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The Guide to Construction Arbitration

General Editors
Stavros Brekoulakis and David Brynmor Thomas QC

Third Edition

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Editors

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Introduction

Stavros Brekoulakis and David Brynmor Thomas QC[1]

It is a pleasure to introduce the third edition of *The Guide to Construction Arbitration*. The *Guide* has evolved since its first edition to form, we hope, a valuable resource for clients, in-house counsel, experts and external counsel involved in construction arbitration, whether they are dealing with construction arbitration for the first time or have extensive experience in it.

The construction industry is a major contributor to economic growth worldwide. In the United Kingdom it has been estimated that every £1 investment in construction output generates £2.84 in total economic activity.[2] In India, the BJP, which now forms the government, proposed infrastructure spending of 100 lakh crore rupees (over US$1,300 billion) over the next five years in its 2019 manifesto.

The industry covers a wide range of different types of projects, from building offices, factories and warehouses, shopping malls, hotels and homes to major infrastructure projects that involve more complex civil engineering works such as the construction of harbours, railroads, mines, highways and bridges. Other construction projects involve specialist engineering works such as shipbuilding; bespoke plant and machinery such as turbines, generators and aircraft engines; or works that aim to support energy projects such as upstream oil and gas projects or renewables (wind, wave, solar) and nuclear plants.

These complex construction projects are rarely completed without encountering risks that lead to changes to the time and cost required for their execution. Those changes in turn give rise to disputes, the majority of which (possibly the vast majority) are submitted to alternative dispute resolution (ADR) processes and eventually arbitration. The reasons that lead construction parties to choose ADR and arbitration owe as much to the (perceived or

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2 Report of Economic Consultants LEK for the UK Contractors Group.

real) inefficiencies of national courts as to the (perceived or real) advantages of out-of-court dispute resolution. For example, with a few notable exceptions such as the Technology and Construction Court in England and Wales, most national courts lack construction specialist departments or judges with construction expertise and experience. Arbitration, on the other hand, allows construction parties to appoint arbitrators with the necessary specialised knowledge and understanding of complex construction projects. Importantly, arbitration allows construction parties to 'design and build' (to stay in tune with the theme of *The Guide to Construction Arbitration*) the dispute resolution procedure in a way that addresses a number of procedural challenges in construction arbitrations, including the typically large volume of documentary evidence, the most effective use of experts to address delay and quantum, as well as complex technical issues, and programme analysis. While the use of some ADR methods such as dispute adjudication boards has spread relatively recently,[3] arbitration has traditionally been included as the default dispute resolution mechanism for disputes arising out of international construction contracts.[4]

A question that often arises is: what is special about international construction disputes that they require specialist arbitration knowledge? In the first place, construction projects are associated with considerably more risk than any other typical commercial transaction, both in terms of the amount of risk allocated under them and the complexity of that risk. Their nature and typically long duration lead to risks including unexpected ground and climate conditions, industrial accidents, fluctuation in the price of materials and in the value of currency, political risks (such as political riots, governmental interventions and strikes) and legal risks (such as amendments in law or failure to secure legal permits and licences).

Further, time is very often critical in construction projects. An Olympic Games stadium must be delivered before the hard deadline that is the date of the games. If a shopping mall is not ready for the commercially busy Christmas period, significant amounts may be lost in seasonal retail trade. The late delivery of a power station can disrupt the project financing used to fund it.

Moreover, arguments as to causation, especially of delay, in construction projects are typically complex. Many phases of a construction project can run concurrently, which often makes it difficult to identify the origins and causes of delay. Legal concepts such as concurrent delay, critical paths and global claims are unique to construction disputes.

Equally, the involvement of a wide number of parties with different capacities and divergent interests adds to the complexity of construction disputes. A typical construction project may involve not only an employer and a contractor, but several subcontractors, a project manager, an engineer and architect, specialist professionals such as civil or structural engineers and designers, mechanical engineers, consultants such as acoustic and energy consultants, lenders and other funders, insurers and suppliers. A seemingly limited dipute arising on one subcontract may lead to disputes under other subcontracts and the main construction contract, and may have financial and legal consequences for many of the above parties, triggering disputes under much wider documentation such as shareholder agreements, joint operating agreements, funding documents and concessions. That often

3 Dispute adjudication boards were first introduced in FIDIC contracts (in the Orange Book) in 1995 and in ICE contracts as recently as in 2005.

4 Arbitration has been included in FIDIC contracts since the publication of the first FIDC contract in 1957.

gives rise to issues about multiparty arbitration proceedings and third-party participation in arbitration proceedings.

Another important feature of construction disputes is the widespread use of standard forms, such as the FIDIC or the ICE conditions of construction contracts. Efficient dispute resolution requires familiarity and understanding of the, often nuanced, risk allocation arrangements in these standard forms. Good knowledge of construction-specific legislation is necessary too. While the resolution of most construction disputes will depend on the factual circumstances and the provisions of the contractual agreement of the parties, legal issues may often arise in relation to statutory (frequently mandatory) warranty and limitation periods for construction claims, statutory direct claims by subcontractors against the employers,[5] statutory prohibition of the pay-when-paid and pay-if-paid provisions[6] and, of course, mandatory legislation on public procurement.[7]

Finally, as already mentioned, construction disputes are technically complex, requiring efficient management of challenging evidentiary processes, including document management, expert evidence, programme analysis and quantification of damages. The evidentiary challenges in construction disputes have given rise to the use of tools, such as Scott Schedules (used to present fact intensive disputes in a more user friendly format), that are unique in construction arbitrations.[8]

It is for all these reasons that alternative dispute resolution and arbitration of construction disputes require special focus and attention, which is what *The Guide to Construction Arbitration* aims to provide.

The Guide to Construction Arbitration is designed to appeal to different audiences. The authors of the various chapters are themselves market-leading experts, so it can provide a ready resource for specialist construction arbitration practitioners who already have a view of the information they seek. Beyond that, it has been compiled and written to offer practical information to practitioners who are inexperienced in international construction contracts or dispute resolution in construction disputes. For example, in-house lawyers who may be experienced in negotiating and drafting construction contracts but not in running disputes arising from them, or construction professionals who may have experience in managing construction projects but may lack experience in the conduct of construction arbitration, will find *The Guide to Construction Arbitration* useful. Lawyers in private practice who are familiar with arbitration, but lack experience in construction will also benefit. Last but not least, students who study construction arbitration will find it to be a helpful source of information.

While the main focus of *The Guide to Construction Arbitration* is the resolution, by arbitration, of disputes arising out of construction projects, Part I is devoted to important substantive aspects of international construction contracts. To understand how construction disputes are resolved in international arbitration, one has to understand how disputes arise out of a typical construction contract in the first place, and what are the substantive rights, obligations and remedies of the parties to a construction contract.

5 For example, in France, Law No. 75-1334 of 31 December 1975 on Subcontracting.

6 For example, in the United Kingdom with the UK Housing Grants Construction and Regeneration Act 1996.

7 For example, EU Directive 2014/24.

8 J. Jenkins and K. Rosenberg, 'Engineering and Construction Arbitration', in Lew et al. (editors) *Arbitration in England*, Kluwer (2013).

Thus, this book is broadly divided in four parts. Part I examines a wide range of substantive issues in construction contracts, such as The Contract: the Foundation of Construction Projects, Bonds and Guarantees, an Introduction to the FIDIC Suite of Contracts, Allocation of Risk in Construction Contracts, Contractors' and Employers' Claims, Remedies and Reliefs. Chapters valuably address the quantification of delays, the role of programmes and the various methods used for the computation of costs and damages in construction arbitrations, while an entire chapter is devoted to an examination, from a comparative law perspective, of the practically critical topic of concurrent delay.

Part II then focuses on dispute resolution processes in construction disputes. The aim of this Part is to look into special features of construction arbitration, and the following chapters are included: Suitability of Arbitration Rules for Construction Disputes, Subcontracts and Multiparty Arbitration in Construction Disputes, Interim Relief, including Emergency Arbitrators in Construction Arbitration, Organisation of the Proceedings in Construction Arbitrations, Documents in Construction Disputes and Awards, and the role and management of expert evidence.

Part III examines a number of select topics in international construction arbitration by reference to some key industry sectors and contract structures, including the nuclear sector, energy sector, concession contracts and turnkey projects. Part IV examines construction arbitration in specific jurisdictions of particular interest and with very active construction industries

We have taken the opportunity to add to the chapters in this third edition, to address matters identified by users of the first two editions. These include chapters examining dispute boards, ADR in construction contracts, agreements to arbitrate and interim relief in detail. There are chapters on pricing and payment, investment treaty arbitration in the construction sector, a discussion of the typical parties to a construction contract, further discussion of the organisation of expert testimony and a chapter on construction arbitration in Brazil.

Overall, the third edition of *The Guide to Construction Arbitration* builds upon the success of the first two editions and has been further expanded. The structure and organisation of *The Guide to Construction Arbitration* is broadly based on the LLM course on International Construction Contracts and Arbitration that we teach at Queen Mary University of London. The course was first introduced by HH Humphrey Lloyd in 1987 and was taught by him for more than 20 years. Humphrey has been an exceptional source of inspiration for hundreds of students who followed his classes, and we are personally indebted to him for having conceived the course originally and for his generous assistance when he passed the course on some years ago.

We want to thank all the authors for contributing to *The Guide to Construction Arbitration*. We are extremely fortunate that a group of distinguished practitioners and construction arbitration specialists from a wide range of jurisdictions have agreed to participate in this project. We further want to thank Gemma Chalk, Bevan Woodhouse and Hannah Higgins for all their hard work in the commission, editing and production of this book. They have made our work easy. Special thanks are due to David Samuels and GAR for asking us to conceive, design and edit this book. We thoroughly enjoyed the task, and hope that the readers will find the result to be useful and informative.

Part IV

Regional Construction Arbitration

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Construction Arbitration in Australia

Andrew Stephenson, Lee Carroll and Lindsay Hogan[1]

Introduction

In Australia, two regimes exist that regulate arbitration, depending upon whether the arbitration is characterised as international or domestic. Prior to 2010, significantly different policy settings applied to the two regimes. Therefore, when considering cases before 2010, it is important to consider whether the arbitration in question is international or domestic. Some of these earlier Australian cases relating to domestic arbitration were criticised internationally but this criticism failed to appreciate the different policy settings for domestic and international arbitration that existed at the time and assumed principles expounded in these cases were relevant to international arbitration.

There was, however, some legitimate criticism of cases that related to international arbitration where the Australian courts had failed to understand the policy setting stipulated by the New York Convention,[2] and the Model Law (as at 1985),[3] both of which had been incorporated into the law of Australia for the purposes of international arbitration.

By 2010, there was a ground swell of support for significant reform of the law relating to both international and domestic arbitration. Both regimes are now based on the Model Law (as at 2006).[4] However, there are subtle differences between the two regimes that are discussed below.

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2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('New York Convention').

3 UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985).

4 UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) ('Model Law').

The 2010 reforms involved amendments of the existing International Arbitration Act 1974 (IAA),[5] and the repeal of the mid-1980s version of the Commercial Arbitration Act (the Old CAA) of each state and territory and enactment of a new Commercial Arbitration Act by each state and territory (collectively the CAA).[6] The principal reforms relate to:

- confidentiality;
- stays (for domestic arbitration);
- the capacity to contract out of the Model Law for international arbitration; and
- recourse against the award.

Before embarking on a detailed discussion of these issues, it is appropriate to first consider how Australian law distinguishes between international and domestic arbitration.

Characterisation of arbitration agreements – international versus domestic

Pursuant to Section 1(3) of the CAA an arbitration is domestic if at the time of the conclusion of the arbitration agreement the parties had their places of business in Australia and the Model Law (as given effect by the IAA) does not apply.

Article 1(3) of the Model Law provides that an arbitration is international (and therefore not domestic) if:

> *(a) the parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business in different States;*[7] *or*
>
> *(b) one of the following places is situated outside the State in which the parties have their places of business:*
>
> *(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;*
>
> *(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*
>
> *(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.*

Accordingly, it is possible for an arbitration between two Australian entities to be regulated by the international regime.

Confidentiality

In other common law countries, confidentiality has been a hallmark of arbitration, rooted in principles of self-determination and the parties' ability to choose to keep both their dispute and its resolution private and confidential. The confidentiality associated with a

5 International Arbitration Act 1974 (Cth).

6 Commercial Arbitration Act 2010 (NSW); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT); Commercial Arbitration Act 2011 (SA); Commercial Arbitration Act 2011 (TAS); Commercial Arbitration Act 2011 (VIC); Commercial Arbitration Act 2012 (WA); Commercial Arbitration Act 2013 (QLD); Commercial Arbitration Act 2017 (ACT).

7 Meaning in this context, countries, and not to be confused with Australian states.

private arbitration in those countries has meant that commercially sensitive information or awards will not be in the public domain. The risk of reputational damage associated with publicly airing a dispute in open court is also avoided if the dispute is kept confidential.

Prior to the enactment of the CAA in Australia, there was no presumption of confidentiality in Australia. In the 1995 case *Esso Australia Resources Ltd v. Plowman (Minister for Energy and Minerals) ('Esso')*,[8] the High Court of Australia held that there was no implied obligation of confidentiality in arbitration agreements. Confidentiality was an obligation only if expressly specified in the arbitration agreement.

In *Esso*, Plowman sought to disclose information Esso had provided during the course of the arbitration. Esso argued that the arbitration agreement contained an implied term of confidentiality, which meant that documents obtained during the course of the arbitration could not be disclosed to third parties. The High Court held by majority that while arbitration proceedings are private, they attract no greater confidentiality than a court proceeding, and that confidentiality is not a necessary attribute of such privacy.

In practice, parties could circumvent *Esso* by expressly agreeing that the arbitration was confidential as well as private.

The Australian position following *Esso* was out of step with international commercial arbitration. Accordingly, some argued that this was an important reason why foreign disputants chose not to arbitrate in Australia.[9]

The CAA brought Australian domestic arbitration law back in line with international best practice by imposing a statutory duty of confidence. Section 27E of the CAA prohibits the parties and the tribunal from disclosing confidential information, subject to certain exceptions. Pursuant to Section 27E(1) the parties may agree to opt-out of the statutory duty.

The IAA, which deals with international arbitration, provided for confidentiality on an opt-in basis. However, in October 2015, the IAA was amended to mirror the duty of confidence required in respect of domestic arbitration, by making confidentiality available on an opt-out basis. So unless the parties stipulate otherwise, proceedings arising from all arbitration agreements will remain confidential.

Stays

As discussed above, the IAA gives effect to both the New York Convention and the Model Law (2006 version). The Model Law has, by virtue of Section 16 of the IAA, the force of law in Australia. Section 7 of the IAA enforces 'foreign' arbitration agreements,[10] and provides that a court must, upon application by a party to the proceedings, stay any court proceedings within the ambit of the arbitration clause and refer the parties to arbitration.

8 (1995) 183 CLR 10.

9 J. Galatas, 'The Role and Attitude of the Courts in Australian in Relation to International Commercial Arbitration' (2005) 1 *The International Construction Law Review* 27, 49.

10 Being agreements where the procedure of the arbitration is governed by the law of a convention country; the procedure of the arbitration is governed by a non-convention country and a party to that agreement is a person who, at the time of the arbitration agreement, was ordinarily resident in Australia; a party to the arbitration agreement is a convention country; or a party to the arbitration agreement was, at the time of the arbitration agreement, ordinarily resident in a convention country.

Article 8 of the Model Law relates to international arbitration as defined in the Model Law (as discussed above), which also stipulates that a court must, on application by a party to the proceedings, refer the parties to arbitration if an action is brought in a matter that is the subject of an arbitration amount. This article has been adopted in the domestic regime.

Both the international and domestic regimes are subject to the usual exception that a reference to arbitration will not be made if the arbitration agreement is 'null and void, inoperative or incapable of being performed'.

The issues that arise in respect of stays are twofold:

- Is the dispute the subject of the proceedings within the scope of the arbitration clause?
- Is the arbitration clause null and void, inoperative or incapable of being performed?

Is the dispute the subject of the proceedings within the scope of the arbitration clause?

This issue is to be resolved by a proper interpretation of the arbitration clause. Like in England and Wales, prior to *Fiona Trust & Holding Corp v. Privalov*,[11] Australian courts read arbitration clauses strictly, including making distinctions between clauses that referred to arbitration disputes 'arising under', 'connected with' or 'relating to' the contract. This gave rise to serious inconvenience where a court stayed part of the proceedings that were held to fall within the scope of the arbitration clause, while allowing the balance of the dispute to proceed to litigation.[12]

However, by the 1990s, a line of authority developed that arbitration clauses should be construed widely,[13] so as to allow claims based on the contract and claims based on non-contractual remedies (arising from the same or similar facts) to be determined together in arbitration. The House of Lords decision in the *Fiona Trust* case arguably went further than this line of authority, and was accepted by the Western Australian Court of Appeal.[14]

The approach taken in the *Fiona Trust* case by Lord Hoffman was put succinctly as follows:[15]

> *In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal*

11 [2007] 4 All ER 951 (*Fiona Trust*).

12 See for example *Allergan Pharmaceuticals Inc v. Bausch Lomb Inc* [1985] FCA 507 and *Hi-Fert Pty Ltd v. Kuikiang Maritime Carriers Inc* (1998) 159 ALR 142.

13 See for example, the decision of Gleeson CJ (subsequently Chief Justice of the High Court of Australia – the final court of appeal in Australia) in *Francis Travel Marketing v. Virgin Atlantic Airways Ltd (*1996) 39 NSWLR 160 at [165]; *Comandate Corp v. Pan Australian Shipping Pty Ltd* (2006) 157 FCR 45 at [164]; *Walter Rau Neussel Oelund Fett AG v. Cross Pacific Trading* [2005] FCA 1102 at [41]–[42]; *Global Partners Fund Ltd v. Babcock & Brown Ltd (in liq)* [2010] NSWCA 196 at [60]–[65] per Spigelman CJ, Giles and Tobias JJA agreeing – interestingly, Spigelman CJ expressly referred to *Fiona Trust* at [63] in support of the liberal interpretation proposed in that case; *Lipman Pty Ltd v. Emergency Services Superannuation Board* [2011] NSWCA 163 at [6] to [8].

14 See *Paharpur Cooling Towers Ltd v. Paramount (WA) Ltd* [2008] WASCA 110 at [39].

15 [2007] 4 All ER 951, [6]–[8].

> *which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.*
>
> *If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.*
>
> *A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. But the same policy of giving effect to the commercial purpose also drives the approach of the courts (and the legislature) to the second question raised in this appeal, namely, whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the contract to arbitration should not be allowed to do so.*

The second paragraph quoted above is of particular importance to Lord Hoffman's reasoning, specifically the question:

> *Could they [the businessmen who entered into the arbitration agreement] have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court?*

He concludes that it is not rational to read the clause narrowly. That is, having regard to the purpose of the clause, it is extremely unlikely that rational businesspersons would have wanted the resolution of a dispute to be dealt with by two different tribunals.

The *Fiona Trust* case was considered by the New South Wales Court of Appeal in *Rinehart v. Welker*.[16] In that case, the relevant arbitration clause provided that disputes 'under this deed' were to be referred to arbitration. Bathurst CJ referred to the decision of the High Court of Australia in *Toll (FGCT) Pty Ltd v. Alphapharm Pty Ltd*,[17] which stands for (inter alia) the proposition that the correct interpretation of a contract is to be determined objectively, by reference to what a reasonable person would have understood the words to mean. However, he went on to observe:[18]

16 [2012] NSWCA 95 (*Rinehart v. Welker*).

17 (2004) 219 CLR 165.

18 [116].

> *That does not mean that the court is entitled to disregard clear and unambiguous language used by the parties to produce results which the surrounding circumstances may indicate are more commercial or business-like: Western Export Services Inc v. Jireh International Pty Ltd [2011] HCA 45; (2011) 86 ALJR 1. Resort may only be had to surrounding circumstance where the words in question exhibit uncertainty or ambiguity: Codelfa Construction Pty Ltd v. State Rail Authority (NSW) [1982] HCA 24; (1982) 149 CLR 337 at 352.*

He then referred to the line of authority that had developed since the mid-1990s, which supported a liberal interpretation of arbitration clauses, and stated:[19]

> *That is not to say that the words of the clause can be given a meaning they do not have to satisfy a perceived commercial purpose. Such an approach would be inconsistent with the approach to construction of contracts to which I have referred above. As stated by French J in Paper Products the scope of disputes covered by an arbitration clause must depend on the language of the clause. Similar statements were made by Allsop P whilst a judge of the Federal Court, in Walter Rau and Comandate Marine Corp and in this court in Lipman Pty Ltd. Rather, the words of an arbitration clause should be, to the extent possible, consistent with the ordinary meaning of the words, liberally construed.*
>
> *It follows that it is not appropriate for this court to adopt what Lord Hoffman described in Fiona Corporation as a 'fresh start' and construe clauses irrespective of the language in accordance with the presumption that the parties are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal unless the language makes it clear certain questions were intended to be excluded. Whilst the presumption that parties intended the same tribunal to resolve all their disputes may justify a liberal approach consistent with the plain meaning of the words in question, the approach suggested by Lord Hoffman is contrary, in my opinion, to the approach laid down by the High Court as to the construction of commercial contracts.*

Since *Rinehart v. Welker* was decided, the High Court has again considered the correct approach to contractual interpretation. In *Mount Bruce Mining Pty Ltd v. Wright Prospecting Pty Ltd*,[20] French CJ, Nettle and Gordon JJ observed:[21]

> *In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects secured by the contract.*

With all due respect to the New South Wales Court of Appeal, the decision in *Rinehart v. Welker* puts too much emphasis on what it contends is the plain meaning of the words (construed by lawyers having regard to old authority) rather than the likely (objective)

19 [120]–[121] (references omitted).

20 (2015) 256 CLR 104.

21 [47].

meaning of the same words used by businesspersons, not schooled in the law. Accordingly, it is respectfully suggested that, in time, *Rinehart v. Welker* will be regarded as an anomaly, inconsistent with the modern authority that had been developing since the mid-1990s.

Indeed, the issue was considered by the Full Court of the Federal Court of Australia in *Hancock Prospecting Pty Ltd v. Rinehart* (2017) 350 ALR 658 (*Hancock Prospecting*). The Full Court of the Federal Court disagreed with the New South Wales Court of Appeal. The Full Court observed (at [193]):

> *We respectfully cannot agree that Fiona Trust says that arbitration clauses should be construed irrespective of the language used or that it says anything different in substance from Francis Travel and Comandate. We agree with Martin CJ in Cape Lambert in that respect. Lord Hoffmann and Lord Hope were refusing (just as Longmore LJ preferred to approach the matter) to engage in semantic debates about relational prepositional phrases capable of throwing up fine distinctions, often based on the temporal or visual metaphor from the language 'under', 'arising under', 'out of', 'arising out of', 'in relation to' and 'in connection with'. Context will almost always tell one more about the objectively intended reach of such phrases than textual comparison of words of a general relational character. None of the phrases is linguistically stable or fixed. It may be that past cases decided in recognised markets with stable standard forms admit of, and may demand, necessary textual consistency: Federal Commerce and Navigation Co Ltd v. Tradax Export SA (The Maratha Envoy) [1978] AC 1 at 7–8. Far more important, however, is the correct general approach referred to by Gleeson CJ in Francis Travel — that sensible parties do not intend to have possible disputes that may arise heard in two places. Effect is given to that assumption by interpreting words liberally when they permit that to be done. As some of the cases discussed in Fiona Trust (in the Court of Appeal and the House of Lords) reveal, the phrase 'under this agreement' is amply able to encompass a dispute concerned with a claim to rescission of the agreement. Seeking to give the phrase some amplitude one would construe the phrase as including a dispute that contained a substantial issue that concerned the exercise of rights or obligations in the agreement, or a dispute that concerned the existence, validity or operation of the agreement as a substantial issue, or a dispute the resolution of which was governed or controlled by the agreement. That is not meant to be a prescriptive definition, but rather an illustration of a liberal reading of an arbitration clause using the correct general approach as an aspect of context in conventional contractual construction that can be found in Francis Travel, Comandate, United Group Rail, Global Partners Fund, Lipman and Cape Lambert Resources, and, in our respectful view, Fiona Trust. Disputes governed or controlled by the deed and its operation can be seen as part of the meaning of the phrase, but it is difficult to see why the meaning should be so limited.*

The Australian High Court recently affirmed the decision in *Hancock Prospecting* and, in doing so, made some salient observations concerning the interpretation of arbitration clauses, which may affect the continuing relevance of *Fiona Trust* in Australia.[22] The High Court noted that while a large part of the Full Court's reasons were taken up with the approach taken in *Fiona Trust* (because this was how the case was argued), appeals of this nature can be resolved by the application of orthodox principles of interpretation, in light

22 *Rinehart v. Hancock Prospecting Pty Ltd* [2019] HCA 13.

of the context and purpose of the clause, without reference to *Fiona Trust*.[23] Accordingly, the High Court eschewed the opportunity to consider the correctness of the approach taken in *Fiona Trust*.[24]

By applying orthodox principles of interpretation, the High Court determined that it was 'inconceivable' for the parties, who had entered into two deeds of release containing arbitration clauses, to challenge the validity of those deeds in a public forum,[25] given that one of the primary purposes of the deeds was to keep disputes between the parties confidential, and further, that the validity of one of those deeds had already been the subject of challenge.[26] The approach of construing arbitration clauses in this manner (i.e., by reference to the orthodox principles that govern commercial contracts) has already been followed in the Supreme Court of Victoria.[27]

Even though the High Court did not take the opportunity to endorse the approach taken in *Fiona Trust*, the decision will likely still have relevance in Australia in cases where the context and purpose of an arbitration clause are not readily apparent, and a textual approach to interpretation is required. The Court did note, however, that *Fiona Trust* is likely to have less relevance given the trend by commercial parties to include wider arbitration clauses in agreements.

Is the arbitration clause null and void, inoperative or incapable of being performed?

This exception was considered by the Supreme Court of New South Wales in *Siemens Ltd v. Origin Energy Uranquinty Power Pty Ltd*.[28] In this case, Siemens sought to recover amounts the subject of payment claims made under the Building and Construction Industry (Security of Payment) Act 1999 (NSW) (the SOP Act). Origin sought a stay under Section 8(1) of the NSW CAA arguing that the matter was the subject of an arbitration agreement.

The parties fell into dispute about the payment claims in early 2009. At that time, under the terms of their existing contract, either party could refer an unresolved dispute to arbitration. However, in late 2010, they expressly agreed that all pre-existing disputes had to be resolved by arbitration.

The facts of this case are complex. However, in summary, the defendant sought a stay of proceedings brought pursuant to Section 15(2)(a)(i) of the SOP Act. That legislation stipulated that the plaintiff could issue a payment claim pursuant to the legislation. The defendant had a limited time to respond to such a claim. If it did not do so, the plaintiff could recover the amount claimed as a debt due in any court of competent jurisdiction. The defendant failed to respond within time, but contended that its failure was induced by misleading or deceptive conduct, which, pursuant to other legislation[29] and authority,[30]

23 [18].

24 [21].

25 [48], [49].

26 [48].

27 *RW Health Partnership Pty Ltd v. Lendlease Building Contractors Pty Ltd* [2019] VSC 353.

28 *Siemens Ltd v. Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398.

29 Trade Practices Act 1974 (Cth) Section 52.

30 *Bitannia Pty Ltd v. Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9.

entitled it to defend the claim made pursuant to the SOP Act. The defence was a matter which could not be dealt with by the adjudication regime prescribed by the legislation. Accordingly, the dispute could only be dealt with by a court or arbitration.

Ball J concluded that while the dispute fell within the ambit of the arbitration clause, it was not arbitrable. His conclusion is best explained by the contention that Section 15(2) is part of the mechanism which leads to adjudication, a quick interim decision which can be reversed by a court or arbitrator subsequently. While the dispute in the case related to whether the right of the plaintiff to sue in court for a statutory debt created by Section 15(2) had been adversely affected by misleading or deceptive conduct, his Honour had regard to the overall scheme of the legislation in concluding that the dispute was not arbitrable.

While the reasoning in this case can be criticised, it is unique. As the reasons in this case establish, for an arbitration clause to be held null and void, inoperative or incapable of being performed, a serious issue of public policy must arise.

The meaning of the term 'inoperative' was also the subject of discussion in *Broken Hill City Council v. Unique Urban Built Pty Ltd* [2018] NSWSC 825. Hammerschlag J held that the term 'inoperative' means 'having no field of operation or to be without effect'. Hammerschlag J relied on a Hong Kong decision (*Lucky-Goldstar International (HK) Ltd v. NG Moo Kee Engineering Ltd* [1993] 1 HKC 404). In that decision, Kaplan J said 'inoperative' covers 'those cases where the arbitration agreement has ceased to have effect'. For example, where the parties have revoked the arbitration agreement or the same dispute has already been decided.

The capacity to contract out of the Model Law for International Arbitration

In an unfortunate 2001 decision, the Queensland Court of Appeal held in *Australian Granites v. Eisenwerk* that where parties choose to have their disputes determined according to institutional rules, they implicitly choose to exclude the operation of the Model Law.[31] The decision created several difficulties, the most significant being that the *lex arbitri* became the relevant Old CAA. The important differences between the IAA and the Old CAA included:

- the granting of a stay of court proceedings was a matter of discretion for the courts; and
- there was, subject to leave being granted, a general right of appeal in respect of the merits of an award.

While *Eisenwerk* was rejected by the Supreme Court of New South Wales in *Cargill International SA v. Peabody Australia Mining Ltd*,[32] it was followed in other cases.[33] The effect of *Eisenwerk* was not consistent with the policy settings evident from the IAA. Accordingly, the federal parliament amended Section 21 of the IAA to provide that if the Model Law applies to an arbitration, the law of a state or territory does not apply to that arbitration. The amendment did not end the controversy, however, because the question remained

31 *Australian Granites Ltd v. Eisenwerk Hensel Bayreuth Dipl.-ing Burkhardt GmbH* [2001] 1 Qd R 461 (Eisenwerk).

32 *Cargill International SA v. Peabody Australia Mining Ltd* (2010) 78 NSWLR 533.

33 See for example *Lightsource Technologies Australia Pty Ltd v. Pointsec Mobile Technologies AB* (2011) 250 FLR 63.

about whether *Eisenwerk* applied to arbitration agreements struck before the amendment to Section 21.[34] To put the controversy beyond all doubt, the federal parliament gave the amended Section 21 retrospective effect in 2015.[35]

Recourse against the award

Prior to the law reform in 2010, the policy settings for domestic arbitration were very different to those for international arbitration. In domestic arbitration there was a general right of appeal. That right was subject to the court granting leave. The legislation contained the criteria for granting leave, which were similar in effect to the 'Nema Rules' established pursuant to the Arbitration Act 1979 in England and Wales.[36] Under the Old CAA it was not possible to contract out of the right of appeal until after the dispute had arisen. This was rarely, if ever, agreed. Accordingly, the default position was that there was a general right to have the merits of an award reviewed, if leave was granted. In addition, the award could be challenged pursuant to Section 42 of the Old CAA if the arbitrator had engaged in misconduct. Misconduct related to both extreme behaviour (such as fraud) and non-blameworthy conduct, such as falling into some technical jurisdictional error.

Pursuant to the new legislation an appeal is only possible in respect of a domestic arbitration if the parties so agree (which can be done at any time). Even where there is such an agreement, the right of appeal is subject to leave being granted by a court. The criteria for granting leave have been tightened.[37]

Where the parties to a domestic agreement have not agreed to make the award the subject of an appeal, recourse against the award is limited to those matters prescribed by the Model Law. Therefore, in this circumstance the position is the same as that for international arbitration.

In the context of international arbitration it is relevant to consider the extent to which:

- an Australian international award can be challenged in Australia; and
- an Australian court will refuse to enforce an international award from a non-Australian seat (i.e., a foreign award).

Setting aside an award made in Australia

When choosing a seat of arbitration it is important to understand the extent to which an award may, at the seat, be annulled or set aside by the local courts. This issue is not dealt with by the New York Convention, as it relates to enforcement of foreign awards (i.e., enforcement in a state that is not the seat).

Some jurisdictions have sought to distinguish themselves from others by allowing a merits review (i.e., an appeal), however, Australia has not adopted this approach. Instead, Article 34 of the Model Law entitles a party to seek to have an award set aside in limited circumstances, which largely mirror the grounds for refusing to enforce a foreign award in Article V of the New York Convention.

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34 See for example *Castel Electronics Pty Ltd v. TCL Air Conditioner Co Ltd* (2012) 201 FCR 209 cf *Rizhao Steel Holding Group v. Koolan Iron Ore* (2012) 43 WAR 91.

35 Civil Law and Justice Legislation Amendment Act 2015 (Cth).

36 Established in *Pioneering Shipping Ltd v. BTP Tioxide, the Nema* [1981] 2 All ER 1030.

37 See Section 34A CAA.

Article 34 of the Model Law provides that an award may only be set aside where:[38]

> *(a) the [applicant] furnishes proof that:*
>
> *(i) a party to the arbitration agreement … was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or … the law of this State; or*
>
> *(ii) the [applicant] was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present [its] case; or*
>
> *(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration …; or*
>
> *(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement [conflicted with a mandatory term of, or was not in accordance with, the Model Law]; or*
>
> *(b) the court finds that:*
>
> *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or*
>
> *(ii) the award is in conflict with the public policy of this State.*

Internationally, in the context of Article V of the New York Convention, the most controversial issue has been the circumstances in which a court will refuse to enforce an award because it is against public policy. Public policy may also result in the setting aside of an Australian international arbitration award and it is therefore important to consider that ground in further detail.

Setting aside an award on the grounds of public policy

In *TCL Air Conditioner (Zhongshan) Co Ltd v. Castel Electronics Pty Ltd*,[39] the defendant, an Australian company, commenced an arbitration against the plaintiff, a Chinese company, claiming breaches of a distribution agreement between them. An arbitral tribunal seated in Australia awarded Castel over $3 million, which was calculated by reference to the financial impact of the breaches on Castel's sales. TCL sought to set aside the award under Article 34 of the Model Law, and resist enforcement under Article 36 (as Castel had sought to enforce the award under Article 35) on two grounds: first, the arbitrators failed to provide it with procedural fairness such that the rules of natural justice were breached in connection with the making of the award, and second, the award was in conflict with, or contrary to, Australian public policy.

TCL failed on both counts, with the Full Federal Court (Allsop CJ, Middleton and Foster JJ in agreement) making important findings concerning the nature of the application made by TCL, and what is required to prove a successful claim. Their Honours held:[40]

38 Model Law Article 34(1)–(2).

39 *TCL Air Conditioner (Zhongshan) Co Ltd v. Castel Electronics Pty Ltd* (2014) 232 FCR 361.

40 [54].

> *If the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been conducted regularly and fairly. That danger is acute if natural justice is reduced in its application to black-letter rules, if a mindset appears that these rules can be 'broken' in a minor and technical way and if the distinction between factual evaluation of available evidence and a complete absence of supporting material is blurred.*

In this particular case, the application made by the plaintiff was:[41]

> *a disguised attack on the factual findings of the arbitrators dressed up as a complaint about natural justice.*

From a practical view, the court identified what is required to trigger the requirement, noting that:[42]

> *An international commercial arbitration award will not be set aside or denied recognition or enforcement under Arts 34 and 36 of the Model Law (or under Art V of the New York Convention) unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness. The demonstration of real unfairness or real practical injustice will generally be able to be expressed, and demonstrated, with tolerable clarity and expedition. It does not involve the contested evaluation of a fact-finding process or 'fact interpretation process' or the factual analysis of asserted 'reasoning failure', as was argued here.*

In *Emerald Grain v. Agrocorp*, the plaintiff asked the Federal Court to set aside an award under Article 34(2)(b)(ii) of the Model Law on the ground that the award conflicted with Australian public policy.[43] Section 19 of the IAA clarifies that an award will conflict with public policy for the purpose of Article 34(2)(b)(ii) if a breach of the rules of natural justice occurred in the making of the award.

The parties fell into dispute over a delivery of canola. Agrocorp commenced and won at arbitration. Emerald sought to have the award set aside for a breach of the rules of natural justice. It argued there was no evidence of probative value before the tribunal to make the findings made ('no evidence rule') and the tribunal based its findings on its own opinions and ideas without giving Emerald adequate notice to argue its case ('no hearing rule').[44]

41 [54].

42 [55].

43 *Emerald Grain Australia Pty Ltd v. Agrocorp International Pte Ltd* (2014) 314 ALR 299.

44 [5].

The applicant failed on both counts with Pagone J confirming that the court must be vigilant not to allow a party to run a merits review through the backdoor.[45] His Honour further confirmed that an arbitral award will not be viewed in the same way as a reasoned court decision, as a court's role to ensure compliance with the rules of natural justice is supervisory only – there is no expectation that an arbitral award must analyse every argument put before the tribunal and identify all facts by reference to the supporting evidence.[46]

The 'curial caution', which must be applied when assessing natural justice and public policy arguments, was recognised in a recent decision of the Supreme Court of Western Australia in *Spaseski v. Mladenovski*.[47] In that case, a builder sought to resist the enforcement of two arbitral awards,[48] and have them set aside,[49] on the basis that, inter alia, the recognition or enforcement of the awards would be against the public policy of Western Australia. In rejecting the builder's application, the Supreme Court cautioned against 'so-called natural justice or procedural fairness arguments … fashioned to pass through the narrow dimensions of a local public policy gateway'. Further, it highlighted that the requirement under Article 18 of the Model Law, which provides that a party must be given a reasonable opportunity to present its case, 'is clearly not unqualified, open ended or unlimited'. To that end, the Supreme Court identified that:[50]

> *… what will amount to a 'reasonable' opportunity to present a party's case must depend upon the invariably unique presenting circumstances of each and every distinct arbitral dispute.*

Enforcing foreign arbitration awards in Australia

Section 8(1) of the IAA provides that a foreign arbitral award is binding on the parties to the arbitration agreement in pursuance of which it is made. The IAA provides that a foreign award may be enforced in a court of a state or territory or in the Federal Court, as if the award were a judgment or order of those courts.[51] Section 8(3A) further provides that an Australian court may only refuse to enforce a foreign arbitral award where a ground to resist enforcement is proved under Section 8(5) or Section 8(7). These grounds largely reflect those in Article V of the New York Convention and Article 36 of the Model Law (which, in the context of setting aside an award, are the same as those in Article 34 of the Model Law, set out above).

There have now been numerous cases concerning the grounds to refuse enforcement. The logic from these cases will be applied equally in the context of setting aside an award because the basis for challenging the enforcement of an award and setting an award aside have effectively been the same since 2011.

45 [10].

46 [16].

47 [2019] WASC 65, [59] and [61].

48 Pursuant to ss 36(1)(a)(ii) and 36(1)(b)(ii) of the WA CAA.

49 Pursuant to ss 34(2)(a)(ii) and 34(2)(b)(ii) of the WA CAA.

50 [58].

51 International Arbitration Act 1974 (Cth) Section 8(2)–(3).

Third parties to the arbitration agreement

Under Article V of the New York Convention and Section 8(5) of the IAA, a court may refuse to enforce a foreign award if a party proves (*inter alia*), to the satisfaction of the court, that it was not able to present its case or the award did not deal with a difference falling within the submission to arbitrate.[52] These grounds were the focus of the Victorian Court of Appeal in *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC*,[53] a case concerning the enforceability of a foreign award against an Australian company who was not a party to the arbitration agreement. However, this case was ultimately decided by reference to an issue which was considered a precondition to determining whether one of the grounds in Article V of the New York Convention had been made out, namely whether the awarded debtor was a party 'to the arbitration agreement in pursuance of which it was made' (Section 8(1) of the IAA). The case also considered the onus of proof which the award creditor needed to satisfy in respect of this precondition.

The respondent was incorporated in Mongolia.[54] It entered into an operations management agreement (OMA) with IMC Mining Inc (IMCM), a company incorporated in the British Virgin Islands. IMCM executed a consulting agreement with a related Australian company, IMC Mining Solutions Pty Ltd (IMCS) to perform some of its obligations under the OMA.

Altain terminated the OMA and commenced an arbitration in Mongolia under the OMA. An arbitral tribunal awarded in excess of $6 million to Altain with IMCM (a party to the arbitration agreement and arbitration) and IMCS (a non-party to the arbitration agreement and arbitration) named as entities responsible to pay the award to Altain.

Altain successfully enforced the award against both companies in the Supreme Court of Victoria.[55] During the hearing IMCS, which was not a party to the arbitration agreement or arbitration, argued that before it needed to address whether enforcement should be refused under Article V of the New York Convention (being Section 8(5) and (7) of the IAA and Article 36 of the Model Law), the award creditor had to prove that it was a party to the arbitration agreement.

At first instance, the judge held that the onus of proving that there was a ground justifying a refusal to enforce rested with the award debtor.[56] This burden, he noted, was a 'heavy' one, particularly in light of the pro-enforcement and pro-arbitration environment the IAA and New York Convention exemplify.[57]

IMCS, which was not a party to the arbitration agreement or the arbitration, appealed. The other award debtor, IMCM, did not. One of the key grounds of appeal concerned the question of onus.[58] IMCS argued that the legal onus fell on the award creditor to prove that it was a party to the arbitration agreement. If this was not established then there was no entitlement to enforce and therefore it was unnecessary to consider whether any of

52 An equivalent ground is contained in Article 36(1)(a)(iii) of the Model Law.

53 (2011) 38 VR 303.

54 The facts are set out in the joint judgment of Hansen JA and Kyrou AJA at [79]–[115].

55 *Altain Khuder LLC v. IMC Mining Inc* (2011) 276 ALR 733.

56 (2011) 276 ALR 733, [60]–[61] (at first instance).

57 (2011) 276 ALR 733, [61]–[62], [88] (at first instance).

58 (2011) 38 VR 303, [125].

the grounds for a refusal to enforce had been made out. Altain argued that once the award creditor had produced to the Court duly authenticated originals or certified copies of the award and arbitration agreement (a precondition to enforcement stipulated by Section 9 of the IAA, consistent with Article IV(1) of the New York Convention), the onus shifted to the award debtor.

The majority confirmed that the award creditor, in its capacity as the party invoking the court's jurisdiction, bears the evidential onus of satisfying the court, on a *prima facie* basis, that the court has jurisdiction to make the order to enforce the foreign arbitral award.[59] Once this precondition is met, the court may only refuse to enforce an award where the award debtor proves a ground stipulated in Article V of the New York Convention exists.[60]

Further, there could be no *prima facie* proof that IMCS was a party to the arbitration agreement if, on the face of the arbitration agreement and award, the person against whom the award was made was not a party to the agreement.[61] This is consistent with the House of Lords decision in *Dallah*.[62]

In a dissenting judgment, the Chief Justice determined that Section 8(3A) circumscribes the defences open to an award debtor once the 'preliminary burden' has been met;[63] that is, the threshold question under Section 8(1). Her Honour was not persuaded by the overseas decisions on point (which supported the majority) and construed the IAA according to the strict rules of statutory interpretation to arrive at a different position.

While the court was split, the reasoning of the majority seems more appealing: it is based on similar approaches taken internationally, and consistent with the purpose of both the IAA and international arbitration generally. It is therefore likely to be followed, or at least be persuasive, in future cases heard in the region.

The majority also made interesting findings in relation to onus. At first instance, Croft J held that the award debtor faces a heavy onus to prove that one of the grounds for refusing enforcement was made out.[64] The majority held that the reasoning was incorrect; in the absence of express words to the contrary, the appropriate onus is the balance of probabilities.[65] Croft J, their Honours held, unnecessarily imposed a higher burden than that required under these provisions.

Resisting enforcement on the grounds of public policy

As is addressed above, a party can apply to have an award set aside on the ground that it offends public policy under Article 34(2)(b)(ii) of the Model Law. In addition, Section 8(7)(b) of the IAA provides the same ground to resist enforcement of a foreign arbitral award. It is the equivalent to Article V(2)(b) of the New York Convention. While the exception

59 (2011) 38 VR 303, [134].

60 (2011) 38 VR 303, [134].

61 (2011) 38 VR 303, [138].

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

63 (2011) 38 VR 303, [40].

64 (2011) 276 ALR 733, [61]–[62], [88] (at first instance).

65 (2011) 38 VR 303, [192].

under the New York Convention was only intended to apply in narrow and exceptional circumstances, unfortunately it has been applied in wider circumstances than expected in some non-Australian jurisdictions.

To clarify the operation of the public policy exception in the IAA, the federal legislature inserted Section 8(7A) into the IAA. This section provides, non-exhaustively, that the enforcement of a foreign award is against public policy if the making of the award is induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred in the making of the award. In 2014, the Full Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v. Castel Electronics Pty Ltd* determined that, in the context of Article V of the New York Convention, Article 34 and Article 36 of the Model Law, and lastly, Section 8(7A) of the IAA, the public policy is very much restricted to fundamental issues of justice and morality.[66] This sets a high bar to relief and rests comfortably with the approach adopted in the leading United States decision of *Parsons*.[67] It has been, and will continue to be, a persuasive case for decisions that follow.[68]

66 (2014) 232 FCR 361.

67 *Parsons & Whittemore Overseas Co Inc v. Societe Generale de l'Industrie du Papier* (RAKTA) 508 F 2d 969 (2d Cir 1974).

68 See for example *Sauber Motorsport AG v. Giedo Van Der Garde BV and Others* (2015) 317 ALR 786.

Appendix 1

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