

ARBITRATION IN AUSTRALIA

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1. Overview and historical background

- 1.1.1 Australia's legislative powers are divided between the Commonwealth of Australia (as the federal entity), the six states and the two federal territories.
- 1.1.2 The provisions governing international arbitration in Australia are found in the International Arbitration Act (1974) (**Australian Arbitration Act**).
- 1.1.3 For domestic arbitration, each state and territory has its own Commercial Arbitration Act (**CAA**).¹ The CAAs are largely uniform and while they have historically been quite different to the Australian Arbitration Act, there have been recent amendments aimed at harmonising and achieving uniformity between the international and domestic arbitration regimes.
- 1.1.4 The Australian Arbitration Act came into force in 1974 and implemented Australia's obligations under the New York Convention to enforce and recognise foreign arbitration agreements and awards.² The Australian Arbitration Act also gave the force of law to the Model Law (1985) as the law governing international arbitrations in Australia.³
- 1.1.5 The Australian Arbitration Act was amended in July 2010 to ensure that it remains at the forefront of international arbitration practice. This involved updating the Australian Arbitration Act to incorporate amendments made to the Model Law (1985) by the Model Law (2006),⁴ and also clarifying the circumstances in which a court may refuse to enforce a foreign award.
- 1.1.6 The most significant reform is that the Australian Arbitration Act now makes it clear that the Model Law (2006) is the exclusive law governing international commercial arbitrations that take place in Australia. Previously, parties had been able to opt out of the Model Law (1985) and apply one of the CAAs to the arbitration. Accordingly, the Model Law (2006) will now govern any future international arbitration in Australia.
- 1.1.7 For domestic arbitration, historically the laws varied from state to state. In 1984, the first uniform CAAs were implemented in Victoria and New South Wales

¹ New South Wales Commercial Arbitration Act 1984, Victorian Commercial Arbitration Act 1984, Queensland Commercial Arbitration Act 1990, South Australian Commercial Arbitration Act 1986, Western Australian Commercial Arbitration Act 1985, Tasmanian Commercial Arbitration Act 1986, Australia Capital Territory Commercial Arbitration Act 1986 and Northern Territory Commercial Arbitration Act 1985 (collectively referred to hereinafter as **CAAs**).

² For the text of the New York Convention, see CMS Guide to Arbitration, vol II, appendix 2.1.

³ Australian Arbitration Act, s 16. For the text of the Model Law (1985), see CMS Guide to Arbitration, vol II, appendix 2.1.

⁴ For the text of the Model Law (2006), see CMS Guide to Arbitration, vol II, appendix 2.1.

(NSW). The other jurisdictions followed and, by 1990, the state laws were mostly uniform. These reforms removed the confusion surrounding cross jurisdictional disputes within Australia and removed the barriers that were previously affecting the enforcement of awards between Australian states.

- 1.1.8 Recently, the Australian Standing Committee of Attorneys-General – comprised of Attorneys-General from each state, federal territory and the Commonwealth – agreed to overhaul Australia’s domestic commercial arbitration regime, with the adoption of new uniform laws based on the Model Law (2006).⁵ The legislation in NSW has been passed and came into effect on 1 October 2010. This legislation essentially updates the NSW CAA by adopting the Model Law (2006) as the basis for domestic arbitration. The NSW CAA contains some areas of difference from the Model Law (2006). These differences are largely the result of the NSW CAA’s exclusive application to domestic arbitration, but there are also a number of other departures from the Model Law (2006). These include provisions for situations not covered in the Model Law (2006) where the parties fail to agree on the method to appoint arbitrators⁶ and additional detail on the powers given to arbitral tribunals.⁷ It is anticipated that the other states and territories will follow suit and enact legislation that is similar to the NSW CAA.

2. Scope of application and general provisions of the Australian Arbitration Act

2.1 Scope of application

International disputes

- 2.1.1 The Australian Arbitration Act governs all “international arbitrations”, the legal seat or place of which is in Australia, irrespective of whether the dispute is the subject of institutional or ad hoc arbitration. An arbitration is “international” where the parties’ places of business are in different countries. Where a party has places of business in more than one country, the relevant place of business is the one most closely connected to the dispute. If a party has no place of business, reference is made to its habitual residence.
- 2.1.2 If the parties’ places of business are in the same country, an arbitration can still be regarded as international if:

⁵ Standing Committee of Attorneys-General, Communiqué, 7 May 2010.

⁶ NSW CAA, s 11(3)(c).

⁷ *Ibid*, s 19(4)–(6).

- it is conducted in a different country;
- a substantial proportion of the obligations owed under the commercial relationship are to be performed in a different country;
- the subject matter of the dispute is most closely connected to a different country; or
- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Domestic disputes

- 2.1.3 Individual CAAs, as enacted by the states and territories, apply to domestic disputes. Due to the wide definition given to “arbitration agreement” in the CAAs they are not necessarily limited to arbitration in a commercial context.
- 2.1.4 The recently amended NSW CAA applies to domestic commercial arbitrations where the place of the arbitration is in NSW. In addition, some provisions – such as those relating to interim measures and to the enforcement of awards – are relevant to applications to NSW courts in relation to domestic commercial arbitrations where the place of the arbitration is outside NSW.

2.2 General principles

- 2.2.1 Provided that the parties do not agree otherwise, an arbitral tribunal is free to conduct the arbitral proceedings as it deems appropriate. This principle applies under both the Australian Arbitration Act and the CAAs. However, there are certain mandatory provisions from which the parties cannot derogate by agreement.
- 2.2.2 The mandatory provisions exist to preserve and protect due process and natural justice. By way of example, the Australian Arbitration Act mandates, among other things, that:
- each party is given a full opportunity to present its case;
 - the parties are treated with equality; and
 - the parties are given sufficient notice prior to any hearing of the arbitral tribunal.⁸
- 2.2.3 There are only a few mandatory provisions in the context of domestic arbitral procedure, as provided for in the CAAs. However, some common law principles – such as principles of natural justice and due process – are also applicable.

⁸ Model Law (2006), ch V (see CMS Guide to Arbitration, vol II, appendix 2.1).

3. The arbitration agreement

3.1 Formal requirements

3.1.1 The CAAs,⁹ the Australian Arbitration Act,¹⁰ the Model Law (2006)¹¹ and the New York Convention¹² provide that parties to a legal relationship must agree in writing to resolve all or certain disputes by arbitration in order for there to be a binding arbitration agreement. The arbitration agreement may be a separate, stand alone agreement or it may be a clause within another substantive agreement between the parties.

3.1.2 The Australian Arbitration Act specifically requires that an arbitration agreement is either signed by the parties or is contained in an exchange of letters, telex or telegrams.¹³

3.2 Applicable rules

3.2.1 The parties are free to agree on the procedure to be followed by the arbitral tribunal.¹⁴ Therefore, parties may agree to a set of institutional or ad hoc rules which they can modify so as to tailor the procedural rules to their particular circumstances and needs.

3.2.2 Where the parties fail to agree on a particular set of rules, the Model Law (2006) provides that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.¹⁵ This power includes an ability to determine the admissibility, relevance, materiality and weight of any evidence.

3.2.3 In the case of domestic arbitrations, subject to the arbitration agreement and any mandatory provisions in the relevant CAA, the arbitral tribunal¹⁶ may conduct the arbitral proceedings in such manner as it thinks fit.¹⁷

⁹ CAAs, part 2.

¹⁰ Australian Arbitration Act, sch 1, art II.

¹¹ Model Law (2006), art 2 (see CMS Guide to Arbitration, vol II, appendix 2.1).

¹² New York Convention, art II (see CMS Guide to Arbitration, vol II, appendix 1.1).

¹³ Model Law (2006), art 7(4) (see CMS Guide to Arbitration, vol II, appendix 2.1).

¹⁴ Model Law (2006), art 19(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).

¹⁵ Model Law (2006), art 19(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

¹⁶ As discussed in para 4.1.5, under Australian law, the default position in domestic arbitration is to have a sole arbitrator. References in this chapter to an "arbitral tribunal" in domestic arbitrations are to circumstances in which the arbitral tribunal could comprise of one or more arbitrators. References to an "arbitrator" are to an individual arbitrator's duties or responsibilities or to a sole arbitrator, depending on the context.

¹⁷ CAAs, s 14.

3.3 Separability

- 3.3.1 Australian law adopts the principle of separability, whereby arbitration clauses are considered to be independent from the contract in which they appear and, accordingly, are not void simply by reason of the substantive contract being void.

3.4 Legal consequences of a binding arbitration agreement

- 3.4.1 In the case of both domestic and international arbitrations, if a civil action which is the subject of an arbitration agreement is brought before a court, that court must refer the parties to arbitration if a party to the dispute so requests. This does not apply if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.¹⁸

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

- 4.1.1 The parties are free to agree on the appointment of arbitrators, the number of arbitrators required to constitute the arbitral tribunal and the appointment procedure to be followed.¹⁹ There are default procedures for the appointment of arbitrators that will apply if no procedure is stipulated.²⁰
- 4.1.2 In relation to international arbitrations, the parties are free to determine the number of arbitrators and, failing such a determination, the default number of arbitrators is three.²¹
- 4.1.3 Where the number of arbitrators is, by default, three, and there is no procedure for the appointment of the arbitral tribunal, the parties will each choose an arbitrator, and those arbitrators will choose the third arbitrator.²² Where the parties or the party-appointed arbitrators fail to act as required in this procedure, or where the number of arbitrators is one, the Supreme Court of the relevant state or territory shall appoint the arbitrator(s).
- 4.1.4 Arbitrators who are approached for appointment to the arbitral tribunal are compelled to disclose circumstances that may affect their impartiality or independence.²³

¹⁸ *Ibid*, s 8 and Australian Arbitration Act, s 17(2) and (5).

¹⁹ Model Law (2006), art 11(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

²⁰ Model Law (2006), art 11(3) (see CMS Guide to Arbitration, vol II, appendix 2.1).

²¹ Model Law (2006), art 10 (see CMS Guide to Arbitration, vol II, appendix 2.1).

²² Model Law (2006), art 11 (see CMS Guide to Arbitration, vol II, appendix 2.1).

²³ Model Law (2006), art 12(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).

4.1.5 In relation to domestic arbitrations, in the event that the arbitration agreement does not provide for the composition of the arbitral tribunal, there is a presumption that the dispute will be heard by a single arbitrator, jointly appointed by the parties to the agreement.²⁴

4.2 Procedure for challenging and substituting arbitrators

The challenge of arbitrators

4.2.1 There are two circumstances in which an arbitrator may be removed, namely:

- (i) where there are justifiable doubts as to the arbitrator's impartiality or independence; or
- (ii) where the arbitrator does not have the qualifications agreed to by the parties.²⁵

4.2.2 In determining whether there are justifiable doubts as to the arbitrator's impartiality, Australian courts apply the common law reasonable apprehension test. This test provides that suspicion is established if a member of the public would reasonably consider that the arbitrator would not decide the dispute in a fair and unprejudiced manner.²⁶

Procedure for challenge

4.2.3 The parties can agree on the procedure for challenging arbitrators. Where there is no agreement on the procedure, a party may challenge the appointment of an arbitrator (if either of the circumstances listed in paragraph 4.2.1 above arise) within 15 days of the appointment, or within 15 days of becoming aware of the circumstances listed in paragraph 4.2.1. A party may only challenge its appointed arbitrator if that party became aware of the grounds for a challenge after the appointment was made.

4.2.4 The challenge is made by sending a written statement to the arbitral tribunal outlining the reasons for the challenge. The parties can then agree on the challenge or the arbitrator can withdraw from the arbitral tribunal voluntarily. If the other party does not agree to the challenge or the arbitrator does not withdraw from the arbitral tribunal voluntarily, then the arbitral tribunal may decide the challenge.²⁷

4.2.5 Where a challenge fails, the challenging party may apply to the Supreme Court to make a final decision on the challenge. While such an application is pending in the court the arbitral tribunal may continue with proceedings and make an award.

²⁴ This default procedure is provided for by CAAs, s 6–8.

²⁵ Model Law (2006), art 12(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

²⁶ Australian Arbitration Act, s 18A.

²⁷ Model Law (2006), art 13(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

- 4.2.6 Where an arbitrator can no longer act, or fails to act without undue delay, the parties may agree to terminate the arbitrator's mandate.²⁸ Alternatively, the arbitrator can withdraw from the arbitral tribunal voluntarily. Where the termination of an arbitrator's mandate occurs or the arbitrator withdraws from the arbitral tribunal for these reasons, it does not imply that there are justifiable doubts as to an arbitrator's impartiality or independence or that the arbitrator does not have the agreed qualifications.
- 4.2.7 In relation to domestic arbitration, the position is somewhat different. The test to be applied under the NSW CAA is whether there is a real danger of bias.²⁹ The Model Law (2006) provides what is arguably a higher threshold test for whether there are justifiable doubts as to the impartiality or independence of an arbitrator.³⁰

The appointment of substitute arbitrators

- 4.2.8 Where the tenure of an arbitrator ceases due to a successful challenge, or where that arbitrator is unable to perform his or her duties, a substitute arbitrator will be appointed in accordance with the rules that were applied to appoint the arbitrator that is being replaced.³¹

4.3 Arbitration fees

- 4.3.1 The allocation of costs is similar under both the Australian Arbitration Act and the CAAs. Costs are discussed in further detail in section 7.4 below.

4.4 Arbitrator immunity

- 4.4.1 Arbitrators are not liable for anything done or omitted to be done in good faith in their capacity as arbitrators.³² The CAAs contain similar provisions for domestic arbitrations.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

- 5.1.1 An arbitral tribunal may rule on its own jurisdiction by virtue of Article 16 of the Model Law (2006), which incorporates the principle of *competence-competence*. This includes the ability to rule on any challenges to the validity of the arbitration clause or the arbitration agreement.

²⁸ Model Law (2006), art 14(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).

²⁹ NSW CAA, art 12.

³⁰ Model Law (2006), art 12(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

³¹ Model Law (2006), art 15 (see CMS Guide to Arbitration, vol II, appendix 2.1).

³² Australian Arbitration Act, s 28(1).

5.1.2 A plea that the arbitral tribunal does not have jurisdiction must be raised no later than in the submission of the statement of defence, while a challenge that asserts that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of the tribunal's authority is raised during the arbitral proceedings. However, the arbitral tribunal has the discretion to hear a late plea if it considers that the delay is justified.³³

5.2 Power to order interim measures

5.2.1 In international arbitrations, provided that the arbitration agreement does not specify otherwise, the arbitral tribunal has the power to order any party to take such interim measures of protection as it considers necessary in respect of the subject matter of the dispute.³⁴

5.2.2 An interim measure is a temporary measure which either maintains or restores the status quo while the dispute is determined, or prevents harm or prejudice to the arbitral process. Examples include ordering a party to preserve assets or evidence pending the issue of a final award by the arbitral tribunal. The power to order interim measures of protection also includes the power to require a party to provide security in connection with such a measure.

5.2.3 Except in limited circumstances, an interim measure will be recognised and enforced by the Australian courts, irrespective of the country in which it was issued.³⁵

5.2.4 The Australian courts have the power to order interim measures to support an arbitration, where they are requested to do so by the parties to an international arbitration taking place anywhere in the world. An Australian court has the same power to order interim measures in arbitral proceedings as it does in relation to proceedings in that court (see section 8 below).

5.2.5 The only part of the Model Law (2006) that Australia did not adopt is the right to obtain preliminary orders from the arbitral tribunal on an *ex parte* basis.

5.2.6 In relation to domestic arbitration, the CAAs also generally provide the arbitral tribunal with an ability to make an interim award, unless a contrary intention is expressed in the arbitration agreement.

³³ Model Law (2006), art 16(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

³⁴ Model Law (2006), art 17 (see CMS Guide to Arbitration, vol II, appendix 2.1).

³⁵ Australian Arbitration Act, s 8.

6. Conduct of proceedings

6.1 Common law tradition

6.1.1 Australia is a common law jurisdiction. The legal process has traditionally emphasised the importance of procedural issues. A number of Australian procedural concepts, although familiar in other common law jurisdiction such as the United Kingdom, United States, Canada and most other Commonwealth states, are not part of the civil law tradition. These concepts include the disclosure and inspection of documents, the exchange of witness statements, cross-examination of witnesses and the use of party-appointed experts.

6.1.2 While some Australian states have adopted a more proactive approach in respect of case management by the courts, e.g. via the introduction of the Civil Procedure Act 2010 in Victoria, Australian legal proceedings are unequivocally adversarial in their approach (i.e. party-driven with the judge adopting the position of arbiter between the opposing parties) rather than inquisitorial (i.e. more reliant on the judge taking charge of progressing the case). Australian arbitral proceedings are not tied to Australian court procedure. Indeed, the parties may agree on the procedure of the arbitral proceedings.³⁶ Where no procedure is agreed upon, the arbitral tribunal is granted wide ranging powers to decide on the procedure, including issues relating to the admissibility, relevance, materiality and weight of any evidence.³⁷

6.2 Commencement of arbitration

6.2.1 The parties are free to agree on the commencement date of the arbitral proceedings. Where parties have not prescribed a commencement date, arbitral proceedings commence when the respondent receives the request for arbitration.³⁸

6.3 Seat, place of hearings and language of arbitration

6.3.1 Where no agreement is made by the parties on the seat of arbitration, the arbitral tribunal may decide the seat of arbitration, taking into consideration what is convenient for both parties and the circumstances of the case.³⁹ Further, unless otherwise agreed by the parties, the arbitral tribunal may decide to meet at any location for consultation, hearing evidence or inspection of goods and documents.

³⁶ Model Law (2006), art 19 (see CMS Guide to Arbitration, vol II, appendix 2.1).

³⁷ See section 3.2 above on this point.

³⁸ Model Law (2006), art 21(see CMS Guide to Arbitration, vol II, appendix 2.1).

³⁹ Model Law (2006), art 20 (see CMS Guide to Arbitration, vol II, appendix 2.1).

6.3.2 The parties may select the language of the arbitration.⁴⁰ Where no language is chosen, the arbitral tribunal will select the language. All correspondence must accord with the applicable language and the arbitral tribunal may order any documentary evidence to be translated.

6.4 Multi-party issues

6.4.1 Parties to an arbitration agreement may agree, either in a provision of the arbitration agreement itself or otherwise in writing, that Section 24 of the Australian Arbitration Act will apply.⁴¹ Section 24 allows a party to arbitral proceedings to apply to the arbitral tribunal to make orders in relation to other related arbitral proceedings if a common fact or question of law exists, the rights to relief of both proceedings arise out of a common transaction or series of transactions, or for some other reason.

6.4.2 The arbitral tribunal can make orders to consolidate arbitral proceedings or hear related arbitral proceedings together or in sequence. Otherwise, the arbitral tribunal can stay arbitral proceedings, pending the determination of the related arbitral proceedings. Where an arbitral tribunal receives such an application, it must inform the arbitral tribunal hearing the related arbitral proceedings so that both arbitral tribunals can deliberate on the application. Where an agreement is reached on the application, the arbitral tribunals will jointly make an order dealing with the related arbitral proceedings.

6.4.3 Where arbitral proceedings are consolidated, a new arbitral tribunal must be established in accordance with Articles 10 and 11 of the Model Law (2006). Where no agreement is made, the related arbitral proceedings will continue to be heard by separate arbitral tribunals.

6.5 Submissions

6.5.1 The parties may determine the format and timetable for submissions. In the event that there is no agreement between the parties, the arbitral tribunal may determine these matters.

6.5.2 Within the set timeframe, the claimant must submit the points of issue and identify what remedy is sought. Unless otherwise agreed by the parties, the arbitral proceedings will be terminated where the claimant does not communicate its submissions in this way without "sufficient cause" for its failure to do so.⁴² The respondent must provide its defence in relation to the claimant's points of issue

⁴⁰ Model Law (2006), art 22 (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁴¹ Australian Arbitration Act, s 22(5).

⁴² Model Law (2006), art 25 (see CMS Guide to Arbitration, vol II, appendix 2.1).

(unless the elements of this submission are otherwise agreed between the parties) but, unlike the claimant, failure to communicate its submissions without “sufficient cause” will not result in termination of the arbitration.⁴³ Despite the failure of a party to make submissions, an arbitral tribunal may still make an award on the basis of the evidence before it.⁴⁴

6.5.3 A party’s submission may be amended during the arbitral proceedings, unless the arbitral tribunal considers it inappropriate or the parties agree otherwise.

6.5.4 All submissions, evidence and other information provided to the arbitral tribunal must be communicated to the other parties to the arbitral proceedings.⁴⁵

6.6 Oral hearings and written proceedings

6.6.1 Article 24 of the Model Law (2006) governs oral hearings and written proceedings. Parties may agree on whether proceedings are to be oral or written. In the absence of any such agreement, the arbitral tribunal will decide. The arbitral tribunal must hold oral hearings if requested by any party.⁴⁶ Parties must be given “sufficient advance notice” of any oral hearings or meetings for the inspection of property or documentation.⁴⁷

6.6.2 Parties are entitled to representation of their choice. The representative need not be a legal practitioner and can be from any jurisdiction.⁴⁸

6.7 Evidence generally

6.7.1 Arbitral tribunals conducting arbitral proceedings under the Model Law (2006) have the power to determine the admissibility, relevance, materiality and weight of the evidence and are not bound by local rules of evidence.⁴⁹

6.7.2 In relation to domestic arbitrations, the CAAs also provide a liberal approach in applying the rules of evidence.⁵⁰ The arbitral tribunal may inform itself in such a manner as it thinks fit. However, the parties can, by agreement, require the arbitral tribunal to apply certain rules of evidence.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Model Law (2006), art 24(3) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁴⁶ Model Law (2006), art 24(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁴⁷ Model Law (2006), art 24(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁴⁸ Australian Arbitration Act, s 29.

⁴⁹ Model Law (2006), art 19(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁵⁰ CAAs, s 19(3).

6.8 Appointment of experts

6.8.1 Parties may agree on the appointment of expert witnesses or, where there is no agreement, the arbitral tribunal may appoint expert witnesses.⁵¹ Parties may request that an expert attends the arbitral proceedings in order to testify and take questions, but only if the arbitral tribunal considers it necessary.⁵²

6.9 Confidentiality

6.9.1 Parties to arbitral proceedings must not disclose confidential information in relation to arbitral proceedings,⁵³ except in situations where:

- all parties consent to disclosure;
- the information is disclosed to a professional or other adviser to any of the parties;
- disclosure is necessary to enable a party to fully present its case;
- disclosure is necessary for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party;
- disclosure is necessary for the purposes of enforcing an award;
- disclosure is necessary for the purposes of the Australian Arbitration Act;
- disclosure is required by a subpoena or order made by a court; or
- another relevant law or regulatory body authorises or requires disclosure.⁵⁴

6.9.2 The arbitral tribunal may also make an order for disclosure of confidential information by a party to the arbitral proceedings upon a request from the other party. This need not necessarily be for any of the reasons outlined in paragraph 6.9.1. Before making such an order, each party to the arbitral proceedings must be given the opportunity to be heard.⁵⁵

7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 In relation to international arbitral proceedings, the arbitral tribunal must decide the dispute in accordance with the “rules of law” chosen by the parties as applicable to the substance of the dispute.⁵⁶ In the absence of choice by the parties, the arbitral tribunal must apply the law determined by whichever conflict

⁵¹ Model Law (2006), art 26(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁵² Model Law (2006), art 26(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁵³ Australian Arbitration Act, s 23C.

⁵⁴ *Ibid*, s 23D.

⁵⁵ *Ibid*, s 23E.

⁵⁶ Model Law (2006), art 28(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).

of laws rules it considers applicable,⁵⁷ and will usually (although not always) apply the law of the seat of arbitration.

7.1.2 In the context of domestic arbitral proceedings, an arbitral tribunal is required to make any determination in accordance with the law.⁵⁸ However, if the parties to an arbitration agreement so agree in writing, the arbitral tribunal may determine any question that arises for determination in the course of the arbitral proceedings by reference to considerations of general justice and fairness.⁵⁹

7.2 Timing, form, content and notification of an award

7.2.1 In relation to international arbitration, awards must:

- be in writing;
- state the date and forum of the arbitration;
- be signed by all members of the arbitral tribunal, or by the majority with reasons outlining why signatures were omitted; and
- unless parties agree otherwise, provide reasons for the decision.⁶⁰

7.2.2 After the award is made, a copy which complies with the form requirements described in paragraph 7.2.1 above must be delivered to each party.⁶¹

7.2.3 In the context of domestic arbitrations, an award must also be in writing.⁶² Where an arbitral tribunal makes an award other than in writing, the arbitral tribunal must, upon request by a party, within seven days after making the award, give to the party a statement in writing signed by the arbitral tribunal that contains the determination and reasons for making the award.⁶³

7.2.4 The High Court of Australia has recently clarified the extent to which an arbitral tribunal must provide reasons for an award and the test to be applied to determine the sufficiency of those reasons.⁶⁴ The High Court held that an arbitral tribunal is not required to provide reasons which are equivalent to those that would be provided by a judge in court proceedings, but that an award must:

⁵⁷ Model Law (2006), art 28(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁵⁸ CAAs, s 22(1).

⁵⁹ *Ibid.*, s 22(2).

⁶⁰ Model Law (2006), art 31 (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁶¹ *Ibid.*

⁶² CAAs, s 29(1).

⁶³ *Ibid.*, s 29(2).

⁶⁴ *Westport Insurance Corporation & Ors v Gordian Runoff Limited* [2011] HCA 37.

- set out the arbitral tribunal’s determination – based on the arbitral tribunal’s view of the evidence – of what did or did not happen;
- explain succinctly why, in the light of what happened, the arbitral tribunal reached its decision; and
- state what the arbitral tribunal’s decision is.⁶⁵

7.3 Settlement

7.3.1 If the parties to arbitral proceedings settle their dispute, the arbitral tribunal shall terminate the arbitral proceedings.⁶⁶ If the parties so request, and the arbitral tribunal agrees, the settlement will be recorded in the form of an award.

7.4 Power to award costs and interest

Costs

7.4.1 Parties to an arbitration agreement have the option to incorporate Section 27 of the Australian Arbitration Act,⁶⁷ which provides that the costs of an arbitration will be at the discretion of the arbitral tribunal.⁶⁸

7.4.2 This option must be exercised in writing, either through the parties’ arbitration agreement or any other document. The arbitral tribunal has a general discretion to award costs, except where otherwise agreed by the parties.⁶⁹

7.4.3 In exercising its general discretion to award costs, the arbitral tribunal may:

- direct to whom, by whom, and in what manner costs are to be paid;
- determine the amount of costs to be paid, or arrange for an assessment of costs; or
- award that costs are to be assessed or settled as between the parties or as between a legal practitioner and client.

7.4.4 In the context of domestic arbitration, in exercising the above discretion, the arbitral tribunal must take into account any refusal or failure by a party to do all things required by the arbitral tribunal to enable a just award to be made.⁷⁰

⁶⁵ *Ibid.*

⁶⁶ Model Law (2006), art 30 (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁶⁷ Australian Arbitration Act, s 22.

⁶⁸ *Ibid.*, s 27.

⁶⁹ *Ibid.*

⁷⁰ CAAs, s 34(7).

7.4.5 Where an award is silent on the issue of costs, a party to the arbitral proceedings has 14 days after receiving the award to apply to the arbitral tribunal for directions as to the payment of costs. The arbitral tribunal must then hear the parties and amend the award to include provision for costs.

Interest

7.4.6 Sections 25 and 26 of the Australian Arbitration Act apply to the question of interest, unless the parties to the arbitration agreement have agreed to the contrary.⁷¹ The arbitral tribunal is allowed to make an award for the payment of money, which includes interest at such reasonable rate as the arbitral tribunal determines. Interest upon interest is not permitted and orders for interest do not affect damages recoverable for the dishonour of a bill of exchange.⁷² If an arbitral tribunal makes an award for the payment of money and under that award the amount is to be paid by a particular date, the arbitral tribunal may direct that interest (including compound interest) is payable if the amount is not paid by that due date.⁷³

7.4.7 In relation to domestic arbitration, the provisions of the CAAs are similar to those under the Australian Arbitration Act and they also empower an arbitral tribunal to award interest.⁷⁴

7.4.8 It is important to note that interest may also be available under common law. Australian courts have held that interest and opportunity cost are not too remote to amount to a claim in damages.⁷⁵ Accordingly, an arbitral tribunal may award, as damages, an amount that compensates a party for financing charges incurred or the lost opportunity to earn interest, provided that the arbitration agreement does not exclude the common law right to interest.

7.5 Termination

7.5.1 Arbitral proceedings are terminated where:

- a party withdraws its claim (unless the respondent objects to termination);
- the parties agree to terminate the proceedings; or
- arbitral proceedings become impossible or unnecessary.⁷⁶

⁷¹ Australian Arbitration Act, s 22.

⁷² *Ibid*, s 25(2).

⁷³ *Ibid*, s 26.

⁷⁴ CAAs, s 31 and Australian Arbitration Act, s 25.

⁷⁵ *Hungerfords v Walker* (1989) 171 CLR 125.

⁷⁶ Model Law (2006), art 32(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

7.6 Effect of the award

- 7.6.1 An award made by an arbitral tribunal must be recognised as binding and be enforced by the relevant court.⁷⁷
- 7.6.2 A court may refuse to recognise or enforce an award upon the request of a party against whom it is invoked if it can be proved that:
- a party to the arbitration agreement was under some incapacity;
 - the arbitration agreement is not valid under the law of the country in which the award was made, or alternatively the law to which the parties have subjected it;
 - the award deals with a dispute beyond the scope of the parties' original submission to arbitration;
 - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country in which the arbitration took place; or
 - the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.
- 7.6.3 Additionally, a court may refuse to recognise or enforce an award if it finds that doing so would be contrary to the public policy of the state, or if the subject matter of the dispute is not capable of settlement by arbitration under the relevant law.⁷⁸

7.7 Correction, clarification and issue of a additional award

Correction and clarification of an award

- 7.7.1 A party may, within 30 days of receiving an award, request the arbitral tribunal to correct any typographical errors in the award, or – provided that the other parties consent – give an interpretation of a specific point in the award.⁷⁹ If the arbitral tribunal considers the request to be justified, it must comply with the request within 30 days.⁸⁰
- 7.7.2 Alternatively, the arbitral tribunal may correct typographical errors without the request of a party within 30 days of the date of the award.⁸¹

⁷⁷ Model Law (2006), art 35(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁷⁸ Model Law (2006), art 36 (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁷⁹ Model Law (2006), art 33(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁸⁰ Model Law (2006), art 33(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁸¹ Model Law (2006), art 33(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

Additional awards

- 7.7.3 Within 30 days of receipt of an award, a party may request that a further award be made concerning matters not dealt with in the original award.⁸² The requesting party must provide notice to the other parties of any such request. The arbitral tribunal may thereafter make an additional award within 60 days, or, if necessary, an extended period if it considers the request to be justified.

7.8 Remedies

- 7.8.1 While the Australian courts are yet to consider whether an arbitral tribunal can award punitive or exemplary damages, there are generally no limits on the remedies that an arbitral tribunal can award, provided that the parties do not agree otherwise.

8. Role of the courts

8.1 Jurisdiction of the courts

- 8.1.1 Generally, Australian courts are reluctant to interfere with arbitral proceedings. The courts tend to focus on assisting arbitral proceedings with a view to preserving and respecting the jurisdiction of the arbitral tribunal.
- 8.1.2 In international arbitrations, the circumstances in which a court can intervene in the arbitral process are quite limited by virtue of Article 5 of the Model Law (2006), which provides for greater autonomy of the arbitration. Article 5 of the Model Law (2006) specifically states that no court shall intervene in matters governed by the Model Law (2006), except where provided for in the Model Law (2006) itself.
- 8.1.3 Notwithstanding the intention of the Model Law (2006) for minimal judicial interference in the arbitral process, the Supreme Court may supervise arbitrations in relation to certain procedural issues.⁸³ The Supreme Court may:
- appoint arbitrators where the parties or the two party-appointed arbitrators fail to agree on an arbitrator;⁸⁴
 - decide on a challenge of an arbitrator if so requested by the challenging party;⁸⁵
 - decide, upon request by a party, on the termination of the mandate of an arbitrator;⁸⁶

⁸² Model Law (2006), art 33(3) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁸³ Model Law (2006), art 6 (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁸⁴ Model Law (2006), art 11(3) and (4) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁸⁵ Model Law (2006), art 13(3) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁸⁶ Model Law (2006), art 14 (see CMS Guide to Arbitration, vol II, appendix 2.1).

- assist in the taking of evidence;⁸⁷
- grant interim measures of protection;⁸⁸
- decide on the jurisdiction of the arbitral tribunal, where the tribunal has ruled on a plea as a preliminary question and a party has requested the Supreme Court to make a final determination on its jurisdiction;⁸⁹ and
- set aside an award.⁹⁰

8.1.4 If the arbitral tribunal has decided on the issue of jurisdiction as a preliminary question, either party may, within 30 days, request the Supreme Court of the state or territory in which the arbitration had its seat, or alternatively the Federal Court of Australia, to finally decide on the issue.⁹¹

8.1.5 The powers of the Australian courts to intervene in arbitral proceedings are more extensive in respect of domestic arbitrations under the CAAs. For example, courts have the power to review an award on a question of law.⁹²

8.2 Stay of court proceedings and preliminary rulings on jurisdiction

8.2.1 Article 8 of the Model Law (2006) governs the approach of national courts in Australia where a party commences court proceedings in apparent breach of an arbitration agreement. This provision requires an Australian court to stay its proceedings and refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Arbitral proceedings may be continued or commenced, and an award may be made, while the dispute is pending before a court. A court may grant an interim measure before or during arbitral proceedings.⁹³

8.2.2 Similarly, under Section 7 of the Australian Arbitration Act, where pending court proceedings have been instituted by certain parties to an arbitration agreement concerning a dispute that is capable of being settled through arbitration, the court must stay those court proceedings and refer the dispute to arbitration (unless the arbitration agreement is null and void, inoperative or incapable of being performed).⁹⁴

⁸⁷ Model Law (2006), art 27 (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁸⁸ Model Law (2006), art 9 (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁸⁹ Model Law (2006), art 16(3) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁹⁰ Model Law (2006), art 34(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁹¹ Model Law (2006), art 16(3) (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁹² CAAs, s 38; see section 9.3 below for further details.

⁹³ Model Law (2006), art 9 (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁹⁴ Australian Arbitration Act, s 7.

- 8.2.3 Section 7 of the Australian Arbitration Act only applies where:
- the procedure of the arbitral proceedings is governed by the law of a New York Convention country;
 - the arbitral proceedings are not governed by the law of a New York Convention country, but a party to the arbitral proceedings is Australian, or is a state (meaning, Australia or any foreign country), or is a person domiciled or ordinarily resident in Australia at the time that the arbitration agreement was made;
 - a party to the arbitration is part of the government, or is the government of a New York Convention country; or
 - a party to the arbitration is a person domiciled or ordinarily resident in a New York Convention country at the time that the arbitration agreement was made.
- 8.2.4 For domestic arbitrations, the court has a discretionary power to stay its proceedings.⁹⁵ This power may be exercised where the court is satisfied that:
- there is no sufficient reason why the matter should not be referred to arbitration; and
 - the applicant is ready and willing to do all things necessary for the proper conduct of the arbitration.
- 8.2.5 In NSW, this position has been substantially amended to ensure that NSW courts no longer have discretion as to whether to enforce an agreement to arbitrate. Instead, the NSW provision mirrors the Model Law (2006) and requires that a NSW court must stay any court proceedings that have been commenced in breach of an arbitration agreement, unless the agreement is null and void, inoperative or incapable of being performed.⁹⁶

8.3 Interim protective measures

- 8.3.1 It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, an interim measure of protection from a court and for the court to grant such a measure.⁹⁷
- 8.3.2 In relation to domestic arbitration, the recently amended NSW CAA arguably allows for a higher level of intervention by the courts than the Model Law (2006). Section 47 of the NSW CAA confers on the court the same power to make interlocutory orders for the purposes of, and in relation to, arbitral proceedings as it has for court proceedings.

⁹⁵ CAAs, s 53.

⁹⁶ NSW CAA, s 8.

⁹⁷ Model Law (2006), art 9 (see CMS Guide to Arbitration, vol II, appendix 2.1).

8.4 Obtaining evidence and other court assistance

- 8.4.1 The arbitral tribunal – or a party acting with the approval of the arbitral tribunal – may request assistance from the court in the taking of evidence.⁹⁸ The court may execute the request within its competence and according to its rules on taking evidence.
- 8.4.2 The CAAs allow any party to an arbitration agreement to obtain an order from the Supreme Court requiring a person to produce to the arbitral tribunal the documents specified in the order.⁹⁹ There is also scope to require any person who refuses or fails to attend before an arbitral tribunal (including witnesses) to appear before the Supreme Court.¹⁰⁰

9. Challenging and appealing an award before the courts

9.1 Jurisdiction of the courts

- 9.1.1 In relation to international arbitrations, the grounds upon which an award may be set aside are found in Article 34 of the Model Law (2006), which provides the exclusive avenue of recourse against an award. In summary, the Supreme Court may set aside an award where a party makes an application proving that:
- they were under “some incapacity”;
 - the arbitration agreement was not valid under the applicable law, or alternatively, the law of the state or territory in Australia in which the arbitration is held;
 - they were not provided with “proper notice” of the appointment of the arbitral tribunal or any of its members;
 - they were “unable to present their case”;
 - the award deals with matters not falling within the terms of the submission to arbitration;
 - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
 - the dispute is not capable of settlement by arbitration or the award is in conflict with the public policy of Australia.
- 9.1.2 An award is in conflict with public policy if the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred in connection with the making of the award.¹⁰¹

⁹⁸ Model Law (2006), art 27 (see CMS Guide to Arbitration, vol II, appendix 2.1).

⁹⁹ CAAs, s 17.

¹⁰⁰ *Ibid*, s 18.

¹⁰¹ Australian Arbitration Act, s 19.

9.2 Appeals

- 9.2.1 In relation to international arbitrations, otherwise than described in section 9.1 above, an award cannot be appealed to the Supreme Court.
- 9.2.2 In relation to domestic arbitration, an appeal may be made to the Supreme Court on any question of law arising out of an award.¹⁰² However, such an appeal must be made either with the consent of all parties to the arbitration agreement or with the leave of the Supreme Court.¹⁰³
- 9.2.3 Provided that they do so after the commencement of the arbitration, the parties are allowed to exclude or limit the rights of appeal under Section 38 of the CAAs.¹⁰⁴

9.3 Applications to set aside an award

- 9.3.1 An application to set aside an award must be made within three months from the date on which the party making the application received the award, a corrected award or an interpretation of the award.¹⁰⁵ Where appropriate, and if so requested by a party, a court may suspend the proceedings to set aside the award for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitration or to take other action that will eliminate the grounds for setting aside the award.
- 9.3.2 In relation to domestic arbitrations, the party seeking to appeal an award will have to make an application for leave to appeal to the competent Supreme Court of the relevant state or territory.¹⁰⁶ The Supreme Court will not grant leave unless it considers that:
- the determination of the question of law concerned would substantially affect the rights of a party to the arbitration agreement;
 - there is either a manifest error of law on the face of the award or strong evidence that the arbitral tribunal made an error of law; and
 - the determination of the question may add substantially to the certainty of commercial law.¹⁰⁷

¹⁰² CAAs, s 38.

¹⁰³ *Ibid*, s 34A.

¹⁰⁴ *Ibid*, s 40.

¹⁰⁵ Model Law (2006), art 33 (see CMS Guide to Arbitration, vol II, appendix 2.1).

¹⁰⁶ CAAs, s 38(4).

¹⁰⁷ *Ibid*, s 38(5).

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 The most common procedure for enforcing a domestic award under Australian law is found in Section 35 of the CAAs. Under this provision, an award may, with the leave of the court, be enforced in the same manner as a judgment of the court.¹⁰⁸

10.2 Foreign awards

10.2.1 In relation to the enforcement of foreign awards, Section 8(2) of the Australian Arbitration Act effectively equates a foreign award with a domestic award for the purposes of enforcement by providing that a foreign award may be enforced in the court of a state or territory of Australia as if the award has been made in that state or territory, in accordance with the law of that state or territory.

10.2.2 The party applying for enforcement must supply the authenticated original foreign award with the original arbitration agreement, or duly certified copies thereof.¹⁰⁹ Australian courts may, without the application of a party, refuse to enforce an award if it finds that the dispute is not capable of settlement through arbitration in the relevant state or territory of the court, or enforcement of the award is against Australian public policy.¹¹⁰

10.2.3 If the Australian court is satisfied that an application to set aside or suspend an award has been made to an appropriate authority in the country which, or under the law of which, the award was made, the court may adjourn enforcement proceedings relating to the award.¹¹¹ The court may also order a party to provide suitable security.¹¹²

11. Special provisions and considerations

11.1 Sources of further information

11.1.1 Further information on international arbitration seated in Australia is generally available from the Australian Centre for International Arbitration Limited (**ACICA**), which is arguably the most prominent arbitral institution in Australia. ACICA was

¹⁰⁸ *Ibid.*, s 35.

¹⁰⁹ Australian Arbitration Act, s 9.

¹¹⁰ Model Law (2006), art 34(2)(b) (see CMS Guide to Arbitration, vol II, appendix 2.1).

¹¹¹ Australian Arbitration Act, s 8(8).

¹¹² *Ibid.*

established to support and facilitate international arbitration and promote Australia as a venue for international commercial arbitration. It administers domestic and international arbitrations and also provides a range of other arbitration-related services.

- 11.1.2 Other relevant bodies include the Australian Commercial Dispute Centre Limited, the Chartered Institute of Arbitrators (Australia) Limited, the Institute of Arbitrators and Mediators Australia and the International Chamber of Commerce's Australian branch.

12. Conclusions

- 12.1.1 Both foreign and Australian companies are becoming increasingly aware of the advantages of arbitration in Australia. Australia has, therefore, placed considerable importance on the process of both domestic and international arbitration, evidenced by the wide adoption of the New York Convention and the recent overhaul of the CAAs, which it is hoped will make Australia a more attractive forum for the determination of international arbitrations.

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