport*³⁶ were at pains to point out that the *Model Law* regime was substantially different. The High Court refused to be drawn on that question.³⁷ Moreover, in *Westport* the High Court addressed the juridical nature of arbitration and its relationship with the court system. Several passages in the judgment engendered a degree of foreboding – in particular:

...it is going too far to conclude that performance of the arbitral function is purely a private matter of contract, in which the parties have given up their rights to engage judicial power, and is wholly divorced from the exercise of public authority.³⁸

There were fears that the High Court would bring a national sovereign approach towards international commercial arbitration.³⁹

Let us return to the High Court judgment in *TCL v Castel*. TCL alleged constitutional invalidity on two grounds. First, it said that arts 35 and 36 effectively render international arbitration awards determinative, having regard to the very limited grounds for resisting enforcement under art 36, and thus impermissibly purport to confer the judicial power of the Commonwealth on arbitral tribunals, as opposed to a court specified in ch III of the *Constitution*. Second, TCL argued that the Federal Court's discretion to resist enforcement of an international arbitration award was so limited under arts 35 and 36 that it constituted an impermissible interference with the judicial power of the Commonwealth. It said this was because arts 35 and 36 in effect require Australian courts to act administratively in 'rubber-stamping' international arbitration awards when entertaining applications to enforce them.⁴⁰

Underlying both grounds of attack was an argument that Australian superior courts are mandated by the *IAA* to enforce an international arbitration award made in Australia even if, on its face, it contains a manifest error of law. TCL contended that to oblige an Australian court to enforce an award in those circumstances was to require the court to act in a fashion that is repugnant to the judicial process. The majority judgment of the High Court was delivered by Hayne, Crennan, Kiefel and Bell JJ, French CJ and Gageler J handed down a separate concurring joint judgment.

The court noted that the international origins of the *Model Law* require it to be interpreted without any assumption that it embodies common law concepts – including the somewhat haphazard common law rule that an arbitral award may be set aside for error of law on the face of the award.⁴¹ It also noted that, like the *New York Convention*, the *Model Law* operates on the basis that an arbitral award satisfies the parties' accord to refer their disputes to determination by arbitration, which supersedes (by agreement) the original rights and obligations of the parties.⁴²

TCL argued that art 28 of the *Model Law* required an arbitrator to decide the dispute correctly in accordance with the rules of law chosen by the parties. Alternatively, it contended that there was an implied term in the arbitration agreement to that effect. The court held that there is nothing to suggest that art 28 requires an arbitral tribunal to decide a dispute in accordance with the substantive rules of law chosen by the parties in a manner that a competent court would determine to be correct.⁴³ The absence of an error of law ground in art 36 strongly militated against TCL's submission concerning the interpretation of art 28. Nor was there any implied term that required an arbitral award to be correct in law. Therefore, misapplication (as opposed to non-application) of the chosen rules of law was not a ground for impugning a *Model Law*

³⁵ (2011) 281 ALR 593.

³⁶ Being the same interveners that later intervened in *TCL v Castel*.

³⁷ *Westport Insurance Corporation v Gordian Runoff Limited* (2011) 244 CLR 239, 261 [18].

³⁸ Ibid 261-2 [20].

³⁹ See James Allsop, 'The Authority of the Arbitrator' (2014) 30(4) *Arbitration International* 639, 647.

⁴⁰ *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533, 540.

⁴¹ Ibid 550 [17], 560-61 [51]-[53].

⁴² Ibid 545-46 [9].

⁴³ Ibid 549 [14], 549-50 [16], 561 [53], 566 [73]-[74].

award.⁴⁴ The court rejected the contention that the making of the arbitral award pursuant to the *Model Law* amounted to an exercise of the judicial power of the Commonwealth.⁴⁵ It noted that the essential distinction between judicial power and arbitral authority is that arbitral authority is based on the voluntary agreement of the parties, whereas judicial power is exercised coercively and operates independently of the consent of the parties. Moreover, unlike a judgment, an arbitrator's award is not binding of its own force. The exercise of judicial power in the present case only arose upon the court entertaining an application for enforcement under arts 35 and 36 of the *Model Law*.⁴⁶

As to the second ground of attack, the court held that the inability of the Federal Court as a competent court under arts 35 and 36 of the *Model Law* to refuse enforcement of an arbitral award on the ground of error of law did not undermine the institutional integrity of the Federal Court.⁴⁷ This was because a court undertaking the task of enforcing an award pursuant to the *IAA* has power to refuse enforcement of an award (under art 36 of the *Model Law*) in a variety of circumstances, including if the award is in conflict with the public policy of Australia. The court observed that those provisions are protective of the institutional integrity of courts in the Australian judicial system, which are called upon to exercise jurisdiction under the *IAA* to enforce international arbitration awards.⁴⁸ Moreover, enforcement of the arbitral award was the enforcement of the binding result of the parties' agreement to submit their dispute to arbitration, not enforcement of the underlying disputed rights submitted to arbitration.⁴⁹

The High Court's judgment confirms that Australia is an arbitration-friendly jurisdiction. Had the decision gone the other way, it may have sounded the death knell for international arbitration in Australia.⁵⁰ As an eminent Australian judge noted (shortly before the High Court heard the TCL Case), international traders (and their advisers) have unprecedented freedom to choose their dispute resolution arrangements.⁵¹ They expect high-quality, but minimal, judicial intervention in arbitration. If a jurisdiction does not offer this, they vote with their feet.⁵²

C *TCL v Castel: Single Instance Decision on 'Natural Justice'*⁵³

Following the High Court's judgement, TCL prosecuted its appeal from Murphy J's second judgment, delivered a few days before the High Court heard argument in the constitutional challenge discussed above. His Honour dismissed its application to set aside the awards and instead enforced the awards.⁵⁴ TCL had argued before Murphy J that a breach of the rules of natural justice had occurred in the making of the awards – hence it was contrary to the public policy of Australia to enforce the awards. Indeed, it was argued that the awards should be set aside for that reason.

TCL's key contention concerned the tribunal's assessment of Castel's loss arising from TCL's sale of OEM (ie original equipment manufactured) products⁵⁵ in Australia. Castel's expert witness adopted a substitution ratio of 1:1 (or 100%) between TCL branded products and OEM products. The tribunal found that Castel's expert witness lacked sufficient expertise and therefore rejected his opinion as to substitutability. TCL relied on an expert witness who opined that Castel could have expected to pick up a maximum of about 7.4 per cent of the sales of OEM products as extra sales of TCL branded products. However, TCL's expert conceded that he relied on incomplete data. The tribunal found (and the court accepted) that his expert estimate as to the degree of substitutability was not reliable. Having regard to other lay evidence (not considered by TCL's expert, which contradicted some of the assumptions made by him), the tribunal

⁴⁴ Ibid.

⁴⁵ Ibid 547-48 [12], 550 [17], 553-55 [27]-[32] (French CJ and Gageler J). See also 558-59 [45], 566-67 [75]-[77], 574-75 [106]-[107] (Hayne, Crennan, Kiefel and Bell JJ).

⁴⁶ Ibid 555-56 [32]-[34], 573-74 [103]-[105].

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid 547-49 [11]-[16], 558-59 [45], 567 [78], 575 [109].

⁵⁰ Ian Hunter, 'Case Note on TCL v The Judges of the Federal Court of Australia' (2013) 8(2) *Global Arbitration Review* 30.

⁵¹ Keane, above n 30, 207.

⁵² Ibid.

⁵³ *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 (2 November 2012).

⁵⁴ Ibid.

⁵⁵ OEM Products are non-TCL branded products.

concluded that Castel's lost sales were 22.5 per cent of sales of the OEM products in Australia, and assessed damages accordingly. TCL contended that upon rejecting Castel's expert witness's evidence, the tribunal was bound to accept the evidence of TCL's expert witness. TCL objected that the tribunal instead plucked the 22.5 per cent figure 'from the air.'⁵⁶ TCL contended that two rules of natural justice (and hence public policy) were thereby violated when making the award. The first, a breach of the so-called 'no evidence' rule – that is, no evidence supported the factual findings made by the arbitral tribunal in connection with the assessment of Castel's loss. The second, a breach of the 'hearing' rule – that is, TCL was not afforded a reasonable opportunity to address the relevant findings made by the tribunal, allegedly not based directly on the evidence or arguments put before it.

Murphy J proceeded on the basis that breach of the 'no evidence' rule violates the rules of natural justice, but he acknowledged that TCL faced a significant hurdle in proving such a breach.⁵⁷ Ultimately, Murphy J rejected this contention and concluded that the tribunal had acted on rationally probative evidence in arriving at the figure of 22.5 per cent. He held that the tribunal was entitled to have regard to the fact that TCL's expert based his opinion on incomplete data, and had not taken into account certain lay evidence which pointed to a figure higher than 7.4 per cent.⁵⁸ Regarding the 'hearing' rule, Murphy J concluded that a reasonable litigant in TCL's shoes would have understood the possibility of the reasoning of the type that led to the tribunal's findings – in particular, rejecting TCL's substitution rate of 7.4 per cent and adopting a higher substitution rate.⁵⁹

Accordingly, the court rejected TCL's contention that there had been a breach of the rules of natural justice in connection to the making of the award. In any event, Murphy J noted that any breach of the rules of natural justice that might be found was minor, and certainly not one that could be described as offending fundamental notions of fairness or justice. Therefore, he was not persuaded that a case had been made out for the exercise of his discretion to set aside the award, even if a breach of the rules of natural justice had been established.⁶⁰

Turning to Castel's application for enforcement, as the court had rejected TCL's arguments that there had been a breach of the 'no evidence' rule or the 'hearing rule,' Murphy J held that there was no compelling reason why the award should not be enforced.⁶¹

D *TCL v Castel: Appeal Decision on 'Natural Justice'*⁶²

An appeal from Murphy J's judgment was heard on 22 November 2013. The Full Court of the Federal Court dismissed the appeal that day indicating that its reasons would be published in due course. On 16 July 2014, the court handed down its judgment.⁶³ It is a seminal judgment. Indeed, it was nominated in the Global Arbitration Review awards in the category of 'most important published decision of 2013 for jurisprudential or other reasons.'⁶⁴

The court acknowledged that the making of a factual finding by an arbitral tribunal without probative evidence *may*, in certain circumstances, reveal a breach of the rules of natural justice:

This would be so when the fact was critical, was never the subject of attention by the parties to the dispute, and where the making of the finding occurred without the parties having an opportunity to deal with it. That is unfairness; the parties have not been given an opportunity to be heard.⁶⁵

⁵⁶ *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 (2 November 2012) [149], [144].

⁵⁷ *Ibid* [104].

⁵⁸ In particular, evidence that the Castel dealership network was being directly targeted by those for whom TCL had manufactured OEM products, such that the impact of the sale of OEM products in Australia fell disproportionately on Castel (as opposed to other sellers).

⁵⁹ *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 (2 November 2012) [175]–[176].

⁶⁰ *Ibid* [178].

⁶¹ *Ibid* [185]–[186]. See also [187] Murphy J reiterated here that any breach of the rules of natural justice was a minor one that did not justify the exercise of his discretion to resist enforcement.

⁶² *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387.

⁶³ *Ibid*.

⁶⁴ Global Arbitration Review, *Vote Now for the GAR Awards* (6 February 2015)

<<http://globalarbitrationreview.com/news/article/33370/vote-now/>>.

⁶⁵ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, 409 [83].

However, the court emphasised that a factual conclusion unsupported by probative evidence does not by itself necessarily breach the rules of natural justice.⁶⁶ Ultimately, the court found it unnecessary to determine whether a finding of fact by an arbitrator without probative evidence should ever be characterised as a breach of the rules of natural justice.⁶⁷

The Full Court disagreed with the view of the primary judge that *any* breach of the rules of natural justice amounted to a breach of public policy. Rather, the court held that a substantial denial of natural justice was required to enliven the court's discretion to set aside, or alternatively, to resist enforcement of, an award under arts 34 and 36 of the *Model Law*. The court opined that an international arbitration award would not be set aside unless there is 'real unfairness or real practical injustice' in the way that the arbitration was conducted or resolved, by reference to established rules of natural justice or procedural fairness.⁶⁸

Central to the decision is the emphasis on the context in which the concepts of 'natural justice' and 'public policy' are to be considered. Whilst the making of a factual finding without probative evidence may amount to a breach of natural justice in an administrative law context, the Full Court considered that to do so find in an international arbitration context could fundamentally undermine the objects of international commercial arbitration. In particular, it could undermine the finality of arbitral awards, which is an essential hallmark of international arbitration. Thus, the court emphasised that in the context of international commercial arbitration, a technical breach of the rules of natural justice will not suffice to set aside or justify refusal of enforcement of an arbitral awards. Rather, the award debtor must establish that a breach occasioned some real unfairness or prejudice.

The Full Court stressed that examination of whether there was real unfairness or real practical injustice in the way that the arbitration was conducted or resolved would not ordinarily involve a detailed re-examination of evidence or the tribunal's fact-finding process and reasoning. In this context, the Full Court repeatedly indicated that the primary judge ought not to have allowed TCL to spend three days on the setting aside/enforcement application, time spent re-agitating factual matters canvassed before the tribunal 'when the substance of the complaint is the evidential foundation for, and reason process towards, facts as found.'⁶⁹ The judgment thus offers clear guidance to single judges in how to deal with applications to set aside or enforce arbitral awards. It provides support to resist attempts by disgruntled award debtors to re-agitate actual findings under the guise of an attack on the arbitral award on the ground of breach of natural justice.

The Full Court's decision emphasises the importance of regional coherence in arbitral jurisprudence. In arriving at its decision, the court surveyed the law in other jurisdictions (including New Zealand, Singapore, and Hong Kong). On appeal, the award debtor complained that the primary judge had fallen into error by relying on the importance of uniformity with decisions in other jurisdictions. The Full Court rejected this submission and embraced the importance of consistency in interpretation of the *IAA* with international arbitration jurisprudence.⁷⁰

The decision is instructive as to why some common law jurisdictions (such as Australia, New Zealand and Singapore) introduced the concept of 'natural justice' to supplement the concept of 'public policy' in their arbitration legislation. Some doubt existed in common law jurisdictions as to whether 'public policy' extended to procedural justice. Accordingly, for the avoidance of doubt, the *IAA* (and similar legislation in New Zealand and Singapore) made clear that a breach of natural justice could amount to breach of public policy (and justify the setting aside or non-enforcement of an award).

The Full Court's decision illustrates the pro-arbitration approach adopted by Australian courts and their support for the integrity of the international arbitration system. That being said, I hesitate to use the label 'pro-arbitration.' In this regard, Bathurst CJ recently observed:

It is ... common for practitioners and commentators to scrutinise each successive judgment in an attempt to glean in what they might say more broadly about a court's general attitude to commercial arbitration. Without wanting to generalise, blunt labels are often applied to each decision: whether it is pro-arbitration, internationalist,

⁶⁶ Ibid.

⁶⁷ Ibid 416 [112].

⁶⁸ Ibid 398 [55].

⁶⁹ Ibid 398 [53].

⁷⁰ Ibid 405-6 [75].

interventionist or anti-arbitration. In my view, this binary distinction about whether a court or jurisdiction is pro- or anti- arbitration is over simplistic and unhelpful. It fails to appreciate the peculiarities of individual cases and the novel questions which can arise.

... [t]here are weaknesses in applying a bare pro- or anti- arbitration label to each decision, and seeking to draw from that a broader narrative about the inclination of courts towards commercial arbitration. This is especially the case in jurisdictions where there is not a particularly large body case law being generated.⁷¹

With respect, his Honour makes a fair point. The question is raised, what is an ‘arbitration friendly’ or ‘pro-arbitration’ decision? Is it a decision that supports the efficacy of the arbitration process, at all costs? For example, take the New Zealand Supreme Court’s decision in *Carr v Gallaway Cook Allan*⁷² (‘*Gallaway*’). The decision set aside a (domestic) arbitral award made after a 10-day hearing. Having regard to the consequences of the decision, in particular the substantial costs of the arbitration, it might be considered as arbitration-unfriendly. Yet, the decision was arguably justified on its peculiar facts (given the italicisation, and emphasis of the relevant offending words, in the arbitration agreement), which made the United States cases, involving similar facts, distinguishable on the severability issue.⁷³ For my part, it would be unfair to characterise the *Gallaway* decision as arbitration-unfriendly, or to seek to draw some inference from that decision about the general attitude of the New Zealand courts towards arbitration.⁷⁴ Arguably, what is required amongst commentators is a more nuanced approach where court decisions are criticised (fairly) in circumstances where they are out of step with established international arbitration jurisprudence and norms.

IV FURTHER LEGISLATIVE REFORM

A question presently facing Australian stakeholders is whether Australia should embark on a second round of reform of the *IAA*. Alternatively stated, would it be better to allow the law to develop organically without interruption by further legislative amendment, or to commence further reform?

Professor Luke Nottage (of Sydney University) and I have agitated for further legislative reform in the past. Professor Nottage’s reform agenda is more ambitious than mine.⁷⁵ It is fair to say that the proposed reforms fall into two categories. First, there are proposed reforms that address legislative difficulties exposed in recent case law. These include the failure of the *IAA* to expressly define the ‘competent court’ for the purposes of art 35 of the *Model Law*, as well as the ‘black-hole’ problem, which is discussed below. Second, there are potential amendments that could be made to further improve the *IAA* generally.

The current Solicitor-General of Australia, Justin Gleeson SC, has opined that it would be better for judges and practitioners to work through the difficulties in the application of the *IAA* as they arise, and to allow for a body of law to develop, before further legislative intervention is warranted.⁷⁶ Mr Gleeson also appears to be of the view that if further reform is to be undertaken, an expert working group should be established to oversee the reform process. Bathurst CJ has recently acknowledged that some further changes may be required to address the issues that have arisen since the 2010 amendments to the *IAA*, and perhaps to address emerging or so-called ‘burning issues’ in arbitration, to ensure that Australia remains up-to-date with innovations in the international arbitration landscape.⁷⁷ Beyond that, he posits that the Australian system should be given time to grow naturally without too much intervention.⁷⁸

International dispute resolution is a fast-moving area of practice. Jurisdictions that aspire to be an attractive seat cannot afford to stand still. In our region, one only needs to look at Singapore where the legislature has shown itself not to be averse to introducing statutory amendments, as and when required, in

⁷¹ Thomas F Bathurst, ‘Judicial Support for Arbitration - A Reprise’ (2015) 162(3) *Australian Construction Law Newsletter* 6.

⁷² [2014] 1 NZLR 792 .

⁷³ In particular, *Hall Street Associates, LLC v Mattell Inc*, 113 Fed App 272 (9th Cir, 2004); *Hall Street Associates, LLC v Mattell Inc* 552 US 576 (2008) .

⁷⁴ Cf *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188 (19 December 2014).

⁷⁵ Luke Nottage, ‘International Commercial Arbitration in Australia: What’s New and What’s Next?’ (2013) 30(5) *Journal of International Arbitration* 465.

⁷⁶ Justin Gleeson, ‘Commentary on Paper by Professor Luke Nottage’, in N Perram J (ed), *International Commercial Law and Arbitration: Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2014) 346.

⁷⁷ See Bathurst, above n 71.

⁷⁸ Bathurst, above n 72, 6, 8, 12.

order to ensure that Singapore's arbitral law, at all times, reflects international best practice.⁷⁹ A jurisdiction does not demonstrate weakness by updating its arbitral legislation. Indeed, the contrary is true. By continually updating its arbitration legislation a jurisdiction sends a message to the international market place that it is vibrant and engaged. It also has the salutary effect of stimulating local interest in this important area of dispute resolution.

While expert working groups may have their place – including in framing the policy debate – there is a danger in assuming that a select few have a monopoly on relevant ideas. Whilst Australia has a solid legislative framework regulating international commercial arbitration, there is room for improvement.

Some amendments have already been made during 2015.⁸⁰ The *Civil Law and Justice Legislation Amendment Act 2014* (Cth) received royal assent on 17 August 2015. Schedule 2 of that Act amends s 21 of the *IAA*, which was the centrepiece of Australia's 2010 international arbitration law reforms. Section 21 removed the ability of parties to opt-out of the *Model Law*. Yet, in an oversight, Parliament failed to specify whether the 2010 amendments had retrospective effect – that is, whether s 21 applied to arbitration agreements entered into before the amendment of the *IAA* on 6 July 2010. The new Act makes it clear that s 21 applies to an arbitration commenced on or after the commencement of the Act (ie 18 August 2015), whether the arbitration agreement giving rise to the arbitration was made before, on or after 6 July 2010. Specifically, the Act inserts '(1)' before the text of the existing s 21, and then adds a new subsection (2) which provides:

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.

To the surprise of many, an additional Bill, the *Civil Law and Justice (Omnibus Amendments) Bill 2015* (Cth), was introduced into the Australian Senate on 25 June 2015. It received royal assent on 13 October and has now entered into force. Items 56–64 of sch 1 of the Bill seek to make miscellaneous amendments to the *IAA*. The amendments are quite limited. Most notably:

- a. the heading of Pt II – 'Enforcement of Foreign Awards' is amended to read: 'Part II Enforcement of Foreign Arbitration Agreements and Awards'. This is said to better reflect its content, as giving effect to the *New York Convention*;
- b. section 8(4) is repealed. That subsection introduced a reciprocity requirement in terms of the enforcement of foreign awards. It required that either the foreign award must be made in a *New York Convention* country; alternatively the award creditor must, at the time of the application to enforce, be domiciled or ordinarily resident in Australia or in a *New York Convention* country. Section 8(4) was somewhat curious as Australia did not accede to the *New York Convention* under any reciprocity reservation. The removal of s 8(4) will mean that following the amendment a foreign award will be enforceable in Australia wherever it is made;
- c. section 8(5)(a) of the *IAA*, reflecting in part art V(1)(a) of the *New York Convention*, presently provides that one ground for resisting the enforcement of a foreign award is that the award debtor was, under the law. Indeed art V(1)(a) speaks of 'the parties', not simply the award debtor. Section 8(5)(a) is to be amended to provide that the incapacity of either the award debtor or the award creditor may justify the refusal to enforce a foreign award. In this way, it will more faithfully reflect the *New York Convention*;
- d. presently the confidentiality provisions of the *IAA* apply on an opt-in basis. The Bill amends this to prescribe that the confidentiality provisions apply on an opt-out basis. Most commentators would applaud this particular amendment;⁸¹ and
- e. section 30 of the *IAA*, which concerns application of pt III of the *IAA*, is repealed. The ambit of s 30, following the 2010 amendments, remains somewhat uncertain. Its removal is desirable and avoids any unintended operation.

Some further amendments are discussed below.

⁷⁹ Witness the recent establishment of the Singapore International Commercial Court, which is likely to impact on the international commercial arbitration landscape in the Asia-Pacific region. See Singapore International Commercial Court, *Establishment of the SICC* (2015) <<http://www.sicc.gov.sg/About.aspx?id=21>>.

⁸⁰ Monichino and Fawke, above n 29, 193-4.

⁸¹ Confidentiality has been a controversial topic in Australian arbitration since the High Court's decision in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10. That case refused to recognise an automatic confidentiality (as opposed to privacy) obligation attaching to arbitration in Australia.

A *Competent Court for the Purposes of Art 35 Model Law*

Unfortunately, the *IAA* does not define ‘the competent court’ for the purposes of art 35 of the *Model Law*, which is concerned with the recognition and enforcement of arbitral awards. The *IAA* should be amended to provide expressly that both the Federal Court and the State and Territory Supreme Courts have jurisdiction to enforce awards under ch VIII of the *Model Law*. This could be done by way of supplementation of the existing s 18. A like amendment should be made to art 17H of the *Model Law*, dealing with recognition and enforcement of interim measures.

B *Evidentiary Onus*

In terms of drafting difficulties, there is uncertainty as to the nature of the onus (if any) cast by s 8(1) of the *IAA*. The *IAA*’s s 8 is intended to give effect to art V of the *New York Convention*, whilst s 9 is intended to give effect to art IV of the *New York Convention*. Section 8(1) states that foreign awards are binding ‘on the parties to the arbitration agreement in pursuance of which it was made.’ Specifically, there is conflicting authority on whether by reason of s 8(1), the award creditor has some onus to prove that an award debtor, who is not named in the arbitration agreement, was a party to the arbitration agreement. By contrast, equivalent legislative provisions in other jurisdictions provide that a foreign award is ‘binding upon the persons between whom it was made.’⁸² There is no explanation in the Explanatory Memorandum⁸³ in respect of the *IAA* as originally enacted⁸⁴ for Parliament’s choice of language in s 8(1). This section should be brought into line with the equivalent provisions in other jurisdictions.

C *Confidentiality*

Confidentiality is perceived by many to be a key benefit of arbitration. Sections 23C-23G of the *IAA* provide for confidentiality of international arbitrations seated in Australia. The *IAA* does not address confidentiality or otherwise of arbitration-related proceedings in court. In contrast, arbitration-related proceedings in Singapore and Hong Kong are *prima facie* confidential, thus protecting the confidentiality of the underlying arbitration.⁸⁵ There is much to be said for the latter approach. In *TCL v Castel*, for example, any confidentiality in the arbitral process was expunged once the matter was ventilated in open court.

D *Negative Jurisdictional Rulings*

Art 16 of the *Model Law* (which is given the force of law by s 16 of the *IAA*) only provides for review by the court at the seat of a positive jurisdictional ruling (ie a ruling that the arbitral tribunal has jurisdiction). Singapore has recently amended its *International Arbitration Act* to provide for court review of negative jurisdictional rulings (ie rulings by the arbitral tribunal declining jurisdiction).⁸⁶ A similar amendment could usefully be made to the *IAA*.

E *Enforcement of Emergency Arbitrator Awards*

Several Asia-Pacific arbitral institutions (including ACICA) have recently introduced rules to provide emergency interim relief prior to the constitution of the arbitral tribunal. The emergency arbitrator is required to render his/her award in a very short space of time (usually 5–15 business days). If not complied with voluntarily, there is an issue as to whether the emergency arbitrator’s award is an award capable of enforcement under the relevant arbitration legislation. Both Singapore and Hong Kong have amended their respective arbitration statutes to put the matter beyond doubt by providing for enforcement of emergency arbitrator awards. The *IAA* could be usefully amended to remove the existing uncertainty.

⁸² See, eg, *Arbitration Act 1996* (UK) s 101(1); *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 29(2); *Arbitration Ordinance* (Hong Kong) cap 609, s 87(2).

⁸³ Explanatory Memorandum, Arbitration (Foreign Awards and Agreements) Bill 1974 (Cth).

⁸⁴ Then known as the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth).

⁸⁵ *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 22; *Arbitration Ordinance* (Hong Kong) cap 609, s 16.

⁸⁶ *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 10(3)(b).

F Court Orders for Evidence in Aid of Foreign-Seated Arbitrations

Art 17J of the revised *Model Law* (forming sch 2 of the *IAA*) provides that the court may issue an interim measure in relation to arbitration proceedings, irrespective of whether the place of arbitration is in Australia. Section 23 of the *IAA* permits the court to issue a subpoena requiring a person to attend for examination before, or to produce specified documents to, the arbitral tribunal. The better view is that the power to order subpoenas is limited to arbitrations seated in Australia. However, there are circumstances where an Australian-based witness might be usefully required to produce evidence (oral or documentary) in a foreign-seated arbitration. At the present time, an Australian court may not directly assist in those circumstances. Section 23(3) of the *IAA* might usefully be amended to provide that an Australian court may issue a subpoena requiring a person in Australia to attend for examination before, or produce documents to, an arbitral tribunal conducting arbitral proceedings in Australia, irrespective of whether the arbitration is seated in Australia or not.

G Arb-Med

The *IAA*, in contrast with the Singapore and Hong Kong international arbitration Acts,⁸⁷ do not contain any provision which expressly recognises an Arb-Med procedure; that is, a procedure whereby the arbitral tribunal assumes the role of a mediator or conciliator in order to facilitate settlement of the dispute referred to arbitration. In the absence of a statutory recognition of an Arb-Med process (whether with or without private caucusing) in the *IAA*, there is a serious risk that enforcement of an international arbitral award made in Australia following a failed Arb-Med procedure will be refused. Such procedures are attractive to Chinese and Japanese parties in particular. In the interests of encouraging a more culturally tolerant approach to the diverse needs of international parties, serious consideration should be given to the inclusion in the *IAA* of statutory recognition for Arb-Med procedures.

H Indemnity Costs

Consideration might also be given to introducing a default cost rule in respect of arbitration-related court proceedings, such that award debtors who unsuccessfully apply to set aside (or unsuccessfully resist enforcement of) an award should be required to pay costs of the court proceedings on an indemnity basis.⁸⁸ Similarly, consideration might also be given to introducing a default indemnity costs rule in relation to unsuccessful stay applications.⁸⁹

In *Altain Khuder LLC v IMC Mining Inc (No 2)*⁹⁰ ('*Altain Khuder*') Croft J awarded indemnity costs against an award debtor who successfully sought to resist enforcement of a foreign award. His Honour's decision enforcing the foreign award was reversed on appeal.⁹¹ Whilst it was not necessary for the Court of Appeal to do so, it disagreed with Croft J on the indemnity cost issue. Croft J relied on arbitration jurisprudence in Hong Kong.⁹² The Victorian Court of Appeal found that his Honour acted on a wrong principle in embracing the approach that had been adopted in Hong Kong.

The debate on the indemnity costs issue was revived in a recent address given by Allsop CJ during Sydney Arbitration Week in 2014.⁹³ His Honour argued that public policy considerations arise in the award of costs, that both the United Kingdom and Hong Kong jurisprudence recognises this, and that the approach

⁸⁷ See, eg, *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 17.

⁸⁸ A Monichino, *When High Risk Strategies are 'Worth a Go'* [2013] (June 2) ACICA News 23.

⁸⁹ Brought either under s 7 of the *IAA* or art 8 of the *Model Law*.

⁹⁰ [2011] VSC 12 (3 February 2011).

⁹¹ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 (22 August 2011).

⁹² See, eg, *A v R* [2009] HKCFI 342 (30 April 2009). The Hong Kong Court of Appeal confirmed this approach in *Gao Haiyan v Keeneye Holdings Ltd (No 2)* [2012] HKCA 43 (2 December 2011), and also in *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd CACV* [2012] HKCA 200 (9 May 2012).

⁹³ James Allsop, 'The Enforcement of International Arbitration Awards and Public Policy' (Speech delivered at AMTAC and Holding Redlich Seminar, 10 November 2014) 30-40 <<http://www.amtac.org.au/assets/media/Papers/AMTAC-Seminar-2014/Award-Enforcement-and-Public-Policy-10-November-2014.pdf>>. See also Malcolm Holmes, 'Open Policy in the *New York Convention* and the *Model Law*' (Speech delivered at AMTAC and Holding Redlich Seminar, 10 November 2014) 14-23 <<http://www.amtac.org.au/assets/media/Papers/AMTAC-Seminar-2014/Award-Enforcement-and-Public-Policy-10-November-2014.pdf>>.

of the Victorian Court of Appeal in *Altain Khuder* operates on the (mistaken) assumption that enforcement proceedings are substantially the same as other proceedings brought between Australian courts. Allsop CJ stated:

Commencing litigation to resist enforcement (if without foundation) may be viewed first and foremost as an abandonment of that contractual bargain. It may be said that there is a public policy interest in discouraging parties from abandoning promises by way of contract. Distinguishing it from other kinds of proceedings, the very act of commencing (unsuccessful) litigation to resist enforcement is itself an attempt to subvert a dispute resolution agreed upon by the parties, a repudiation of a contractual undertaking that causes further unnecessary damage to the innocent party.⁹⁴

This is an important debate, which is not closed. Absent a statutory amendment, it is unlikely that the Hong Kong approach will receive judicial favour under the *IAA* in the foreseeable future.⁹⁵

I *Possible Application of the Australian Consumer Law*

Consideration might be given to clarifying the uncertain application of the *Australian Consumer Law*⁹⁶ ('*ACL*') provisions relating to misleading and deceptive conduct as well as statutory unconscionability, to international arbitrations seated in Australia. In particular, this consideration would address situations where the parties have chosen a foreign law or applicable private international law principles, leading to a foreign law being applied as the governing substantive law of the arbitration, in relation to the *ACL*. The present uncertainty may be a disincentive to selecting Australia as a seat for international arbitration.

J *Lack of 'Australian Law' as a Barrier to Arbitration?*

Recently, Allsop CJ of the Federal Court, speaking extra-curially, noted that the inability of the national parties to adopt 'Australian law' as their governing (or applicable) law to determine the merits of the dispute may be a possible disincentive to choose an Australian city as a seat for international arbitration.⁹⁷ This is because Australia is a federation and the law in the various States (and Territories) differs. On the other hand, Australia's primary competitors in the Asia-Pacific region (in particular, Hong Kong and Singapore) operate in unitary jurisdictions. Although I personally doubt that this is a real problem, in deference to the learned Chief Justice, the question arises as to whether the *IAA* may be usefully amended to provide a definition as to what constitutes 'Australian law' for the purposes of selecting a governing law in an international arbitration seated in Australia.

K *Centralisation of Judicial Power*

Perhaps the most controversial proposal is the amendment of the *IAA* to establish the Federal Court as the single intermediate appellate court in international arbitration matters. I proposed this in a paper given at an ICC conference in Melbourne in 2011.⁹⁸ The major justification of the proposal is to promote a uniform approach to international arbitration in Australian jurisprudence.⁹⁹ The proposal was much more moderate than the proposal raised in the 2008 discussion paper to vest exclusive jurisdiction in international arbitration matters in the Federal Court. Instead, under this more moderate proposal, State/Territory and Federal Courts would have concurrent first instance jurisdiction under the *IAA*, but appeals from single instance decisions would be heard by the Federal Court as the single intermediate appellate court.¹⁰⁰

⁹⁴ Allsop, above n 94, 38-9 [74].

⁹⁵ In *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd [No 2]* [2015] NSWSC 564 (15 May 2015) [38], Hannersschlag J noted that, in the context of an arbitration under the *Commercial Arbitration Act 2010* (NSW), one of the reasons for not following the Hong Kong approach is the fact that '...the Legislature could have, but did not, create or recognise any such categories for an award of indemnity costs in the Act.'

⁹⁶ *Competition and Consumer Act 2010* (Cth) sch 2.

⁹⁷ Stephanie Garber, 'Lack of 'Australian Law' a Barrier to Arbitration', *Lawyers Weekly* (online), 4 June 2015 <<http://www.lawyersweekly.com.au/wig-chamber/news/16613-lack-of-australian-law-a-barrier-to-arbitration>>.

⁹⁸ See Albert Monichino, 'International Arbitration in Australia: A Need to Centralise Judicial Power' (2012) 68 *Australian Law Journal* 118.

⁹⁹ Ibid. I also argued for the establishment of specialist Arbitration List in order to promote uniformity.

¹⁰⁰ As presently occurs in intellectual property matters (ie copyright, patents, etc). See, eg, *Patents Act 1990* (Cth) s 154.

Immediately prior to his appointment of the High Court of Australia, the then Chief Justice of the Federal Court, Keane CJ, in September 2012, endorsed the proposal as worthy of consideration.¹⁰¹ In August 2013, the Commonwealth Solicitor-General observed that at a practical and functional level, the establishment of a single intermediate appellate court, to deal with all matters involving international commercial arbitration, would be highly desirable in terms of promotion of this area of endeavour.¹⁰²

On the other hand, Bathurst CJ, Chief Justice of the Supreme Court of New South Wales, has recently argued that there are a number of ‘compelling’ reasons that dispel the idea of centralising jurisdiction for international commercial arbitration.¹⁰³ Essentially, Bathurst CJ advanced three reasons. In doing so, with respect, his Honour seems to stray between the exclusive jurisdiction proposal advanced in the 2008 discussion paper (and rejected during the consultation process) and my more moderate proposal of establishing the Federal Court as the single intermediate appellate court in international arbitration matters. The three reasons advanced by the learned Chief Justice were as follows:

- a. There is a single common law of Australia, such that when matters are determined by courts exercising federal judicial power, they are determined as part of an integrated Australian legal system in which any differences between intermediate appellate courts are ultimately resolved by the High Court of Australia. Moreover, there is nothing to suggest that there are presently significant differences in the approach taken between state and territory jurisdictions regarding the IAA;¹⁰⁴
- b. The most significant argument against vesting federal jurisdiction in the Federal Court is the loss of state and territory expertise in IAA-related matters. It cannot be said that the Federal Court has any special expertise in IAA-related matters;¹⁰⁵ and
- c. If the Federal Court heard matters under the IAA while the state and territory courts heard matters in relation to domestic arbitration, an unfortunate divide may occur which may produce divergent jurisprudence.¹⁰⁶

It is beyond the scope of this article to deal with his Honour’s criticism of the proposal in detail. However, several points should be made. First, as previously discussed, all other jurisdictions in the Asia-Pacific region have a unitary court system. In contrast, Australia has nine superior courts exercising appellate jurisdiction under the IAA. This unwieldy structure is a competitive disadvantage in terms of the formal legal infrastructure of the Australian regulatory system. Whilst I acknowledge that, notwithstanding this unwieldy structure, Australian superior courts have so far avoided any substantial conflicts in interpretation of the IAA;¹⁰⁷ differences have begun to emerge. For example, in relation to the temporal operation of the s 21 of the IAA, the interpretation of s 8(1) of the IAA, and also in relation to the appropriateness of awarding indemnity costs.¹⁰⁸ This is not surprising as Allsop CJ, speaking extra-curially, observed:

The central concepts that affect the success of arbitration procedures, and the degree to which courts will assist or impede arbitration are open to a significant degree of interpretation. Depending upon the court’s intellectual predisposition or predilection, *widely different approaches are possible to the same problem* at hand (emphasis added).¹⁰⁹

¹⁰¹ Keane, above n 30, 195.

¹⁰² Gleeson, above n 77, 347.

¹⁰³ Bathurst, above n 72, 13.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Cf the conflict between the Victorian and New South Wales Courts of Appeal as to the interpretation of s 29 of the Old Uniform Acts concerning the adequacy of arbitral reasons in a domestic arbitration award. This conflict was resolved by the High Court in *Westport Insurance Corporation v Gordian Runoff Limited* (2011) 244 CLR 239.

¹⁰⁸ See also the subtle differences in approach between different Australian intermediate appellate courts as to the interpretation of arbitration agreements and, in particular, the extent to which the approach of Lord Hoffman’s approach in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 (17 October 2007) represents the law in Australia. Cf the approach taken in *Rinehart v Welker* [2012] NSWCA 95 (20 April 2012) and *Cape Lambert Resources Ltd v Mac Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666.

¹⁰⁹ James Allsop, ‘International Arbitration and the Courts – the Australian Approach’ (Paper presented at the CIARB Asian-Pacific Conference, Sydney, 27-8 May 2011) 6-7.

It matters not that the High Court may ultimately resolve any conflicts between intermediate courts of appeal. That takes time. In the meantime, the uncertainty caused by conflicts between intermediate appellate court is damaging to Australia's aspirations as a potential seat of arbitration.

Second, Bathurst CJ posits that the most significant argument against vesting jurisdiction under the *IAA* solely in the Federal Court is that the expertise of the State and Territory Supreme Courts would be lost. First, I am not suggesting a return to the exclusive jurisdiction proposal that was raised in the 2008 discussion paper. Under my more moderate proposal, the State and Territory Courts would retain first instance jurisdiction. Moreover, as part of the proposal, recognising the considerable expertise in this area among the State Supreme Courts, I advocated that a select number of State Supreme Court Judges could be given a dual commission (as both Supreme Court and Federal Court judges), and thus be entitled to sit on the Full Court of the Federal Court in important arbitration matters. There is no constitutional impediment to conferring dual commissions. Rather, the only obstacle appears to be an administrative one.

Finally, Bathurst CJ argues that a division whereby the Federal Court hears matters under the *IAA*, whilst the State and Territory Supreme Courts hear matters under the domestic arbitration Acts, would 'create an unfortunate divide.'¹¹⁰ Of course, it is desirable that the jurisprudence in relation to international arbitration and domestic arbitration should develop harmoniously. Section 2A of the revised Uniform Acts (referred to above) is designed to achieve this result. Thus, under my proposal, if the Full Court of the Federal Court were to determine that a provision of the *Model Law* (given the force of law in the *IAA*) is to be interpreted in a particular way, State and Territory Courts (including appeal divisions of those courts) would practically be required by s 2A to follow suit in the interpretation of the equivalent provision of the domestic arbitration Act.

Before moving on, there is one matter that I would like to respond to. Bathurst CJ stated:

There are also more unusual explanations [in favour of the single intermediate appellate court proposal], such as the High Court being "less inclined" to grant special leave from a bench of the Federal Court comprised of specialist judges. There is, I think, no reason why that would ever occur.¹¹¹

What I had in mind was the system of appeals from State Supreme Courts to the Federal Court in taxation matters between 1977 and 1991. At the time, Mason CJ of the High Court observed:

The Full Court of the Federal Court is the ultimate court of appeal in taxation matters subject only to the exceptional cases in which the High Court grants special leave to appeal. It follows that a fundamental principle must arise for decision in such a matter before the High Court will grant special leave.¹¹²

Ultimately, the possible amendment of the *IAA* to establish the Federal Court as the single intermediate appellate court in international arbitration matters is a delicate topic, but one that must be squarely faced by Australian stakeholders (including the judiciary) going forward.

V CONCLUSION

Australia has made substantial progress in the area of international commercial arbitration since the 2010 reforms to the *IAA*. Australia now has a harmonious regime regulating international and domestic arbitration, underpinned by the 2006 revision of the *Model Law*. There has been a substantial shift in judicial attitude toward support for arbitration, with Australian judges now displaying an enlightened 'light touch' approach in arbitration-related matters. Whilst the *IAA* is a respectable *lex arbitri*, there is a strong case for a new wave of legislative reform in order to ensure that the *IAA* reflects international best practice. The combination of amendments referred to above would ensure that Australia is perceived to have first-class formal infrastructure for international dispute resolution, and accordingly enhance Australia's status as a desirable seat for international arbitration.

¹¹⁰ Bathurst, above n 72, 13.

¹¹¹ Bathurst, above n 72, 13.

¹¹² *Federal Commissioner of Taxation v Westfield Ltd* (1991) 22 ATR 400, 400.

