The International Arbitration Review

Fifth Edition

Editor
James H Carter

Law Business Research

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This article was first published in The International Arbitration Review - Edition 5
(published in June 2014 – editor James H. Carter).

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-07-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ABASCAL, SEGOVIA & ASOCIADOS

ADVOKATFIRMAN DELPHI

AMBOS NBGO

ANWALTSBÜRO WIEBECKE

BAKER & MCKENZIE KRZYŻOWSKI I WSPÓLNICY SPK

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CONTENTS

EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter

Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2014

Chapter 4

AUSTRALIA

James Whittaker, Colin Lockhart, Jin Ooi and Timothy Bunker[1]

I INTRODUCTION

Australia has a federal system of government with separate arbitral laws in force in the Commonwealth (as the federal entity) and in each state and territory. International arbitration is regulated at the federal level by the International Arbitration Act 1974 (Cth) (IAA), while domestic arbitration is regulated by the various state and territory's Commercial Arbitration Acts.

The IAA incorporates the Model Law on International Commercial Arbitration (the Model Law) adopted by the United Nations Commission on International Trade Law (UNCITRAL). The IAA also incorporates the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Convention on the Settlement of International Disputes between States and Nationals of Other States (the Washington Convention).

Recent amendments to the IAA and Commercial Arbitration Acts, developments in case law and efforts on the ground have all sought to promote Australia as an attractive regional seat for international arbitration.

i Reform of the IAA

In July 2010, the federal parliament enacted a number of important amendments to the IAA to incorporate changes made to the Model Law in 2006. Section 16(1) of the IAA now gives the Model Law 'the force of law in Australia'. While this simple provision appears at first blush to be uncontroversial, it was recently challenged in the *TCL* case (discussed below along with its related lower court *Castel* decisions) but the constitutional validity of Australia's international arbitration regime was unanimously upheld.

1 James Whittaker is a partner, Colin Lockhart is a counsel, and Jin Ooi and Timothy Bunker are lawyers at Corrs Chambers Westgarth.

Also of significance is the new Section 21 of the IAA that clarifies that the 'Model Law covers the field' for international arbitrations seated in Australia, to the exclusion of state and territory arbitral laws. Prior to the 2010 amendments, parties to an arbitration agreement could choose to have their dispute 'settled otherwise than in accordance with the Model Law', for example, by adopting a state or territory's arbitral law, none of which previously applied the Model Law.

The former Section 21 had long been a source of confusion and concern as it allowed parties to opt out of the Model Law, but not the IAA. This resulted in a range of practical uncertainties, including what happened when the provisions of a nominated law conflicted with the IAA or what law applied when an alternative law was not nominated. Also of significance was the *Eisenwerk* case which held that the parties had opted out of the Model Law by expressly adopting the International Chamber of Commerce (ICC) Rules.[2] This result received widespread criticism, being in direct conflict with Article 19 of the Model Law. Hence the timely enactment of the new Section 21 that denies parties the choice to oust the Model Law as the applicable arbitral law, yet continues to bestow freedom on parties to elect both their procedural rules and applicable substantive law.

Even so, it remains uncertain whether the new Section 21 applies retrospectively to arbitration agreements entered into before 6 July 2010 (when the IAA amendments came into force) or only prospectively. If it operates retrospectively, then the Model Law applies despite the parties' choice to opt out of the Model Law in arbitration agreements entered into before 6 July 2010. The scenario is different if the new Section 21 is to only have prospective effect. Consider for instance the situation where parties to an arbitration agreement entered into before 6 July 2010 had opted out of the Model Law and instead adopted the former Victorian Commercial Arbitration Act 1984 (now repealed). No dispute has arisen between the parties but following the repeal, the parties are left with no *lex arbitri* to govern their international arbitration should one be commenced, giving rise to what commentators describe as a 'legislative black hole'.[3] The new state and territory arbitral laws would also have no application since they only govern domestic commercial arbitrations. The temporal operation of the new Section 21 was considered in the *Castel* and *Rizhao* cases (discussed below) but the predicament is far from resolved.

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2 *Australian Granites Ltd v. Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* (2001) 1 Qd R 461 (*Eisenwerk*). See also *Lightsource Technologies Australia Pty Ltd v. Pointsec Mobile Technologies AB* (2011) 250 FLR 63. The *Einsenwerk* decision was questioned in *Cargill International SA v. Peabody Australia Mining Ltd* (2010) 78 NSWLR 533 and although afforded the opportunity in *Wagners Nouvelle Caledonie Sarl v. Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219, the same Court which ruled on the *Eisenwerk* case expressly declined to consider its correctness.

3 This notion of a 'legislative black hole' as it relates to the temporal operation of the new Section 21 was first identified in Richard Garnett and Luke Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (2011) 7 *Asian International Arbitration Journal* 29 at 48-50. See also Albert Monichino SC, 'The Temporal Operation of the New Section 21 – Beware of the Black Hole' (December 2012) *The ACICA News* at 25; Albert Monichino SC and Alex Fawke, 'International Arbitration in Australia: 2011/2012 in Review' (2012) 23 *Australasian Dispute Resolution Journal* 234 at 235.

Other significant IAA amendments include new interpretation provisions, new provisions that confine the circumstances in which courts can set aside an award made under the Model Law or refuse its enforcement, a range of optional provisions that parties to an arbitration agreement may adopt on an 'opt-in' basis to help resolve their disputes in a fair and efficient manner, and a range of other measures directed at improving the general operation of the IAA.[4] Together, the amendments seek to ensure that the IAA remains at the forefront of international arbitration best practice.[5]

ii New state and territory arbitral laws

In conjunction with the recent amendments to the IAA, the domestic arbitral laws (regulating domestic commercial arbitrations) have undergone a complete overhaul over the last few years. The most significant change is that the new laws are now based on the Model Law. At the time of submission of this chapter, the revised Commercial Arbitration Acts have commenced in all states and territories except the Australian Capital Territory, which has yet to introduce a bill into Parliament.[6] Australia now has a relatively harmonious domestic and international arbitration scheme of legislation based on the Model Law.

iii Australia as an arbitration venue

Despite the implementation of a raft of legislative amendments designed to increase Australia's attractiveness as a regional hub for arbitration, it comes as no surprise that Australia has not traditionally been perceived as the go-to destination for international commercial arbitration. No doubt this is due to the competitive disadvantages facing Australia, not least its geographical distance from other countries.[7]

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4 For a thorough discussion, see, for example Peter Megens and Adam Peters, 'International Arbitration Amendment Act 2010 (Cth) – Towards a New Brand of Australian International Arbitration' (2011) 30 The Arbitrator and Mediator 43 or Garnett and Nottage, above n 3.

5 Commonwealth, Second Reading – International Arbitration Amendment Bill 2009, House of Representatives, 12790 (Robert McClelland, Attorney-General).

6 Commercial Arbitration Act 2010 (NSW) (commenced on 1 October 2010); Commercial Arbitration Act 2011 (Vic) (commenced on 17 November 2011); Commercial Arbitration Act 2011 (SA) (commenced on 1 January 2012); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT) (commenced on 1 August 2012); Commercial Arbitration Act 2011 (Tas) (commenced on 1 October 2012); Commercial Arbitration Act 2013 (Qld) (commenced on 17 May 2013); Commercial Arbitration Act 2012 (WA) (commenced on 7 August 2013).

7 AA de Fina, in his article 'Swings and Roundabouts – Developments in Arbitration in Australia' (2012) 28 *Building and Construction Law Journal* 169, also explains some of the difficulties that Australia faces in relation to the 'serious decline for years' in the use of arbitration for the resolution of domestic disputes, 'not because of an inadequate or flawed domestic law, but variously because of government bias against arbitration, the increase in the use of non-determinative processes, particularly mediation and expert determination, and legal fraternity bias generally against arbitration'.

Despite some remaining sceptical,[8] the outlook for growth of international arbitration in Australia is positive. Since the opening of the Australian International Disputes Centre in August 2010 (Australia's first international dispute resolution centre), over 30 new arbitrations have been filed with Australia's peak body for international commercial arbitration, the Australian Centre for International Commercial Arbitration (ACICA).[9] The recent opening of the Melbourne Commercial Arbitration and Mediation Centre, and plans for a similar centre in Perth, further evince the ambition to increase Australia's share of the Asian commercial arbitration market. This ambition is being realised, with Australia being recently chosen by the International Council for Commercial Arbitration to be a joint host for its 2018 conference, with the successful bid overcoming the strong alternative contenders of Hong Kong, Moscow and Kuala Lumpur.

The recent amendments to Australia's international arbitration regime, coupled with the recent emergence of Asia as the world's economic powerhouse, have given reason for commentators to be more hopeful than ever that Australia will present itself as a prime seat for international arbitration in the Asia-Pacific region.[10] Recent domestic decisions outlined in this chapter reinforce this positivity.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

In March 2011, the International Arbitration Regulations 2011 (Cth) came into force, appointing ACICA as the sole competent authority to perform arbitrator appointment

8 See, for example, de Fina, above n 7 at 169: 'True it is that Australia is in the region, but it is not seen by Asian disputants as being Asian, and is geographically at a significant disadvantage to the well-established centres of Singapore and Hong Kong. A newly established hearing facility in Sydney pales beside the extravagant Maxwell Chambers facility in Singapore funded by the Singapore government and, while beneficial for domestic dispute resolution, is unlikely to be an attraction for international arbitrations which worldwide are predominantly held in other than dedicated hearing rooms.'

9 Michelle Lam, 'Regional Arbitration Grows, with Plans for Australia as Centre' (November 2012) 50(10) Law Society Journal 24 at 25.

10 See, for example, Garnett and Nottage (footnote 3, *supra*); Megens and Peters (footnote 4, *supra*); Albert Monichino SC, 'International Arbitration in Australia – 2010/2011 in Review' (2011) 22 *Australasian Dispute Resolution Journal* 215. In contrast, de Fina (footnote 7, *supra*) at 169, again offers a less enthusiastic view: '[T]his misconception [that the legislative amendments will result in an influx of international arbitrations to Australia] ignor[es]...that Australia has long subscribed to the New York Convention and applied the previous version of the UNCITRAL Model Law as a fundamental part of the International Arbitration Act and has been unsuccessfully promoting Australia as a situs of international arbitrations for over 20 years through the [ACICA]'.

functions under the IAA,[11] where the parties have not agreed on an appointment process or where a procedure previously agreed upon has broken down. Also in March 2011, ACICA adopted the ACICA Appointment of Arbitrators Rules 2011, which establishes a streamlined process through which a party can apply to ACICA to have an arbitrator appointed to an international arbitration seated in Australia.

In August 2011, ACICA released its Expedited Arbitration Rules and a revised version of the ACICA Arbitration Rules. The ACICA Expedited Arbitration Rules have an overriding objective to provide arbitration that is quick, cost effective and fair, considering the amounts in dispute and complexity of issues or facts involved.[12] For example, the Rules provide that there will only be one arbitrator who will be appointed by ACICA within 14 days from the commencement of arbitration.[13]

A standout feature of the revised ACICA Arbitration Rules is the incorporation of new emergency arbitrator provisions, which allow a party to apply to ACICA for emergency interim measures of protection prior to the constitution of an arbitral tribunal.[14] An emergency arbitrator is to be appointed within one business day from receipt of the application and any decision on emergency interim measures is to be made within five business days from when the application was referred to the emergency arbitrator.

ii Arbitration developments in local courts

The past couple of years have been an important period for international arbitration in Australia as cases concerning the recent IAA amendments filter through the judicial system and local courts grapple with the new provisions. While the practical operation of the amendments will continually be tested in court, the judicial reception thus far has been positive.

Enforcement of non-foreign awards and the temporal operation of the IAA's Section 21

Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd[15]

In *Castel*, the Federal Court considered and confirmed its jurisdiction to enforce a 'non-foreign award'. The dispute arose out of a distribution agreement between Castel (based in Australia) and TCL (based in China), in which the arbitral tribunal sitting in Australia delivered awards in favour of Castel. As the awards were made in Australia, it did not fall within the IAA's definition of a 'foreign award', being one made in a country other than Australia and in relation to which the New York Convention applies.[16] The IAA specifically vests jurisdiction in the Federal Court and in state and territory courts to

11 International Arbitration Regulations 2011 (Cth), reg 4. Previously, this function was performed exclusively by the Australian courts.

12 ACICA Expedited Arbitration Rules, r 3.1.

13 ACICA Expedited Arbitration Rules, rr 8.1, 8.2.

14 ACICA Arbitration Rules 2011, sch 2.

15 (2012) 201 FCR 209 (*Castel*).

16 International Arbitration Act 1974 (Cth), ss 3(1), 39(3).

enforce 'foreign awards'[17] but, together with Articles 35 and 36 of the Model Law, is silent as to the 'competent court' responsible for the enforcement of 'non-foreign awards'.[18] Nonetheless, the Court quipped that at least 'some court must be "competent"' to do so.[19]

It ultimately found comfort in a provision of the Commonwealth Judiciary Act 1903 that gives the Federal Court broad supplementary jurisdiction over any matter arising under a federal law and as such, jurisdiction to enforce 'non-foreign awards' made under the Model Law (which the IAA gives the force of law in Australia). Applying this same line of reasoning, it would appear that international awards to which the New York Convention does not apply may also be enforceable in the Federal Court.

The Court went on to consider whether the new Section 21 of the IAA operates in relation to arbitration agreements entered into prior to the 2010 amendments. In doing so, it referred to the common law presumption against retrospectivity set out in *Maxwell v. Murphy*:[20]

a A statute divesting vested rights is to be construed as prospective.

b A statute, merely procedural, is to be construed as retrospective.

c A statute that, while procedural in its character, affects vested rights adversely is to be construed as prospective.

It was common ground that the parties did not opt out of the Model Law, which accordingly applied to their arbitration. The Court observed that the Model Law sets out rules for the commencement and conduct of international commercial arbitrations, as opposed to the substantive law to be applied. In the same vein, it noted that the new Section 21 relates to the capacity to opt in or out of the Model Law and is best described as a procedural rather than substantive provision, with the effect that the provision should be construed as retrospective. In addition, the Court found it difficult to see how any of the parties' vested rights could be adversely affected by the retrospective operation of the new Section 21 which, as discussed, only concerns the *lex arbitri* while still allowing for the substantive law as chosen by the parties to be applied.

It is well-understood that parties cannot opt out of the Model Law under this new Section 21, but the apparent effect of *Castel* is to extend the limitation to arbitration agreements that had been entered into prior to the new Section 21 coming into force. The question then arises as to what effect this reasoning will have on arbitration agreements that (unlike in *Castel*) have expressly opted out of the Model Law before the 2010 amendments.

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17 International Arbitration Act 1974 (Cth), ss 8(2), (3).

18 A 'non-foreign award' is to be distinguished from a 'domestic award', the latter being a non-international award made in Australia, the enforcement of which is governed by the state or territory Commercial Arbitration Acts. 'Foreign awards' and 'non-foreign awards' are each types of arbitral award covered by the IAA and the Model Law: *Castel* (2012) 201 FCR 209 at [15].

19 *Castel* (2012) 201 FCR 209 at [35].

20 (1957) 96 CLR 261 at 270 (High Court of Australia).

Rizhao Steel Holding Group Co Ltd v. Koolan Iron Ore Pty Ltd[21]

This very issue was considered by the Western Australia Court of Appeal in *Rizhao*, which also involved the enforcement of a 'non-foreign award'. This case dealt with appeals by Rizhao (based in China) against Koolan and another party (both based in Australia). When the parties entered into the contracts, they elected to opt out of the Model Law pursuant to the former Section 21 and instead apply the former Western Australian Commercial Arbitration Act 1985 (CAA).

A dispute arose and arbitration commenced, but just as the hearings were concluding, the former Section 21 was repealed and the new Section 21 came into operation. Nonetheless, the arbitrator delivered awards against Rizhao. The primary judge granted leave to Koolan to enforce the awards pursuant to the CAA[22] and dismissed Rizhao's applications for leave to appeal from the awards. Rizhao appealed against the latter decisions – its primary complaint being that the primary judge exceeded jurisdiction by dealing with Koolan's application for enforcement under the CAA when, as Rizhao contended (albeit only on appeal and not before the primary judge), the court's only source of jurisdiction to enforce the awards was the IAA (as a result of the new Section 21).

In dismissing the appeals, the Court held that Rizhao gained a significant forensic advantage by not taking the point which it then sought to raise on appeal in the course of the lower court proceedings, and of which it was then aware. Accordingly, it would have been entirely antithetical to the interests of justice for the Court to entertain Rizhao's jurisdictional point which it withheld from the primary judge.

Having disposed of the case on procedural grounds, the Court nonetheless considered the substantive issues raised, holding that even if Rizhao were permitted to take on appeal the point which it failed to take before the primary judge, the conclusion should nonetheless be that the primary judge did not err as to the source of his jurisdiction. In this regard, it seems that the Court assumed that state supreme courts have jurisdiction to enforce 'non-foreign awards' under the IAA (a matter discussed in *Castel* with regard to the Federal Court but in which the judge refused to rule on with regard to state and territory courts).

Rizhao's first argument was that the authority conferred by the former Section 21 extended only to opting out of the Model Law up to the point of settlement of their dispute which, it contended, occurred when an award was delivered. The Court disagreed, holding that 'settlement' of a dispute in the context of the former Section 21 (and the IAA as a whole) extended to and included all matters up to the final resolution and disposition of claims. Accordingly, in opting out of the Model Law and adopting the CAA, the parties had agreed to exclude all provisions of the Model Law, including those relating to judicial review, recognition and enforcement of awards.

Rizhao's second argument related to the temporal operation of the new Section 21. It asserted that this new provision meant that the Model Law applies to all arbitration

21 (2012) 287 ALR 315 (*Rizhao*).

22 Following the 2010 amendments, the IAA has disposed of the requirement for a party to seek leave to enforce an award.

agreements irrespective of when they were entered into, or in the alternative, to all proceedings for enforcement of international awards commenced after 6 July 2010, even if the parties had agreed prior to that date to opt out of the Model Law. Although the new provision can be characterised as a procedural law (and thus have retrospective application per presumption (b) in *Maxwell v. Murphy*, above), the Court held that the right of the parties to submit to the resolution of the dispute under the CAA was a vested and substantive right. If the Model Law were to be applied, it would have adversely affected the parties' rights by significantly altering the legislative framework in which the parties would be entitled to obtain or resist enforcement of the awards, especially considering that the parties' contractual rights to have their dispute arbitrated under the CAA had already been exercised prior to the commencement of the 2010 amendments. As a result, although procedural in character, the new Section 21 was held to have prospective application per presumption (c) in *Maxwell v. Murphy*, above.

The Court in *Rizhao* distinguished this case from the Federal Court's decision by pointing out that the parties in *Castel* had not exercised the right to opt out of the Model Law, which accordingly applied as the *lex arbitri*, both before and after commencement of the 2010 amendments. In *Castel*, it was difficult for the judge to see how any of the vested rights of the parties could be adversely affected by the retrospective operation of the new Section 21.

While *Rizhao* has provided some clarity as to the temporal operation of the new Section 21, it should be noted that it was unnecessary for both courts in *Castel* and *Rizhao* to consider this point, seeing that they had already decided their respective cases on other grounds. Moreover, in *Rizhao*, the parties' contractual rights to have their dispute arbitrated had already been exercised under the former Section 21 and it is uncertain whether the Court's reasoning will be extended to situations where the parties' rights only crystallise at a time after the commencement of the 2010 amendments.[23] Certainly, one of the judges in *Rizhao* expressly opined that for disputes not referred to arbitration prior to 6 July 2010, the arbitration agreement would be wholly executory, and the rights under the agreement to have any dispute settled by arbitration in accordance with its terms would arguably not have vested,[24] and similar to the *Castel* decision, the new Section 21 would apply retrospectively. With the courts' views on this issue being *obiter* and non-binding, it remains to be seen whether future decisions can shed more light.

Narrow scope for resisting enforcement of awards

Uganda Telecom Ltd v. Hi-Tech Telecom Pty Ltd[25]

In *Uganda*, Hi-Tech argued that the amount of general damages awarded by the arbitrator was arrived at by an erroneous reasoning process involving mistakes of fact and law. Sections 8(5) and 8(7) of the IAA set out the grounds on which a court may refuse to enforce an award. Prior to the 2010 amendments, the view emerged that courts retained a general discretion to refuse enforcement of awards even if none of the grounds

23 See, for example, the comments in *Rizhao* (2012) 287 ALR 315 at [133], [139].

24 Ibid [207].

25 (2011) 277 ALR 415 (*Uganda*).

in Sections 8(5) and 8(7) were made out.[26] The Federal Court in *Uganda* confirmed that whether or not such a residual discretion existed, the new Section 8(3A) of the IAA (inserted in 2010) clarifies that no such discretion remains, with Sections 8(5) and 8(7) constituting exhaustive grounds for refusal.[27]

Further, the Court found that the public policy ground for refusing to enforce an award in Section 8(7)(b) is to be read narrowly in conjunction with the pro-enforcement purpose of the New York Convention and the objects of the IAA.[28] As such, the public policy ground cannot be relied upon to deal with Hi-Tech's complaint of the excessive assessment of general damages in the award. The Court held that erroneous legal reasoning or misapplication of law is generally not a violation of public policy and the time for Hi-Tech to have addressed this matter was during the arbitration proceedings, in which it had chosen not to.

Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd (No. 2)[29]

Also as part of the 2010 amendments, a new Section 8(7A) was inserted into the IAA to avoid misinterpretation of the public policy ground in Section 8(7)(b), by clarifying that the circumstances in which enforcement of an award would be contrary to public policy includes (but is not limited to) where 'the making of the award was induced or affected by fraud or corruption' or where 'a breach of the rules of natural justice occurred in connection with the making of the award'.

Following the Court's earlier decision in *Castel* on the jurisdictional point (discussed above), the Federal Court proceeded to hear Castel's application to enforce the awards and TCL's application to set them aside on the basis that the awards were contrary to public policy because of an alleged breach of the rules of natural justice (namely the no evidence rule and the hearing rule) in the arbitral tribunal's assessment of Castel's losses. The Court in *Castel* (No. 2) rejected TCL's claims and held that the awards should be enforced. In so ruling, the Court laid down some guiding principles in relation to 'public policy' in the IAA:

a 'Public policy' includes procedural questions and questions relating to substantive law.

b Under the Model Law, the expression 'public policy' has a greater and different role in relation to setting aside an award in the court of supervisory jurisdiction (Article 34(2)(b)(ii)), than it does in relation to refusal to enforce an award in the court of enforcement (Article 36(1)(b)(ii)). This is because an order refusing

26 See, for example, *Resort Condominiums International Inc v. Bolwell* [1995] 1 Qd R 406 at 428-432; *Corvetina Technology Ltd v. Clough Engineering Ltd* (2004) 183 FLR 317 at 319-322.

27 *Uganda* (2011) 277 ALR 415 at [132]. See also *ESCO Corp v. Bradken Resources Pty Ltd* (2011) 282 ALR 282 at [85].

28 Ibid, applying the decisions of the United States Court of Appeal in *Parsons & Whittemore Overseas Co Inc v. Société Générale De L'Industrie Du Papier* 508 F 2d 969 at 974 (2nd Cir, 1974) and *Karoha Bodas Co, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 274 at 306 (5th Cir, 2004).

29 [2012] FCA 1214 (*Castel* (No. 2)).

enforcement is effective only in the state where the enforcement is sought, whereas an order setting aside an award prevents its enforcement in all New York Convention countries.[30]

c The proper exercise of the court's discretion to set aside an award or to refuse its enforcement requires that it have regard to the objects of the IAA set out in Section 2D and the matters set out in Section 39(2) (both inserted in 2010), namely that arbitration is intended to be an efficient, enforceable and timely method of resolving commercial disputes, and that arbitral awards are intended to provide certainty and finality. This indicates that the discretion to set aside an award or to refuse enforcement on public policy grounds should be sparingly applied.

d Consistent with the restrictive approach to the scope of public policy in which the courts in New York Convention countries have generally adopted,[31] the Court in *Castel (No. 2)* regarded the public policy ground as requiring 'offence to fundamental notions of fairness and justice' before a court should exercise its discretion to set aside an award or to refuse its enforcement.[32]

e A balance must be struck between the purpose of ensuring certainty and finality of awards, and the competing purpose of protecting the fundamental procedural rights of each party. To that end, the level of review necessary for when an award is challenged for breach of natural justice is that which would enable a court to

30 Ibid, applying the decision of the Hong Kong Court of Final Appeal in *Hebei Import and Export Corp v. Polytek Engineering Co Ltd* [1999] 2 HKC 205 at 229. However, given that the Court in *Castel (No. 2)* is both the court of supervisory jurisdiction and the proposed court of enforcement, and taking into account the circumstances of the case, it considered that 'public policy' has a similar operation in both the setting aside and enforcement contexts.

31 See, for example, *Parsons & Whittemore Overseas Co Inc v. Société Générale De L'Industrie Du Papier* 508 F 2d 969 at 974 (2nd Cir, 1974) (US Second Circuit Court of Appeal); *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Shell International Petroleum Co Ltd* [1990] 1 AC 295 at 316 (English Court of Appeal); *Hebei Import and Export Corp v. Polytek Engineering Co Ltd* [1999] 2 HKC 205 at 215-216, 232-233 (Hong Kong Court of Final Appeal); *Attorney General of Canada v. SD Myers Inc* [2004] 3 FCR 368 at [55] (Federal Court of Canada); *PT Asuransi Jasa Indonesia v. Dexia Bank SA* [2007] 1 SLR(R) 597 at [59] (Singapore Court of Appeal); *Amaltal Corporation Ltd v. Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 at [47] (New Zealand Court of Appeal); *Downer-Hill Joint Venture v. Government of Fiji* [2005] 1 NZLR 554 at [81]-[82], [84] (New Zealand High Court).

32 This finding is consistent with the recent decisions of the Federal Court in *Uganda* (2011) 277 ALR 415 at [132] and *Traxys Europe SA v. Balaji Coke Industry Pvt Ltd* (No 2) (2012) 201 FCR 535 at [96].

determine whether the no evidence rule was breached in the arbitration[33] and whether in reaching those findings the hearing rule was breached.[34]

Having conducted a close examination of the evidence in the arbitral hearing, although not to the extent of examining the facts of the case afresh and revisiting in full the questions before the arbitral tribunal, the Court was still unable to find any breach of natural justice.

TCL Air Conditioner (Zhongshan) Co Ltd v. Judges of the Federal Court of Australia[35]
Before the *Castel (No. 2)* decision was handed down, TCL challenged the constitutional validity of the IAA in the original jurisdiction of the High Court of Australia. In circumstances where the Federal Court, under Articles 35 and 36 of the Model Law, has no power to refuse enforcement of an award on the ground of error of law appearing on the face of the award, TCL argued that Section 16(1) of the IAA (which gives the Model Law the force of law in Australia) either:

a substantially impairs the institutional integrity of the Federal Court, by enlisting it in an arrangement to facilitate arbitration and then enforcing the resulting awards, thereby requiring the Court to knowingly perpetrate legal error; or

b impermissibly vests the judicial power of the Commonwealth on the arbitral tribunal that made the award, by reason of the IAA's enforcement provisions which render an award binding and conclusive, thereby giving the arbitral tribunal the last word on the law applied.

Both of TCL's objections were underpinned by the proposition that courts must be able to determine whether an arbitrator applied the law correctly in reaching the award. TCL argued that Article 28 of the Model Law confines an arbitrator's authority to deciding a dispute correctly, and therefore an award founded on an erroneous principle is not binding upon the parties. Alternatively, TCL submitted that such a term could be implied into every arbitration agreement.

The High Court unanimously rejected TCL's arguments. The Court found that Article 28 is directed to the rules of law to be applied, not the correctness of their application. Moreover, Article 36 makes it plain that recognition and enforcement of an award could only be denied in limited circumstances, which did not include legal error.

The Court emphasised the consensual foundation of private arbitration and explained that enforcement of an arbitral award is enforcement of the binding result of the parties' agreement to submit their dispute to arbitration, not enforcement of

33 That is, whether there was reasonably probative evidence in support of the findings TCL complained of.

34 That is, whether the arbitral tribunal gave TCL a fair hearing and in particular whether the arbitral tribunal made the findings based upon its own opinions and ideas which were not reasonable corollaries of the opinions and ideas traversed during the hearing and which TCL may, with adequate notice, have been able to persuade the arbitral tribunal against.

35 (2013) 295 ALR 596 (*TCL*).

any disputed right submitted to arbitration. There is accordingly no impairment of the Federal Court's institutional integrity, where the making of an appropriate order for enforcement in no way signifies the Court's endorsement of the legal content of the award any more than it signifies its endorsement of the award's factual content. Further, the Court regarded the multiplicity of circumstances in which a court may set aside or refuse to enforce an award (discussed above) to be protective of the institutional integrity of the Australian courts that exercise jurisdiction under the IAA.

That an arbitrator is the final judge on questions of law arising in an arbitration does not demonstrate that there has been some delegation of judicial power to arbitrators. The Court was again at pains to spell out the essential distinction between the judicial power of the Commonwealth and arbitral authority, of the kind governed by the Model Law, based on the parties' voluntary agreement. To conclude that an award is final and conclusive does no more than reflect the consequences of the parties having agreed to submit a dispute to arbitration. One such consequence is that the parties' rights and liabilities under an agreement that gives rise to an arbitration can be, and are, discharged and replaced by the new obligations that are created by an arbitral award.

Gujarat NRE Coke Limited v. Coeclerici Asia (Pte) Ltd[36]

Gujarat reinforced the narrow scope for resisting enforcement of foreign arbitral awards under Section 8 of the IAA, and also indicated that an Australian court (as a court of enforcement of a New York Convention country) will give weight to the views reached by the court of the seat of the arbitration.

Coeclerici had instituted arbitration proceedings in London against Gujarat to recover payments it had made for metallurgical coke, which Gujarat failed to deliver. Shortly before the arbitral hearing, the parties entered into a settlement agreement under which the arbitration was suspended, with Gujarat agreeing that if it failed to make the payments due, Coeclerici would be entitled to resume the arbitration proceedings and to an immediate consent award without further pleadings or hearings. When Gujarat failed to make the first payment on time, Coeclerici requested the arbitral tribunal to make a consent award in its favour. After Gujarat's solicitors failed to give substantive reasons for the non-payment, the arbitrators proceeded to make an award in favour of Coeclerici, having satisfied themselves that if Gujarat were allowed additional time to substantiate their reasons, the settlement agreement itself and the circumstances in which it was concluded would still have led the arbitrators to conclude that Coeclerici was entitled to the award that it sought.

Gujarat sought to set aside the award in the High Court of Justice in London on the grounds of 'serious irregularity affecting the tribunal, the proceedings or the award', under Section 68(1) of the Arbitration Act 1996 (UK), but was wholly unsuccessful. The High Court of Justice ruled that a reasonable opportunity had been given to Gujarat to argue its case.[37]

36 (2013) 304 ALR 468 (*Gujarat*).

37 *Gujarat NRE Coke Limited v. Coeclerici Asia (Pte) Limited* [2013] EWHC 1987 (Comm).

Coeclerici applied to the Federal Court of Australia to enforce the award under Section 8(3) of the IAA, with Gujarat resisting enforcement on two grounds: that it had not been given a reasonable opportunity to present its case before the arbitral tribunal (under Section 8(5)(c) of the IAA), or that there had been a breach of the rules of natural justice in connection with the making of the arbitral award, contrary to the public policy of Australia (under Section 8(7A)(b)).

On appeal, the Full Court of the Federal Court unanimously upheld the trial court's conclusion that Gujarat had been given a reasonable opportunity to be heard. The Court distinguished between, on the one hand, a situation in which Gujarat sought to put forward its defences to a claim in a separate or different arbitration, and, on the other hand, the present situation where the settlement agreement referred the dispute to the arbitral tribunal that was already constituted.[38] In light of the settlement agreement entered into between the parties, the Court held that the arbitrators were entitled to resolve this issue in the arbitration by such procedure as they chose, as long as it gave a fair and reasonable opportunity to Gujarat to present its case. This, it was held, the arbitrators did.[39]

Having already disposed of the appeal by deciding that Gujarat had had a reasonable opportunity to present its case, the Full Court declined to determine the question of whether issue estoppel operated. Nonetheless, the Court agreed with the primary judge that it would generally be inappropriate for the court of enforcement of a New York Convention country to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration (here, the English High Court of Justice). The Court found that, except in exceptional cases, it was appropriate to give weight to the views of the supervising court of the seat of the arbitration.[40]

Emerald Grain Australia Pty Ltd v. Agrocorp International Pte Ltd[41]

The court in Agrocorp was also asked to consider whether an arbitral award should be set aside on the basis that the tribunal had breached the rules of natural justice in connection with the making of the award. Specifically, the applicant submitted that there was no probative evidence before the tribunal to allow it to make certain findings (the 'no evidence claim'), and that the tribunal had had made its findings based on its

38 This point was also made by the English High Court of Justice.

39 The Court was quick to note that there is a clear relationship between the quality of the point being raised and the length of time to be given and the procedure to be employed to resolve the point. It was apparent to the Court that the arbitrators thought that Gujarat's submissions were so lacking in merit that nothing could be gained by any further explication. The worth and substantiality of the points raised by Gujarat on appeal were described by the Court as 'hopeless': *Gujarat* (2013) 304 ALR 468 at [52].

40 On this point, the Court endorsed the decision of Colman J in *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

41 [2014] FCA 414 (*Emerald Grain*).

own opinions and ideas without giving Emerald Grain adequate notice (the 'no hearing claim').

The Court dismissed the application, finding there had not been a breach of the rules of natural justice. As a starting point, the Court found that a dissatisfied party to an arbitral award did not have a right of appeal to challenge a tribunal's finding of facts.[42] In order to succeed on the no evidence claim, a party must show that there was a complete absence of probative evidence available to the tribunal for it to come to a finding of fact, which was to be distinguished from a claim of an incorrect or flawed finding based on facts before the tribunal.[43] In this case, there had been probative documentary evidence before the tribunal to make its findings, and as such, the no evidence claim failed.[44] In relation to the 'no hearing claim', the Court stated that the relevant test was twofold: first, that Emerald Grain would not have foreseen the possibility of the tribunal's reasoning, and second, that Emerald Grain could have possibly persuaded the tribunal otherwise if the tribunal had given adequate notice.[45] The Court held that the applicant failed to establish either of these two grounds.

It is clear from the *Uganda*, *Castel (No. 2)*, *TCL*, *Gujarat* and *Emerald Grain* decisions, together with the 2010 amendments, that the Australian courts are committed to upholding the integrity of the arbitral process and the finality of arbitral awards by increasing certainty in the enforcement process of those awards and strengthening the grounds on which parties may resist enforcement."

Two other important decisions

Dampskibsselskabet Norden A/S v. Gladstone Civil Pty Ltd[46]

The central issue in dispute in *Dampskibsselskabet* was whether a voyage charterparty, which required disputes to be resolved by arbitration in London, fell within the definition of 'sea carriage document' and was thus void under Section 11(1)(a) of the Carriage of Goods by Sea Act 1991 (Cth) (COGSA), as it sought to oust the jurisdiction of the Australian courts.[47]

The Full Court of the Federal Court unanimously upheld the validity of arbitration clauses in voyage charterparties. In coming to its decision, the Full Court had regard to the legislative history of the COGSA and considered the ready availability of international arbitration to resolve disputes to be a fundamental feature of the shipping

42 Ibid [10].

43 Ibid [15]-[16].

44 The Court did note that some aspects of the tribunal's decision were incorrect (for example, at [32]); however, the issue of whether the findings were correct was irrelevant to a finding in relation to the 'no evidence claim'.

45 The principles relating to the the hearing rule were considered in *Trustees of Rotoaira Forest Trust v. Attorney-General* [1999] 2 NZLR 452 and applied in *Castel (No. 2)*.

46 (2013) 216 FCR 469 (*Dampskibsselskabet*).

47 Section 11 of the COGSA provides that an agreement (whether made in Australia or elsewhere) has no effect so far as it purports to preclude or limit the jurisdiction of Australian courts in respect of a 'sea carriage document'.

trade. Importantly, the Full Court also settled previously conflicting jurisprudence on whether a charterparty constitutes a 'sea carriage document'.[48]

Eopply New Energy Technology Co Ltd v. EP Solar Pty Ltd[49]
The key issue in *Eopply* was whether Eopply (the award creditor) could enforce a foreign arbitral award against EP Solar, an Australian corporation in liquidation. In order to enforce the judgment debt, Eopply required the leave of the court pursuant to Section 500(2) of the Corporations Act 2001 (Cth), despite the fact that the liquidators did not oppose Eopply's claim.

After examining the objects of the IAA and the matters set out in section 39 of the IAA (namely that arbitration is intended to be an efficient, enforceable and timely method of resolving commercial disputes and that awards are intended to provide certainty and finality), the Court found good reason to make the path to recovery by the award creditor easier by granting leave and allowing judgment to be entered rather than leave Eopply to the vagaries of the proof of debt process.

iii Investor–state disputes

Australia is a party to 22 bilateral investment treaties (BITs) since 1988[50] and five out of nine free trade agreements (FTAs) with investment protection rules since 2003, which provide for investor–state arbitration.[51] The Australian government is also currently engaged in three bilateral FTA negotiations[52] and four plurilateral FTA negotiations.[53]

In April 2011, the former federal government released a trade policy statement announcing a discontinuance of its practice to seek the inclusion of investor–state

48 Including the trial decision (*Dampskibsselskabet Norden A/S v. Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161), which found that a charterparty was a 'sea carriage document', and a decision of the South Australian Supreme Court (*Jebsens International (Australia) Pty Ltd v. Interfert Australia Pty Ltd* (2012) 112 SASR 297) which came to an opposite view.

49 [2013] FCA 356.

50 Australia has entered into BITs with Argentina, Chile, China, the Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam.

51 These are FTAs with ASEAN–New Zealand (ASEAN consists of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam), Chile, Singapore, Thailand and Korea. The FTA with the USA (entered into force 1 January 2005), Malaysia (entered into force 1 January 2013) and Japan (concluded 7 April 2014, not in force at the time of submission of this chapter) omits ISDS provisions, as does the Investment Protocol (entered into force 1 March 2013) to the Australia–New Zealand Closer Economic Relations Trade Agreement.

52 With China, India and Indonesia.

53 The Trans-Pacific Partnership Agreement, the Gulf Cooperation Council, the Pacific Trade and Economic Agreement, the Regional Comprehensive Economic Partnership Agreement and the Trade in Services Agreement.

dispute settlement (ISDS) procedures in trade agreements with developing countries.[54] However, the new federal government has since tempered this stance, stating that it will consider ISDS provisions in FTAs on a case-by-case basis and would consider dropping its opposition if there was a substantial market access offering,[55] but is still opposed to ISDS provisions that restrict its capacity to regulate in areas such as health and the environment.[56] Perhaps best illustrating the revised case-by-case approach of the new federal government are the recently concluded FTAs with Korea and Japan. The Australia–Korea FTA (signed on 8 April 2014) includes an ISDS provision, but with carve-outs and safeguards in areas such as public welfare, health and the environment. However, the recently concluded Australia–Japan FTA (concluded on 7 April 2014) does not include an ISDS provision.[57] This omission may be explained in the context of the ongoing negotiations in relation to the Trans-Pacific Partnership Agreement (TPP), which includes Japan and Australia (but excludes Korea); with the possible inclusion of an ISDS mechanism in the TPP effectively binding Australia and Japan to an ISDS regime.

***Philip Morris Asia Limited v. The Commonwealth of Australia*[58]**

Only a few months after the government's announcement of its policy statement, Philip Morris Asia Limited (PM Asia) (based in Hong Kong), which owns 100 per cent of the shares of Philip Morris (Australia) Limited (PM Australia), which in turn owns 100 per cent of the shares of Philip Morris Limited (PML), served a notice of claim on the Commonwealth of Australia stating its intention to pursue legal action over the Government's proposed plain cigarette packaging legislation[59] in alleged breach of the Australia–Hong Kong BIT (A–HK-BIT).[60] This UNCITRAL arbitration was launched while PM Australia's (together with other tobacco companies') challenge to the legislation's constitutional validity were on foot in the High Court of Australia.[61] As far as the authors are aware, this is the first ever investment treaty claim against Australia.

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54 Commonwealth, Gillard Government Trade Policy Statement: Trading Our Ways to More Jobs and Prosperity (2011) at 14.

55 Peter Martin, 'Robb to Tackle Trans Pacific Partnership', Business Day, The Sydney Morning Herald, 6 December 2013.

56 Commonwealth Department of Foreign Affairs and Trade, Frequently Asked Questions in Investor-State Dispute Settlement (ISDS) (2013) www.dfat.gov.au/fta/isds-faq.html.

57 Alexia Attwood, 'Winners and Losers in Free Trade Agreement between Japan and Australia', ABC Radio National Breakfast, 8 April 2014.

58 (Jurisdiction) (UNCITRAL, PCA Case No. 2012-12).

59 Tobacco Plain Packaging Act 2011 (Cth). The manufacturing prohibition commenced on 1 October 2012 and the sales prohibition on 1 December 2012.

60 Agreement with Hong Kong concerning the Promotion and Protection of Investments, signed 15 September 1993, Australia–Hong Kong, 1748 UNTS 385 (entered into force 15 October 1993).

61 In October 2012, a majority of the High Court ruled that even though the Tobacco Plain Packaging Act 2011 (Cth) restricted the intellectual property rights of the tobacco companies

In broad terms, PM Asia alleges that the legislation virtually eliminates Philip Morris's branded business due to the substantial deprivation of its valuable intellectual property and goodwill, with the consequential effect of undermining the economic rationale of its investments and substantially diminishing the value of PM Asia's investments in Australia – in circumstances where plain packaging will undermine rather than support the purported public health rationale of the legislation. Specifically, PM Asia alleges that Australia has breached its obligations under the A–HK-BIT because plain packaging:

a deprives PM Asia of its investments and intellectual property without compensation, amounting to unlawful expropriation;

b fails to accord fair and equitable treatment to PM Asia's investments in Australia;

c impairs by unreasonable measures the management, maintenance, use, enjoyment or disposal of PM Asia's investments in Australia;

d fails to accord full protection and security for PM Asia's investments in Australia; and

e fails to observe Australia's international obligations with regard to PM Asia's investments by violating the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Paris Convention for the Protection of Industrial Property (the Paris Convention) and the Agreement on Technical Barriers to Trade (TBT).

PM Asia is seeking an order for the suspension of the enforcement of the legislation or compensatory damages for the loss suffered by means of damage to its investments as a result of the enactment and enforcement of the legislation 'in an amount to be quantified but of the order of billions of Australian dollars'.

Aside from responding to PM Asia's individual claims, the Commonwealth of Australia also raised some objections as to the jurisdiction and overall merits of PM Asia's claims. At the time PM Asia acquired its shares in PM Australia, the government had publicly committed to introduce the legislation by 2012, and as such, the Commonwealth argues that an investor cannot buy into a dispute by making an investment in full knowledge of the relevant facts, i.e., that a dispute is either existing or highly probable. Against that backdrop, it is argued that the legislation cannot be regarded as a breach of any of the substantive provisions under the A–HK-BIT and that the A–HK-BIT does not confer jurisdiction on an arbitral tribunal to determine pre-existing disputes that have been repackaged as BIT claims many months after the relevant governmental measure has been announced. Further, the Commonwealth argues that the A–HK-BIT extends protection to indirect investments only where companies incorporated in a third state qualify as investors under the A–HK-BIT, and that therefore the assets of PM Australia

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and regulated the packaging and presentation of tobacco products, the legislation was not an 'acquisition' under Section 51(xxxi) of the Australian Constitution, as there was no proprietary benefit or advantage conferred on the Commonwealth of Australia: *JT International SA v. Commonwealth*; *British American Tobacco Australasia Ltd v. Commonwealth* (2012) 291 ALR 669.

and PML – two Australian-incorporated companies – do not constitute 'investments' for the purposes of the A–HK-BIT. Finally, the Commonwealth argues that the A–HK-BIT does not extend to obligations owed by Australia to other states under multilateral agreements and that the arbitral tribunal is precluded from determining breaches of agreements under the auspices of the World Trade Organization (WTO) and under the Paris Convention since these treaties do not establish rights for private parties and contain their own dispute settlement procedures.

Following a hearing regarding bifurcation of the proceedings in February 2014, the arbitral tribunal on 14 April 2014 decided to split the proceedings into two phases to address the Commonwealth's jurisdictional objections and the merits of the dispute separately.

WTO Disputes: Requests for the Establishment of a Panel by Ukraine,[62] Honduras,[63] the Dominican Republic,[64] Cuba[65] and Indonesia[66]

Disputes concerning Australia's tobacco plain packaging requirements have also been brought before the WTO. Following unsuccessful dispute consultations with Australia separately requested by Ukraine, Honduras and the Dominican Republic in 2012, and Cuba and Indonesia in 2013, each state filed a request with the WTO Secretariat for the establishment of a WTO dispute settlement panel. At the request of the five states, five dispute settlement panels have been established by the WTO Dispute Settlement Body to examine complaints related to the same matter (the tobacco plain packaging measure). On 5 May 2014, the same panellists were appointed in all five disputes. The parties have also agreed to the harmonisation of the timetable for the panel proceedings in all five disputes. Some 35 WTO members have also reserved their third-party rights to join the dispute, with their positions variously placed on the side of the complainant parties, Australia or as a neutral party.

The states' complaints are largely similar, with each alleging that the plain packaging measures appear to be inconsistent with Australia's obligations under TRIPS, TBT, and the General Agreement on Tariffs and Trade 1994 (GATT). In relation to TRIPS, it is argued that the measures prevent owners of registered trademarks from enjoying the rights conferred by a trademark and that the use of trademarks in relation to tobacco products is unjustifiably encumbered by special requirements, such as use in a special form and in a manner that is detrimental to the trademark's capability to

62 Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS434).

63 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS435).

64 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS441).

65 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS458).

66 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS467).

distinguish tobacco products of one undertaking from those of other undertakings. Further, it is argued that it is inconsistent with the Paris Convention (which provisions are incorporated into TRIPS), that trademarks registered in a country of origin outside Australia are not protected 'as is', and Australia does not provide effective protection against unfair competition and creates confusion between goods of competitors. In relation to TBT, it is argued that Australia's technical regulations create unnecessary obstacles to trade by being more trade-restrictive than necessary to fulfil a legitimate objective. In relation to GATT, it is argued that the measures accord less favourable treatment to imported tobacco products than that accorded to like products of Australian origin. Compared with the UNCITRAL arbitration between PM Asia and Australia, the cases before the WTO are still very much in their preliminary stages and it will be some time before final rulings become available.

White Industries Australia Limited v. The Republic of India[67]

In another investor–state dispute, Australian mining company White Industries Australia Limited was successful in obtaining an arbitral award against India for approximately A$10 million. As far as the authors are aware, this is the first known investment arbitration award in favour of an Australian investor. White initiated the arbitration under the BIT between Australia and India[68] because of the severe delay that White experienced in the Indian courts on matters concerning the enforcement of an earlier ICC award delivered in 2002 against Coal India (a state-owned company).

iv State–state disputes: Timor-Leste v. Australia

In April 2013 the Republic of Timor-Leste notified the Australian government that it had instituted arbitral proceedings in the Permanent Court of Arbitration against Australia under Article 23 of the Timor Sea Treaty,[69] in relation to a dispute concerning the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS).[70] The CMATS regulates the rights to access petroleum and gas deposits in the marine area between the Australian and Timorese coastlines known as the 'Timor Gap', including the highly lucrative Greater Sunrise field.

Timor-Leste is challenging the validity of CMATS, alleging that Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage.[71] A media release from the Australian government in response to the arbitration noted

67 (Award) (UNCITRAL, 30 November 2011).

68 Agreement with the Republic of India on the Promotion and Protection of Investments, signed 26 February 1999, Australia–India, [2000] ATS 14 (entered into force 4 May 2000).

69 Timor Sea Treaty between the Government of East Timor and the Government of Australia, signed 20 May 2002, Australia–East Timor, 2258 UNTS 3 (entered into force 2 April 2013).

70 Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, signed 12 January 2006, Australia–East Timor, 2483 UNTS 359 (entered into force 23 February 2007).

71 Joint media release, Australian Minister for Foreign Affairs and Special Minister of State, Arbitration under the Timor Sea Treaty, 3 May 2013.

that the allegations were not new, and that it was the position of successive Australian governments not to confirm or deny the allegations. However, the Australian government maintains it conducted the CMATS negotiations in good faith, and Australia considers the CMATS treaty is valid and remains in force.[72] The details of the arbitration are confidential, and there is no time frame for when a decision is expected.

On 17 December 2013, Timor-Leste instituted proceedings against Australia in the International Court of Justice (ICJ) relating to the seizure and subsequent detention of documents and data that contained correspondence between the government of Timor-Leste and its legal advisers, including documents relating to the pending arbitration. The seizure was carried out by officers of the Australian Security Intelligence Organisation (ASIO) on the office of an Australian lawyer representing Timor-Leste.[73] On 3 March 2014, the ICJ handed down its decision, ordering by a margin of 15 votes to one that Australia must ensure that the content of the seized material is not used to the disadvantage of Timor-Leste before the arbitration is determined, to keep the materials and any copies under seal, and not to interfere in communications between Timor-Leste and its legal advisers.[74]

III OUTLOOK AND CONCLUSIONS

The international arbitration landscape in Australia has seen a raft of activities in the past few years, all of which were purposefully aimed at bolstering Australia's reputation as a first-rate, arbitration-friendly jurisdiction and as a desirable situs of international commercial arbitrations, particularly in the Asia-Pacific region. It is too early to tell if the IAA amendments truly meet the objectives that it has set out to achieve but the international arbitration community in Australia remains fairly positive that change is on the horizon.

72 Ibid.

73 Tom Allard, 'ASIO Raids Office of Lawyer Bernard Collaery Over East Timor Spy Claim', *The Sydney Morning Herald*, 3 December 2013.

74 Questions relating to the Seizure and detention of Certain Documents and Data (*Timor-Leste v. Australia*) (Order of 3 March 2014 on a Request for the Indication of Provisional Measures), International Court of Justice, 3 March 2014 at [49].

Appendix 1

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