Introduction to Arbitration

A User's Guide

November 2022

CORRS
CHAMBERS
WESTGARTH

corrs.com.au

Foreword

Arbitration has long been the dispute resolution method of choice for transactions that cross international borders.

While its use has traditionally been prevalent in construction, infrastructure and natural resources transactions, it is increasingly popular in sectors that might previously have opted for litigation, including big tech, the pharmaceutical industry, and banking and finance. It is also being progressively adopted by parties involved in M&A and other corporate transactions.

Why are these players opting for arbitration to resolve their disputes, and why is arbitration a particularly suitable choice for certain types of transactions? In short, because it can manage the risk of disputes due to its unique benefits in allowing parties to make choices up front including, for example, to control the costs, timeframes, and confidentiality of a dispute.

At its heart, arbitration is a private process, shaped by the parties involved in a transaction and often kept confidential and away from the media. The parties can agree to apply the procedural rules of their choice. They can agree to who and how many arbitrators determine it. This means that the proceedings can be truncated, only involve agreed necessary steps and be uniquely structured to suit the particular transaction or issues in dispute, including the appointment of subject-matter experts to determine it. The parties can elect to replace costly discovery processes with targeted document production, avoid strict application of rules of evidence, or have their dispute determined expeditiously 'on the papers' without the expense of preparing for and attending a prolonged hearing.

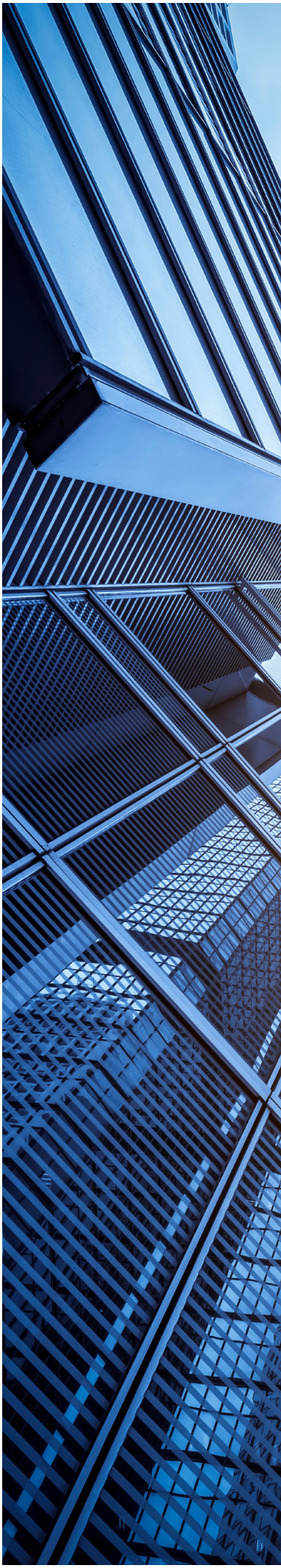
While the choice of procedure is left to the parties, the result is a final and binding award that is enforced like a judgment domestically, and often more easily than a judgment internationally due to a common enforcement regime to which most countries in the world subscribe. Having a common set of rules around enforcement allows an award issued in one country to be reliably recognised and enforced in another country, which makes arbitration particularly attractive for cross-border transactions.

For these reasons, arbitration can effectively and responsibly be used to manage the risk of disputes across an ever increasing number of sectors.

This Guide has been developed to help users of arbitration understand the fundamental tenets of this dispute resolution method, avoid the common pitfalls when drafting arbitration clauses, and successfully navigate the lifecycle of an arbitration.

Relevant to foreign investments, the Guide also provides an introduction to protections and dispute resolution mechanisms available under investment treaties, many of which enable investors to recover damages in arbitration directly against the states in which they invest in the event state measures adversely affect their investment.

Corrs Chambers Westgarth



Contents

01 Why arbitration 4

02 Arbitration in Australia 6

03 Institutional vs *ad hoc* arbitration 10

04 Drafting arbitration clauses 14

05 The lifecycle of an arbitration 17

06 Recognition and enforcement of arbitral awards 30

07 Specific procedures 33

08 Investment treaty arbitration between foreign investors and Host States 38

Annexure 1:
Model arbitration clauses 45

Annexure 2:
Comparison of arbitration institutional rules 46

Authors 51

Our arbitration team 52

01

Why arbitration

Arbitration is a consensual process for the resolution of disputes by an impartial tribunal appointed by an agreed method.

At its heart, arbitration is a private process, shaped by the parties involved in a transaction and often kept confidential and away from the media. The parties agree to resolve their disputes pursuant to a set of procedural rules of their choice and before one or more independent arbitrators instead of in court. In so doing, the process can be truncated, dispense with unnecessary steps, and be uniquely structured to suit the particular transaction or issues in dispute, including through the appointment of subject-matter experts to determine the dispute.

While the procedure is left to the parties, the result is a final and binding award that is enforced like a judgment domestically, and often more easily than a judgment internationally due to a common enforcement regime applicable in most countries around the world. In other words, in most cases, a common set of rules applies for having an award issued in one country recognised and enforced in another country, which makes arbitration particularly attractive for cross-border transactions.

Being a consensual process, arbitration occurs in accordance with the parties' agreement to submit disputes between them to arbitration. Submission to arbitration is typically made before any dispute arises. This usually takes the form of an arbitration clause in a contract which stipulates that the parties agree to resolve certain or any disputes arising out of or in connection with the contract by arbitration. Alternatively, parties may agree to resolve a dispute by arbitration after it has arisen. This form of submission to arbitration is usually done by way of a submission agreement. Either way, it is the parties' arbitration agreement which defines the scope of an arbitral tribunal's jurisdiction and its powers to resolve any dispute between the parties.

Arbitration as the preferred method of dispute resolution

Arbitration has become the dispute resolution method of choice for international transactions involving parties from different jurisdictions. In Australia, arbitration has been commonly used for the construction, infrastructure, and energy and natural resources projects. More recently, its use has spread into sectors that traditionally opted for litigation, including big tech, the pharma industry, corporate and M&A disputes, and banking and finance.

While arbitration has been slower to develop in Australia than has been the case in a number of other jurisdictions, according to the 2020 Australian Arbitration Report, arbitrations with an Australian connection (i.e. disputes involving Australian parties, Australian projects or Australian legal or expert assistance) are 'thriving' in Australia.[1] In fact, between 2016 and 2019, there were over 223 arbitrations with an Australian connection, with a cumulative amount in dispute of over A$35 billion. In terms of disputes by sector, the Report indicated that almost half of all the arbitrations reported were construction, engineering and infrastructure disputes.

For cross-border disputes, arbitration is even more attractive. The 2020 Australian Arbitration Report records that 111 of the 223 arbitrations commenced between 2016 and 2019 were international arbitrations. This is consistent with international arbitration surveys that have time and again confirmed arbitration to be the preferred method of dispute resolution for commercial disputes with an international character. For example, according to the Queen Mary University 2021 International Arbitration Survey, 90% of arbitration users surveyed stated that international arbitration is the preferred method of cross-border dispute settlement, both as a standalone method (31%) and in conjunction with alternative dispute resolution (59%).[2]

1 FTI Consulting and ACICA, 2020 Australian Arbitration Report (Report, March 2021).

2 Queen Mary University of London School of International Arbitration, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* (Report, 2021) 5.

Why choose arbitration?

There are several features of the arbitral process that make it the preferred method of dispute resolution in many industries, for both domestic and cross-border disputes. Some of the key advantages of arbitration include:

- **Parties can select their decision-maker**. A key feature of arbitration is the ability of the parties to select their arbitrator(s) or to require the appointment of a tribunal with specific expertise that will be relevant to potential disputes between the parties. Parties can therefore ensure by agreement between them that arbitrators with familiarity with relevant trade usages, commercial practices, national laws or technical matters are appointed to resolve any disputes that may arise.
- **Arbitration can take place in a neutral forum**. There is no requirement to arbitrate under the laws of any particular jurisdiction. Parties are free to select a legal framework and the rules of a neutral jurisdiction. This may be particularly important in the context of cross-border commercial transactions, i.e. where the parties are located in different jurisdictions and wish to ensure that neither party enjoys a home advantage.
- **Arbitration is typically confidential**. Arbitration provides far greater privacy and confidentiality than litigation. Confidentiality is usually provided for under the chosen arbitral rules or the law governing the arbitration. Typically the parties are to keep confidential both the existence of the proceedings and the information revealed during the arbitration. This may be particularly important where the dispute involves commercially sensitive information. That said, the parties are able to calibrate the degree of confidentiality, agreeing to keep some information confidential while publicising others. There are however, important exceptions to confidentiality (for example in Australia, where a court considers that disclosure would be in the public interest).
- **Arbitration is a party-tailored process**. The parties to an arbitration can choose the procedural rules to be applied to their dispute. In this way, they can simplify the process, dispensing with unnecessary steps. For example, the parties can agree to replace costly discovery processes with targeted document production, avoid strict application of rules of evidence, or have their dispute determined expeditiously 'on the papers' without the expense of preparing for and attending a prolonged hearing. In practice, however, oral evidence from witnesses is a key feature of most international arbitrations, particularly where parties are from common law jurisdictions.
- **Arbitrations are final and more easily enforceable**. An arbitral award is final and binding on the parties, with limited grounds for challenge, compared to a domestic court judgment. As a consequence of the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (**New York Convention**), a widely-ratified treaty, foreign arbitral awards are more easily recognised and enforced in most jurisdictions around the world. This stands in contrast to the recognition and enforcement of foreign court judgments. Domestic arbitral awards are similarly easy to enforce. For example, in Australia, the federal domestic legislation relating to the recognition and enforcement of arbitral awards is based on the New York Convention with only minor amendments.
- **Arbitration agreements are respected and readily enforced by domestic courts**. The New York Convention and the *1985 UNCITRAL Model Law on International Commercial Arbitration* (as amended in 2006) (the **Model Law**) both provide for a mandatory stay of court proceedings and referral to arbitration where there is a matter capable of settlement by arbitration. Australian courts now give an expansive interpretation of arbitration agreements and seek to enforce them as far as possible on the basis that commercial parties did not intend to 'split' their disputes between courts and arbitral tribunals. This approach contrasts with the approach to foreign jurisdiction or choice of court clauses, where Australian courts have been more willing to allow claimants to escape such clauses by suing in a local court where, for example, they have claims under Australian statutory law.

02

Arbitration in Australia

The legislative framework for arbitration in Australia

In Australia, commercial arbitration is governed by federal and state legislative regimes. Both regimes have adopted the Model Law, with some amendments, which are outlined below.

The domestic arbitration regime is governed by uniform State and Territory legislation, the *Commercial Arbitration Act* (the **CAA**). An arbitration will be domestic if the place of business of the parties is within Australia at the time the agreement is concluded.[3]

International arbitrations are governed by the I*nternational Arbitration Act 1974* (Cth) (the **IAA**). An arbitration is 'international' for the purposes of the Act if:

- the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- one of the following places is situated outside the State in which the parties have their places of business:
  - the place of arbitration if determined in, or pursuant to, the arbitration agreement;
  - 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
- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[4]

In addition, the IAA implements Australia's obligations under the New York Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the **ICSID Convention**).

As is the case with the Model Law, the IAA and the CAA contain both mandatory provisions (i.e. provisions which the parties cannot contract out of) and non-mandatory provisions (i.e. provisions which the parties can modify by agreement). They also contain 'opt-in' provisions (that is, provisions which will not apply unless the parties opt-in to the application of those provisions).

An example of a mandatory provision in the IAA and the CAA is the requirement that each party be afforded a reasonable opportunity to present its case.[5]

An example of an 'opt-out' provision is the requirement that the parties not disclose confidential information in relation to the arbitral proceedings unless disclosure is expressly allowed.[6]

While most provisions in the IAA and the CAA are uniform, there are certain differences between them, in particular in terms of the 'opt-in' provisions.

When it comes to international arbitration, an arbitral tribunal has the power to order consolidation of two or more arbitrations if certain conditions are met only if the parties have 'opted-in' to the application of section 24 of the IAA. Conversely, the power of consolidation under the CAA legislation applies unless the parties have 'opted out' by agreement.

Pursuant to the CAA, the parties may preserve the power to appeal an award on a question of law (with leave of the Court) if they have agreed that an appeal may be made under section 34A of the CAA. There is no comparable provision in the IAA.

As can be seen from the above, while the international and domestic regimes are similar, there are some notable differences.

Arbitrability in Australia

A key issue for clients to consider is whether their matter can be settled by arbitration, or in other words is 'arbitrable'. The question of whether a matter is arbitrable is determined by national law. Typically a matter is not arbitrable if it falls within the exclusive domain of the courts. This issue typically arises when a claimant sues in an Australian court in breach of an arbitration agreement and a court is requested to stay its proceedings and refer the parties to arbitration.

3 *Commercial Arbitration Acts* (**CAA**), section 1(3).
4 Model Law, Article 1(3) as applied in Australia by *International Arbitration Act 1974* (Cth) (**IAA**), section 16.
5 IAA, section 18C; CAA, section 18.
6 IAA, section 23C; CAA, section 27E.

Non-arbitral disputes are generally those which concern a legitimate public interest or impact on the rights of third parties, making private resolution of such disputes outside of the domestic court system inappropriate.[7] Examples of non-arbitrable matters include criminal offences, insolvency, divorce, custody of children, property settlement, wills and some competition and intellectual property disputes.[8]
Certain legislative acts explicitly state when matters are not capable of settlement by arbitration. Some examples include:

- section 43(1) of the *Insurance Contracts Act 1984* (Cth) provides that arbitration agreements in contracts of insurance will be void;
- arbitration clauses are prohibited in domestic building contracts in Victoria,[9] New South Wales[10] and the Northern Territory;[11] and
- section 11(2) of the *Carriage of Goods by Sea Act 1991* (Cth) provides that a foreign arbitration clause in a contract for the carriage of goods by sea is void.

Australian courts currently adopt a broad view of whether a commercial dispute is arbitrable and only in "extremely limited circumstances" will a dispute be held to be non-arbitrable, provided the parties have agreed on arbitration as a method to resolve their dispute.[12] For example, parties can submit "issues involving rights conferred under statute and claims where the power to grant statutory remedies has been conferred on the court".[13]

Court support for arbitration in Australia

Australia is increasingly considered a 'pro-arbitration' (or 'arbitration-friendly') jurisdiction. What this means in practice is that the legislative regime clearly sets out the role of the Australian courts in relation to arbitration by specifying the boundaries for judicial intervention in arbitral proceedings, as well as by making provision for the courts to assist the arbitral process where necessary. The pro-arbitration regime in Australia has been furthered in recent years through several significant decisions of the Australian state and federal courts.

Article 5 of the Model Law expressly prohibits court intervention "except where so provided in [the Model law]". The Model Law provisions provide for court support of arbitration and boundaries on judicial intervention.

By way of example, courts in Australia may:

- refer the parties to arbitration where the dispute is the subject of a valid arbitration agreement (Article 8);
- grant interim measures of protection (Articles 9 and 17(1));
- appoint arbitrators (Article 11(3)), decide on challenges to appointments of arbitrators (Article 13(3)) and decide on the termination of an arbitrator's mandate (Article 14(2));
- decide matters of the tribunal's jurisdiction (Article 16(3));
- recognise and enforce interim measures issued by an arbitral tribunal (Article 17H(1)) subject to grounds for refusal (Article 17I);
- assist in the taking of evidence (Article 27);
- determine whether an arbitral award can be set aside (Article 34);
- recognise and enforce an arbitral award (Article 35) subject to grounds for refusal (Article 36).

These powers have been considered by the Australian courts on a number of occasions. Some of the key recent decisions include the following:

- The recent decision of the High Court of Australia in *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 affirmed that, while arbitration clauses are to be construed pursuant to the ordinary canons of contract interpretation (taking into account the language used by the parties, the surrounding circumstances and the purposes of the contract), a liberal construction should be adopted – meaning that courts will seek to give effect as far as possible to the parties' agreement to arbitrate disputes.[14] Again, this issue typically arises in the context of an application to stay court proceedings brought in breach of an arbitration agreement. Also, in that case, the Court provided a broad interpretation of the expression "any person claiming through or under a party to the arbitration agreement" to enable third parties to enforce an arbitration agreement where their defence in a court proceeding shared an 'essential element' with the defence of a party to the arbitration agreement.[15]

7 *Comandante Marine Corp v Pan Australian Shipping Pty Ltd* (2006) 157 FCR 45, Allsop J at [200].
8 *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* (2016) 245 FCR 452, Foster J at [128].
9 *Domestic Building Contracts Act 1995* (Vic), section 14.
10 *Home Building Act 1989* (NSW), section 7C.
11 *Building Act 1993* (NT), section 54BA.
12 *Rinehart v Welker* (2012) 95 NSWLR 221, Bathurst CJ at [120], [164]–[168].
13 Ibid at [168].
14 At [44] and [83].
15 At [65].

- In *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QSC 75, the Queensland Supreme Court took an expansive approach to interpreting the scope of arbitration agreements, holding that they should be construed broadly and informed by the language used in the context of the contract as a whole.[16] The Court considered an arbitration clause expressed as applying to "disputes or differences arising between the Parties" and determined that claims outside the contract based on estoppel by convention or statutory unconscionable conduct under the Australian Consumer Law (**ACL**) were encompassed by this wording. The Court distinguished between the quoted expression and cases in which the relevant clause was limited to disputes arising "under" the applicable agreement, which in the Court's view would merit a narrower interpretation.[17] Unusually, one of the points for determination was whether the clause had been drafted too widely so that it did not fulfil the requirement of the statutory definition of 'arbitration agreement' which required it to apply to disputes "in respect of a defined legal relationship" (under section 7(1) of the CAA). The Court determined that the inclusion of the clause in the contract should be interpreted to mean that it applied to the defined legal relationship created by the contract.[18] The Court granted a stay of proceedings and referred the dispute to arbitration.
- The Victorian Supreme Court in *Transurban WGT Co v CPB Contractors Pty Ltd* [2020] VSC 476 considered the extent of judicial intervention to grant interim measures allowed under the CAA in Victoria where the dispute is the subject of an arbitration agreement. The Court held that the question of whether an arbitration agreement is 'inoperative' under s8 of the CAA properly lies with the arbitral tribunal.[19] The Court considered an application for declaratory and injunctive relief which, if granted, would have restrained the defendants from progressing an arbitration against the plaintiff. The plaintiff argued that under a 'linked claims' provision, the determination of disputes under its subcontract with the defendants was suspended where related disputes under the plaintiff's head contract with the principal were in progress. The Court agreed with the defendants that it was for the arbitral tribunal to determine its own jurisdiction and the validity, enforceability and applicability of the arbitration agreement.[20]
- The Federal Court of Australia in *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767 enforced a CIETAC award despite a challenge by the award debtor. The respondent contested the enforcement application on the basis that the applicant had not provided the court with duly certified copies of the award or arbitration agreements (as required by section 9(1)(a) and (b) of the IAA) and that the form of the award differed to the form of the orders sought by the applicant.[21] The Court dismissed both arguments, noting that the IAA requires the enforcing court to consider the objects of the IAA which include the facilitation of the recognition and enforcement of foreign arbitral awards;[22] that arbitration is intended to be efficient, impartial, enforceable and timely; and that awards are intended to provide certainty and finality.[23] The Court disagreed that section 9(1)(a) and (b) had not been satisfied, as the applicant had provided properly certified copies of the award and arbitration agreements. While the court accepted that the form of the orders sought did not reflect the form of the CIETAC award, this was resolved by directing the parties to confer to determine an appropriate form of order, in the form of a declaration as to the award's enforceability, pursuant to section 8(3) of the IAA.[24] The decision demonstrates the reliance that Australian courts place on the objects of the IAA in determining whether a foreign award should be enforced.
- The Western Australian Supreme Court in *Venetian Nominees Pty Ltd v Weatherford Australia Pty Ltd* [2021] WASC 137[25] dismissed an application to set aside an arbitral award based on an alleged denial of procedural fairness. Procedural fairness has increasingly been used in other jurisdictions, such as Hong Kong and Singapore, as a basis to challenge arbitral awards. In *Venetian Nominees*, the arbitration was conducted remotely by telephone, and the parties were given the opportunity to submit further written submissions and materials at the conclusion of the hearing. The parties did not arrange for a transcript of the proceedings. The Court emphasised the distinction between "a process grievance" (which may justify setting an award aside) and what was "just a badly run case" (which does not).

16 At [29].
17 At [41]-[51].
18 At [23]-[33].
19 At [157].
20 At [134] and [193].
21 At [6]-[7].
22 IAA, sections 2D and 39.
23 At [2]-[3] and [19]
24 At [10]-[17] and [29].
25 See also Corrs' 21 May 2021 insight "'Layers of lipstick' not enough: Court refuses to set aside arbitral award following alleged procedural unfairness". https://www.corrs.com.au/insights/layers-of-lipstick-not-enough-court-refuses-to-set-aside-arbitral-award-following-alleged-procedural-unfairness.

The Court concluded that Venetian's grievance was not a true process grievance but was rather a "poorly disguised attempted appeal … against a decision reached against it".[26] The Court gave significant weight to the opportunity provided to parties to provide further submissions and materials, and that Venetian had not taken up that opportunity.

- In *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCAFC 86,[27] the Full Court of the Federal Court of Australia dismissed an appeal of a decision by the Federal Court of Australia to grant a stay of court proceedings on the basis that the parties had entered into an arbitration agreement. Freedom Foods sought, amongst other things, declarations that Blue Diamond had engaged in misleading and deceptive conduct and unconscionable conduct under the ACL (and therefore was not suitable to be determined by arbitration) and that the agreement was a franchise agreement under the Franchising Code.[28] The Franchising Code prohibits arbitration clauses in franchising agreements where they require a party to commence legal proceedings in a jurisdiction outside Australia. The arbitration agreement provided for arbitration in California. The Court found that the parties' agreement was not a franchising agreement and the matters raised relating to the ACL could be heard in the Californian arbitration.[29]
- In *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110, the Full Court of the Federal Court of Australia declined enforcement of a foreign arbitral award on the basis that the tribunal had not been constituted in accordance with the parties' arbitration agreement. The agreement set out a procedure for appointing a three-member tribunal, with each party nominating an arbitrator and the two arbitrators selecting the president of the tribunal. Energy City Qatar Holding Company (**ECQ**) bypassed the procedure by filing a claim in Qatar's Plenary Court of First Instance, which appointed three arbitrators who rendered an award in favour or ECQ. Hub Street Equipment Pty Ltd (**Hub Street**) did not participate in either the court or arbitration proceedings and ECQ did not send a notice under the arbitration agreement providing Hub Street an opportunity to appoint an arbitrator.

  The FCAFC held that the award could not be enforced in Australia as the composition of the tribunal was not in accordance with the parties' agreement and this struck "at the very heart of the tribunal's jurisdiction". The case demonstrates the primacy courts accord to the terms of the parties' arbitration agreement. In the usual pro-arbitration fashion, the Court emphasised that the limited exceptions to enforcement in s8 of the IAA are "finite and narrow".[30]

The Australian Centre for International Commercial Arbitration

The Australian Centre for International Commercial Arbitration (**ACICA**) is Australia's international dispute resolution institution. ACICA was established in 1985 as an independent, not-for-profit organisation that promotes and facilitates the efficient resolution of commercial disputes throughout Australia and internationally by arbitration. As the leading Australian arbitral institution, ACICA published its own set of arbitration rules in 2005 (since revised three times with the most recent edition issued in 2021), which reflect international best practice on a range of arbitration-related principles and issues.

The 2021 ACICA Arbitration Rules are the most modern iteration of the rules to date. Reflecting developments in international best practice, they codify several procedural innovations including:

- provisions relating to virtual and hybrid hearings;
- provisions relating to paperless filing;
- provisions relating to an extended scope for consolidation of arbitral proceedings and facilitating multi-party arbitrations (Article 15); and
- provisions empowering early dismissal of claims, defences or counterclaims (Article 25(7)).

Other Australian institutions include the Resolution Institute (**RI**) which oversees and facilitates domestic arbitrations in Australia. The RI has published its own Arbitration Rules and maintains a panel of arbitrators for parties to select from. The RI also produces an array of useful resources to assist parties in understanding the arbitral process.

26 At [49] and [134].

27 See also Freedom Foods Pty Ltd v Blue Diamond Growers [2021] FCA 172.

28 *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172 at [8].

29 *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172 at [87] and [140], Freedom Foods Pty Ltd v Blue Diamond Growers [2021] FCAFC 86 at [79].]

30 At [70] and [140].

03

Institutional vs *ad hoc* arbitration

Generally speaking, arbitration proceedings can take two forms: 'institutional' arbitration or '*ad hoc*' arbitration.

An arbitration is 'institutional' where the proceedings are administered by a designated arbitral institution. Arbitral institutions usually provide a set of rules which govern the procedure of the arbitration and manage the administrative side of the proceedings.

'*Ad hoc*' arbitration, on the other hand, is a form of arbitration that is not managed by an arbitral institution and, as a consequence, the parties are free to determine all aspects of the arbitration procedure themselves, including for example, the manner and appointment of the tribunal and the administrative process for conducting the arbitration.

While it is impossible to track the precise number of *ad hoc* arbitrations that occur, evidence suggests that an increasing number of international arbitrations are institutional.[31]

Typically the parties will determine whether the proceedings are to be institutional or *ad hoc* at the time of entering into the arbitration agreement by specifying (or not) the rules of a particular arbitral institution.

When determining whether to elect institutional or *ad hoc* arbitration, there are a number of factors the parties should have regard to. These factors are set out in detail below.

Institutional arbitration

There are numerous arbitral institutions worldwide which offer their rules and services to manage the administrative side of arbitrations.

It is important for parties entering into an arbitration agreement to consider which institution is best suited to manage any potential dispute that may arise between them.

Advantages of institutional arbitration

- **Access to a pre-selected pool of highly qualified arbitrators**. A number of arbitral institutions have their own panel of arbitrators which are maintained as a resource for institutional appointments and party-nominations.
- **Increased predictability and certainty for the resolution of any dispute**. By selecting a set of tried and tested rules, the parties reduce the risk of unpredictable outcomes.
- **Some institutions offer a secondary level of oversight of the final award**. This can be particularly beneficial for complex, high-value, high-stakes disputes.
- **Institution can provide administrative assistance**. Institutions may assist in the efficient management of the arbitration process once the proceedings are on foot. For example, institutions can assist the parties in appointing the tribunal, determining the seat of the arbitration when it is not chosen in the arbitration agreement or facilitating multi-party and multi-contract disputes.

Disadvantages of institutional arbitration

- **The often significant administrative fees**. Depending on the institution, the fees associated with the administration of the arbitration can be considerable and can increase over time depending on the amount in dispute and the complexity of the proceedings.
- **Less flexibility**. A degree of flexibility in the arbitration process is removed when choosing institutional arbitration. While the majority of institutional rules are non-mandatory, there are some rules and requirements that cannot be derogated from by agreement. For example, the ICC Rules require Terms of Reference to be produced for every arbitration. In addition, the ICC Rules provide for a mandatory scrutiny process which enables the ICC Court to make modifications as to the form of the award and draw the tribunal's attention to points of substance. This is discussed further below.

31 Queen Mary School of London and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (Report, October 2015).

A detailed list of arbitral institutions is beyond the scope of this publication. It is, however, relevant to mention some of the major arbitral institutions around the world and in Australia, which are as follows.

- in Australia, the most prominent institutions are the ACICA and the RI; and
- globally, the preferred arbitration institutions include:
  - International Chamber of Commerce (**ICC**);
  - Hong Kong International Arbitration Centre (**HKIAC**);
  - Singapore International Arbitration Centre (**SIAC**); and
  - London Court of International Arbitration (**LCIA**).

These institutions' rules have a significant number of similar features. However, there are several key differences and considerations which parties should bear in mind when selecting an institution and its rules. A detailed comparison of the rules of these major institutions is set out in Annex 2 to this Guide. By way of a summary, the key differences include the following:

- **Scrutiny of the award**: The first key difference is whether the institution provides for a review of the award issued by the tribunal before it is finalised. Only SIAC and the ICC provide that the Registrar and ICC Court respectively are required to approve the form of the award and may draw the tribunal's attention to points of substance which may need to be revised.
- **Costs**: The cost of running an arbitration through each of the institutions varies. Each institution provides a schedule of fees which outlines the administrative costs to be paid to the institution, usually with different amounts depending on the value in dispute. The cost of the arbitration will depend on the nature of the proceedings, however the ICC is generally the most expensive institution, due to it being considered by many as the leading international arbitral institution and the additional cost implicit in the need for Terms of Reference and the scrutiny of the award by the ICC Court.
- **Administration of multi-party / multi-contract disputes**: A party may wish to use a particular institution's rules where the dispute involves multiple parties who are not all party to the same contract, or they envision that a dispute may be of a multi-party or multi-contract nature. Besides the RI Rules, all the rules considered in Annex 2 provide for joinder of an additional party to an arbitration or for the consolidation of multiple arbitrations into a single proceeding, subject to satisfying certain requirements. The differences in the rules concerning joinder and consolidation are discussed in further detail in Chapter 5, Recognition and enforcement of arbitral awards).
- **Specific procedures**. A party may prioritise a set of institutional rules which allow expedited arbitration relative to the amount in dispute. Besides the RI Rules, all the rules considered in Annex 2 provide for an emergency arbitrator to be appointed or an expedited arbitration procedure to be followed. In the case of the ACICA, HKIAC, SIAC and ICC Rules, these procedures can apply where the parties agree or the value of the dispute is under a certain threshold. For the LCIA Rules, the application of the expedited procedure must be approved by the LCIA Court. A detailed discussion on expedited and emergency arbitration is provided in Chapter 7, Specific procedures.
- **Issues of privacy and confidentiality**. With the exception of the ICC, the institutional arbitrations considered in Annex 2 are private and confidential with limited exceptions for circumstances where documents are required to be produced by law. The ICC uniquely provides that awards are to be published unless the parties opt out.

Note that the above institutional rules are subject to any overriding mandatory rules of law of the seat of arbitration (for example on confidentiality).

Ad hoc arbitration

As stated above, in contrast to institutional arbitration, an ad hoc arbitration is an arbitration that is not administered by an arbitral institution. This means that the parties are free to agree on the rules that will govern the arbitration including, for example, the number of arbitrators, the arbitral tribunal appointment process and the procedure by which the arbitration will be conducted.

This is not to say that in an *ad hoc* arbitration the parties will have completely free reign. Even in an *ad hoc* arbitration, it is sensible for the parties to expressly specify certain requirements, for example the seat of the arbitration. This is important because, to the extent the parties are unable to agree on the preliminary steps in an arbitration (such as the appointment of the tribunal members), the law of the seat will dictate the procedural rules that apply.[32]

In practice, an arbitration agreement providing for *ad hoc* arbitration will often specify some form of applicable rules, commonly the United Nations Commission on International Trade Law Arbitration Rules (the **UNCITRAL Rules**). Alternatively, parties could chose to adopt a modified version of a set of established institutional rules.

The UNCITRAL Rules cover all aspects of the arbitral process, including procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award. The most recent version of the UNCITRAL Rules was published in 2021 and incorporates the UNCITRAL Expedited Arbitration Rules.

The advantage of specifying a particular set of rules, such as the UNCITRAL Rules, is that it avoids the need for the parties to attempt to agree at the outset on a comprehensive set of rules that governs all possible circumstances. This limits the risk that not every eventuality is considered and that the parties fail to agree at the first hurdle.

Advantages of *ad hoc* arbitration

- **Increased flexibility**. Subject to a level of agreement and cooperation between them, the parties have ultimate autonomy to tailor the arbitration to their needs.
- **Reduced costs**. Generally speaking, *ad hoc* arbitrations will be more cost effective due to the often considerable costs associated with institutional arbitration.

Disadvantages of *ad hoc* arbitration

- **A level of sustained cooperation between the parties is necessary**. In the event that agreement cannot be reached, parties may find that the overall process is delayed by attempts to resolve issues through the local courts. This negates the primary advantages of *ad hoc* arbitration – i.e. increased flexibility and reduced costs.
- **Increased administrative burden for the arbitrator(s)**. Absent the involvement of an institution, the parties and the arbitrator are required to carry the additional administrative burden associated with the administration of the arbitral proceedings.

32 The seat of an arbitration refers to the legal location of where the arbitration proceeds. For example, where the seat of the arbitration is specified as London, England, the applicable arbitration legislation that will apply is the *Arbitration Act* 1996 (UK).

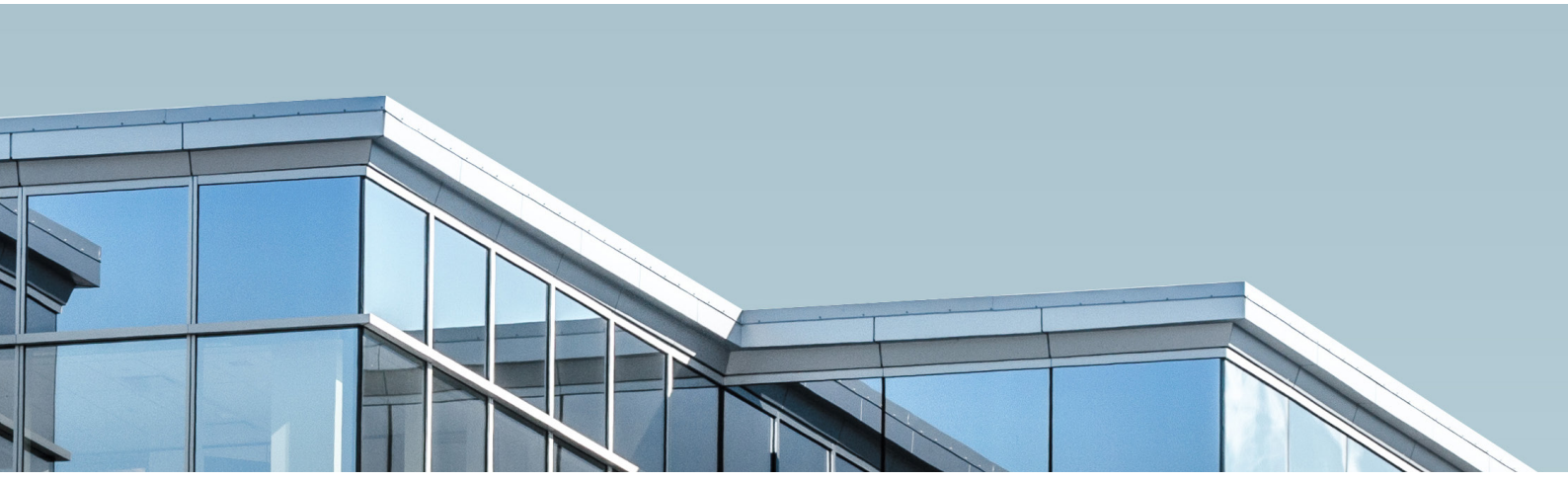
Practical considerations

When considering whether to enter into an arbitration agreement that provides for institutional or *ad hoc* arbitration, parties may wish to have regard to the following factors:

- **The level of expertise of arbitrator(s) required**. If the dispute is particularly complex, the parties may wish to refer it to an institution to ensure they have a pre-existing pool of qualified arbitrators to appoint, rather than go through their own process of approaching potential arbitrators to resolve the dispute.
- **The anticipated level of support required**. If the dispute is large, involves multiple parties or presents administrative challenges, institutional arbitration may be preferred.
- **The value of the dispute**. Where a dispute is high value, the administrative costs of an institution may be seen as minimal in comparison to the quantum in issue and the overall cost of the dispute. Whereas, in a moderate value dispute, the potentially high administrative cost of an institution may be regarded as disproportionate. This points to lower value disputes being more suited to *ad hoc* arbitration.

When considering which institution to use, the nature of the dispute is particularly relevant, and in relation to the institutions considered in this Guide, the parties should consider the following:

- The majority of the institutions listed above specialise in administering international arbitrations, with the exception of the RI which is designed for Australian domestic arbitrations. The RI also prioritises appointment of a sole arbitrator and is generally better suited for smaller claims.
- While the location of the institution does not determine the seat of the arbitration or where hearings can be held, ACICA is the preferred institution for arbitrations with a connection to Australia and the majority of the arbitrations administered by ACICA are international. The ACICA Rules specify Sydney (Australia) as the default seat. ACICA is known to be reliable and relatively cost-effective for resolving disputes in the Asia-Pacific region, and is increasingly used in both international and domestic arbitration agreements in Australia.
- HKIAC is commonly used for disputes involving a party from the People's Republic of China, due to Hong Kong's close legal relationship with China and because it is experienced in facilitating applications for interim measures to Mainland Chinese courts. It is also one of the fastest growing arbitration institutions and has a number of unique benefits, including generally lower administrative fees and favourable provisions on joinder and consolidation.
- SIAC is often perceived as a particularly neutral institution and has a good reputation for the quality of its rules and administration. It has also become increasingly popular as Singapore has become a key venue of choice for parties looking to arbitrate in the Asia Pacific.
- LCIA is well suited for a range of international disputes and is widely respected, as one of the oldest international arbitral institutions. In default of any prior written agreement between the parties, the LCIA Rules specify that the seat of the arbitration shall be London (England). This is an important factor for parties to an arbitration agreement to bear in mind where the seat of the arbitration has not been agreed.
- The ICC is one of the most well-known arbitration institutions globally and is highly respected by courts around the world. It is widely recognised for the quality of its awards and proceedings, but is also the most expensive institution and so is often used for high value disputes.



04

Drafting arbitration clauses

The arbitration agreement – often referred to as one of the 'midnight' clauses – is typically included in commercial contracts with little thought. The consequences of such an approach can be significant, poorly drafted arbitration clauses can have dramatic cost and other undesired consequences for the parties to any potential dispute.

Bearing that in mind, this Chapter sets out a number of tips for drafting effective and enforceable arbitration clauses, provides an overview of the key components of an arbitration clause and its non-essential elements, and offers a helpful checklist of issues to consider when drafting an arbitration agreement.

Drafting tips – essential components of an arbitration clause

Generally speaking, there are four essential components of an arbitration clause. Additional components may be relevant depending on the nature of the parties' commercial relationship.

The essential components are those which must be reflected in an arbitration agreement for it to be valid and enforceable. They are found in all model arbitration clauses prepared by the major arbitral institutions, and are set out in Annex 1 of this Guide.

In summary, the essential components of an arbitration clause are the following:

The clause must demonstrate an intention to arbitrate

The arbitration agreement must clearly express the parties' intention to submit their dispute to arbitration – that is, to have the dispute determined by one or more arbitrators appointed according to the parties' agreement.

The clause must identify the parties

The arbitration agreement must be concluded between two or more parties who are determined or determinable. Where an arbitration agreement is entered into by a party's agent, that agent must be duly empowered to act on behalf of the party.

The clause must specify the dispute(s) referrable to arbitration

The arbitration agreement should identify the disputes between the parties which fall within the scope of the arbitration agreement. An arbitration agreement will not necessarily cover all disputes that arise between the parties to the agreement.

To ensure that both contractual and non-contractual disputes are covered by an agreement to arbitrate (and avoid the risk of having to resolve disputes relating to the same factual issues in different forums), the arbitration clause should be worded broadly, referring to any disputes arising out of or in connection with a contract. Ideally the clause should use mandatory language 'all disputes arising out of this agreement *shall* be submitted to arbitration' rather than permissive wording ('may').

Parties should also avoid including additional dispute resolution provisions in their contract, such as an exclusive jurisdiction clause, which may be interpreted to invalidate the arbitration provision.

The clause should identify the seat of arbitration

In principle, the arbitration agreement must either expressly or indirectly connect the arbitration to a legal system – in other words, it must either expressly or indirectly designate the 'seat' of the arbitration. Often the seat will be chosen by the parties (by stipulating in the arbitration clause – e.g. that "the seat of the arbitration will be Sydney"). Alternatively, the seat must be identifiable (e.g. pursuant to the chosen arbitral rules which provide for a specific seat[33] or empower the tribunal to determine the seat[34]).

33 See e,g. Arbitration Rules of the Australian Centre for International Commercial Arbitration (2021) (**ACICA Rules**), Article 27(1), which provides for Sydney.

34 See e.g. UNCITRAL Arbitration Rules (2021) (**UNCITRAL Rules**), Article 16.

Some non-essential elements of an arbitration clause

There are a number of other elements which are not essential but are useful to include in an arbitration agreement. They are:

- **The language of the arbitration**. It is common for parties to cross-border transaction to come from different jurisdictions and to speak different languages. In such circumstances, it may be important to specify the language of the arbitration.
- **The institutional rules**. The parties may prefer to submit to institutional arbitration. Many arbitral institutions have recently amended their rules to ensure that they are in line with modern best practice, and include flexible procedures, such as expedited arbitration, the ability to join parties and consolidate multiple arbitral proceedings, and adopt flexible hearing arrangements.
- **Expertise of the arbitrator**. Where disputes are likely to involve complex technical issues or specialised subject-matter, the parties may wish to require that arbitrators appointed to determine a dispute have specific qualifications or experience. The parties should, however, avoid being too prescriptive or specific as this may result in it being difficult or expensive to locate an arbitrator with the requisite expertise.
- **Power to order provisional measures**. Most institutional rules provide tribunals with the power to order provisional measures. Where the parties adopt institutional rules, they will be able to seek orders for provisional measures from the tribunal. The same may not be true for *ad hoc* arbitration and the parties may need to expressly provide for that power in their arbitration agreement. That said, most national arbitration laws, as well as the Model Law, also make provision for the grant of interim measures by courts in aid of arbitration.
- **Confidentiality**. Most institutional rules and national arbitration laws contain provisions dealing with confidentiality. However, as the approaches of institutional rules and national laws vary with respect to confidentiality, it is always important for parties to consider how confidentiality claims will be dealt with during the course of the arbitration. Parties may wish to address matters of confidentiality expressly in their arbitration agreement.
- **Costs**. If parties do not specify the way in which cost allocations in the arbitration will be determined, various arbitration rules and national laws provide arbitrators with wide discretion to allocate costs between the parties. If parties wish for costs to be shared, they should specify this in the arbitration agreement. It may also be appropriate to expressly deal with cost allocation in connection with interim awards and procedural orders.

Checklist of issues to consider when drafting an arbitration clause

Parties should consider the following factors when drafting an arbitration clause:

- ☐ What is the scope of the arbitration agreement? Do the parties wish to arbitrate all disputes which may arise between them?
- ☐ What is the seat of the arbitration?
- ☐ What is the law governing the arbitration agreement? What is the law governing the merits of the dispute?
- ☐ Is *ad hoc* or institutional arbitration preferable in the circumstances?
- ☐ How many arbitrators will be needed or is it better not to specify at this stage?
- ☐ Is there an allocation of fees and costs or is this at the discretion of the tribunal?
- ☐ Are there parties from different jurisdictions? If so, what language should apply to the arbitration?
- ☐ Is there potential for a multi-party dispute? If so, do the rules or the law of the seat provide for joinder of third parties or consolidation of related arbitrations and will they assist my client when such a dispute arises?
- ☐ Is confidentiality of the essence? If so, is it provided for or does it need to be stated expressly?
- ☐ If a dispute does arise between the parties, is it likely to be of a highly technical nature in a specialised field? If so, is it preferable for the arbitrator to have certain expertise?
- ☐ Is there likely to be a need for expedited arbitration? If so, do the rules selected provide for expedited arbitration?

Unless special circumstances apply, if the parties wish to opt for institutional arbitration, it is usually recommended that the parties adopt the chosen institution's model arbitration clause.

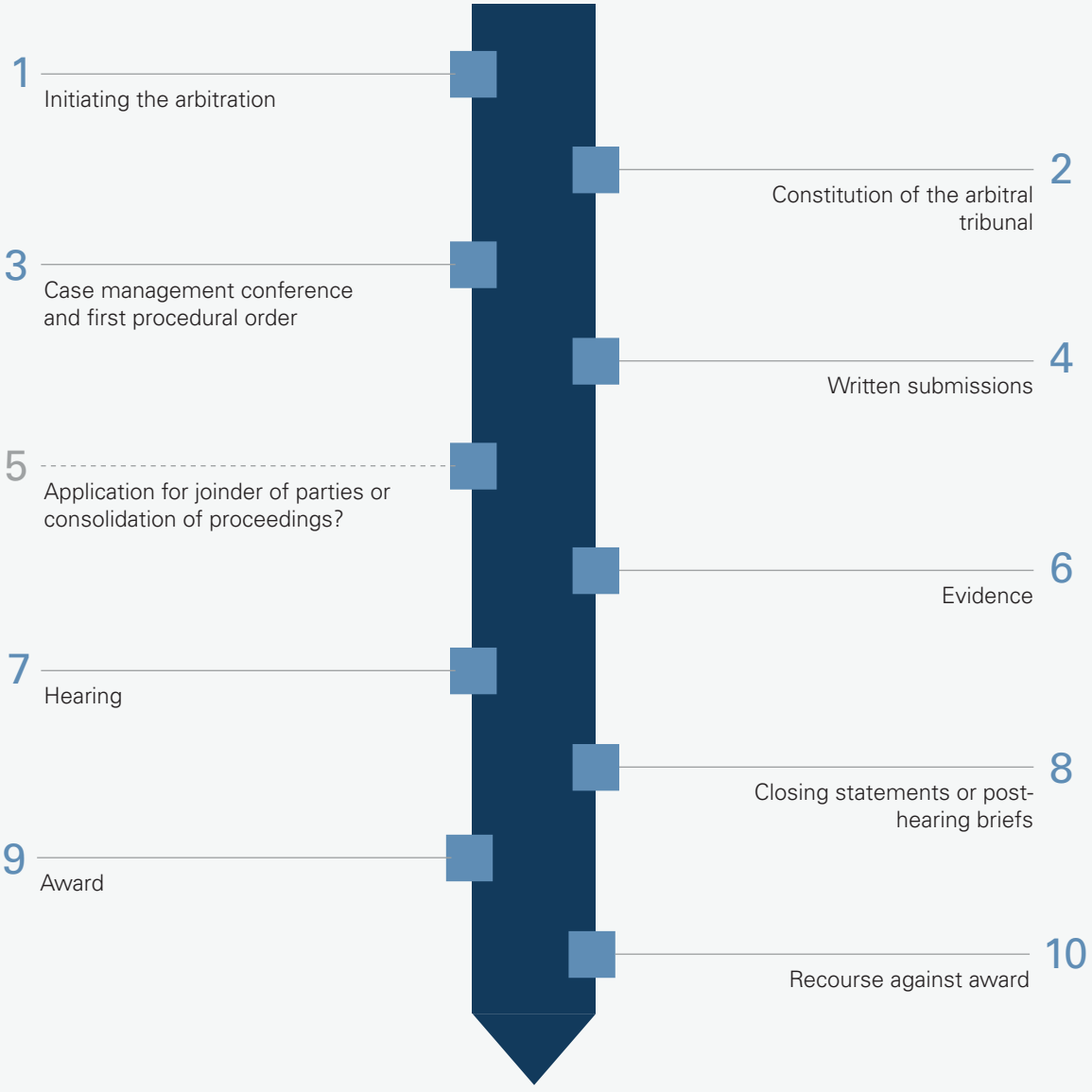
05

The lifecycle of an arbitration

A cornerstone of arbitration is party autonomy, as discussed in Chapter 1 of this Guide.

Parties to an arbitration are free to choose the procedural rules and process that will apply to the determination of disputes between them. For example, before or after a dispute has arisen, parties are free to agree to significant procedural matters such as the number of arbitrators and their qualifications, the governing law and place of arbitration, the prescribed time limits for procedural steps and the issuing of an award and whether specific procedures will be available for the resolution of certain types of disputes.

Having said that, arbitrations do tend to follow certain key procedural steps from the commencement of the proceedings through to the enforcement of the award. The key procedural steps – or 'the lifecycle of the arbitration' – are discussed below by reference to the process contemplated under the ACICA Rules.



1 Initiating the arbitration

To initiate an arbitration, a party will typically file a request or notice of arbitration.

The ACICA Rules require the Notice of Arbitration to be submitted to ACICA and a copy of the notice to be submitted at the same time to the party or parties against whom relief is sought (i.e. the respondents). Typically the claimant will also be required to, at the same time of submitting the Notice of Arbitration, pay a registration fee to the arbitral institution for the purpose of commencing proceedings. An ACICA arbitration is deemed to have been commenced when the Notice of Arbitration or the registration fee is received by ACICA.[35]

In the case of *ad hoc* arbitration, the notice or request will need to be submitted to the opposing party.[36]

The rules typically specify the matters which the request or Notice of Arbitration must contain. For example, Article 6(3) of the ACICA Rules requires the Notice of Arbitration to include:

- a demand that the dispute be referred to arbitration;
- the names, postal addresses, telephone number and email addresses (if any) of the parties and their legal representatives;
- a copy of the arbitration clause or the separate arbitration agreement that is invoked. To the extent that claims are made under more than one arbitration clause or agreement, as referred to in Article 18, an indication and copy of the arbitration clause or agreement under which each claim is made;
- a reference to the contract out of, relating to or in connection with which the dispute arises;
- the general nature of the claim and an indication of the amount involved, if any;
- the relief or remedy sought; and
- a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

Most arbitral institutions require a respondent to file a reply in response to the Request or Notice of Arbitration. This is known as the Answer to Notice of Arbitration. Arbitral rules will usually provide a time limit for when the Answer must be filed and specify what the answer must contain.

For example, Article 7.2 of the ACICA Rules requires that an Answer to Notice of Arbitration be filed within 30 days after receipt of the Notice of Arbitration by the Respondent(s) and include:

- the names, postal addresses, telephone numbers and email addresses (if any) of the Respondent and its legal representatives;
- any plea that an Arbitral Tribunal constituted under these Rules does not have jurisdiction:
- the Respondent's comments on the particulars set forth in the Notice of Arbitration;
- the Respondent's answer to the relief or remedy sought in the Notice of Arbitration; and
- the Respondent's proposal as to the number of arbitrators if the parties have not previously agreed thereon.

For *ad hoc* arbitrations, the parties will need to decide on the procedures for commencing arbitration. Whilst parties will still generally deliver to each other a notice or request for arbitration and an answer, they will forego the guidance that an arbitration institution can provide.

An arbitration institution can ensure all procedural requirements are met before an arbitration commences, and can provide sample templates for the initiating documents.[37] An arbitration institution may also assist with other aspects which are essential for an arbitration to commence. This may include collecting deposits and assisting with the appointment of arbitrators.

In contrast to litigation, all material facts do not need to be pleaded in an originating process for arbitration. Thus, parties typically do not commence arbitration with a lengthy statement of claim and defence. There are also no strict rules of service in arbitration. For example, Article 6.5 of the ACICA Rules merely requires a Claimant to send the Notice of Arbitration to the Respondent, and notify ACICA it has done so with specifics regarding how the notice was communicated and the date of delivery. Notification to the respondent is, however, important to prevent the award being challenged in the seat or not recognised and enforced under the New York Convention.

In proceedings before the courts of some jurisdictions, parties may be required by law to take pre-action steps prior to or on the commencement of proceedings.[38] Similarly, in arbitration, the parties may agree to adopt pre-action steps. Depending on the seat of the arbitration, the parties may be obliged to follow these agreed pre-action steps before commencing arbitration.[39]

35 ACICA Rules, Article 6(2).

36 See e.g. UNCITRAL Rules, Article 3(2).

37 See e.g. sample Notice of Arbitration and Answer to Notice of Arbitration available on the ACICA website.

38 See e.g. *Civil Procedure Act 2010* (Vic) sections 9(2)(a), 70(1)(c).

39 For example, New York courts have repeatedly held that 'conditions precedent' to arbitration must be complied with before commencing arbitration, see generally Gary B Born, *International Commercial Arbitration* (Kluwer Law, 3rd Ed, 2021) 988–9.

2 Constitution of the arbitral tribunal

Parties are free to agree on the number of arbitrators to hear and determine the dispute as well as who will be appointed as an arbitrator or member of a tribunal.

Constituting an arbitral tribunal raises several issues practitioners should be aware of, including the process for appointing arbitrators, the requirements for arbitrators to be independent and impartial, the process for challenging non-party-appointed arbitrator(s), and circumstances calling for the replacement of an arbitrator.

Appointing the arbitrator(s)

The mechanism for appointing the tribunal may be set out in the arbitration agreement or specified by the arbitral rules.[40] Where the parties do not specify the appointment process in their arbitration agreement or select arbitral rules, the legislation at the seat of arbitration may specify the appointing authority. For example, ACICA has been designated as the default appointing authority under the IAA.[41]

The number of arbitrators selected should always be uneven and will typically be one or three arbitrators. If the dispute is uncomplicated and has a small quantum involved, it may be more efficient and cost effective to appoint a sole arbitrator. On the other hand, if the dispute is more complex and involves a significant quantum, then a panel of three arbitrators should be preferred. If parties do not make a determination, the selected institution or appointment authority will typically decide on the number.[42]

A common mechanism for the appointment of the tribunal is for each party to appoint a single arbitrator and then the party-appointed arbitrators to select the chairperson or president of the tribunal.

Alternatively, if the parties have not agreed how the chairperson or president will be appointed or the two already appointed arbitrators cannot agree, the chosen administering institution or relevant court at the seat of arbitration will typically appoint the president of the tribunal.[43] If there are more than two main parties to an arbitration, the second method is typically preferred or parties may agree to jointly appoint arbitrators.[44]

As also discussed in Chapter 4 of this Guide, parties may also wish to stipulate specific qualifications that an arbitrator must possess in order to qualify for appointment. For example, parties may wish for expertise in a particular technical field such as engineering or environmental science. Where that is so, parties should record those qualifications in the arbitration agreement.

However, as also noted previously, it is important to avoid being too specific so as to avoid complications in the constitution of the tribunal. Furthermore, specifying particular qualifications of a potential arbitrator can create a possible basis for challenge to the arbitrator under the law of the seat of the arbitration.

Arbitrators' independence and impartiality

A fundamental component of arbitration is the independence and impartiality of the arbitrator(s). This obligation is borne by the arbitrator from the arbitrator's appointment through to the conclusion of their appointment. In other words, it is a continuing disclosure obligation. The obligation is enshrined in most (if not all) arbitration rules.

The International Bar Association (**IBA**) has published the *Guidelines on Conflicts of Interest in International Arbitration* (the **Guidelines**). The general principle espoused in those guidelines is that every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

To assist parties in identifying the types of conflicts that emerge and their significance, the guidelines have 'traffic-light' lists containing non-exhaustive examples of conflicts. They are as follows:

- **Non-Waivable Red List**. This is the most serious level of conflict and must be disclosed. Examples include a direct professional, personal or financial connection with one of the parties.
- **Waivable Red List**. These are situations that are serious but less severe than the previous list, though in any event, must be disclosed to the parties. Examples include a recent prior professional connection with a party or counsel or a close family member's connection with a party or counsel.
- **Orange List**. These are situations, facts or circumstances that, in the eyes of the parties, may give rise to doubts about the prospective appointee's independence or impartiality. An arbitrator must disclose a situation that falls within the Orange List; however, the disclosure of such situation does not imply the existence of a conflict or in and of itself disqualify an arbitrator. Examples include professional or personal connections within three years prior to the appointment.
- **Green List**. These are situations that are permissible and, as such, do not require disclosure by the arbitrator.

40 See e.g. *UNCITRAL Model Law on International Commercial Arbitration* found in IAA, schedule 2 (**Model Law**), Article 11; ICC Rules of Arbitration (2021) (**ICC Rules**), Article 13(2).

41 *International Arbitration Regulation 2020* (Cth) regulation 6.

42 ICC Rules, Article 12(2); ACICA Rules, Article 11; cf Model Law, Article 10 (if no selection is made, the default position is three).

43 ICC Rules, Article 12(5); ACICA Rules, Article 13(3).

44 For example, ICC Rules, Article 12(7); ACICA Rules, Article 15.

Most arbitral institutions require a prospective arbitrator to sign a statement of availability, impartiality and independence, which discloses in writing any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

A failure to disclose facts or circumstances that would give rise to justifiable doubts as to an arbitrator's independence and impartiality may give a party cause to challenge the appointment of an arbitrator. This is dealt with further below.

Challenges to tribunal appointments

A party may challenge the appointment of an arbitrator if there are circumstances which give rise to justifiable doubt as to an appointed arbitrator's:

- impartiality;
- independence; or
- requisite qualifications (on which the parties have agreed).[45]

For party-appointed arbitrators, it follows that a party can only challenge its appointee if it becomes aware of the above reasons after the appointment.

Subject to any procedure otherwise agreed by the parties, the procedure for challenging the appointment of an arbitrator will depend on the arbitral rules chosen by the parties. The parties will generally be required to make a challenge within a stipulated period of time following notification of appointment or confirmation by the arbitrator, or alternatively, within a stipulated period after becoming aware of any circumstances that may give rise to concerns about the arbitrator's impartiality, independence or requisite qualification (where the parties have specified that the arbitrator is to have specific qualifications).[46]

Following a challenge, the challenged arbitrator may choose to resign or the other parties to the arbitration may agree to the challenge. If one of these outcome eventuates, some rules specifically provide that neither of those cases implies the acceptance of the validity of the grounds for the challenge.[47]

If, following a challenge, either the arbitrator does not withdraw or the other parties do not agree to the challenge, the challenge will be decided by the tribunal or appointing authority.[48]

Replacement of arbitrators

In the event an appointed arbitrator is disqualified, fails to act or it becomes impossible for them to act, or otherwise withdraws, a substitute arbitrator will be appointed.[49]

Subject to the arbitration agreement, the process for appointing a substitute arbitrator is typically covered by the chosen institutional rules. When a substitute arbitrator is appointed, the terms of appointment are the same as those upon which the substituted arbitrator was appointed.[50]

3 Case management conference and first procedural order

Following the constitution of a tribunal a case management conference (**CMC**) will be scheduled.

A CMC is a pre-trial procedural hearing; it is comparable to the first directions hearing for a matter listed before the courts. The rules of most arbitral institutions provide that the first CMC should take place as soon as practicable following the constitution of the tribunal.

The first CMC presents the first opportunity for the tribunal and the parties to come together to decide the process and manner in which the arbitration will be conducted, including the timing for the procedural steps to be taken. Being a consensual process, it is not unusual for the tribunal to dictate that the parties should seek to agree on procedural steps and a procedural timetable prior to the first CMC. The CMC can take place in person or via conference call or video conference.

The matters that will typically be discussed at the first CMC include matters such as:

- whether to appoint a Tribunal Secretary (i.e. a person who typically assists the tribunal throughout the proceedings in the overall management of the proceedings and in producing the final award);
- how and when the parties will exchange memorials or pleadings (as the case may be), submissions, witness statements and expert reports;
- how parties should approach document disclosure, production or requests for discovery;
- scheduling the hearing;
- what, if any, further materials will be exchanged before the hearing (e.g. an agreed list of issues, hearing bundles, chronologies); and
- how and when costs and disbursements will be invoiced.

45 Model Law, Article 12; ICC Rules, Article 14; ACICA Rules, Article 21.
46 Model Law, Article 13; ICC Rules, Article 14; ACICA Rules, Article 22.
47 See e.g. ACICA Rules, Article 22(3).
48 Model Law, Article 13(2); cf ICC Rules, Article 14(3); ACICA Rules, Article 22(4).
49 Model Law, Articles 14–15; ICC Rules, Article 15; ACICA Rules, Article 23.
50 See e.g. Model Law, Article 15.

These decisions are recorded in the first procedural order (or PO1, as it is commonly referred to).

There is no requirement for all procedural steps to be determined at the first case management conference. Nor is it the case that steps cannot be readdressed. Procedural matters not decided and matters to be revisited, can be determined at subsequent case management conferences or by agreement of all the parties.

4 Written submissions: Memorials vs pleadings

There are two main ways parties typically state their case in an arbitration: memorials and pleadings.

Pleadings involve a process akin to litigation in common law jurisdictions, such as Australia, which involves a party setting out its claim by reference to all material facts.

Memorials, on the other hand, are a synthesised narrative of a party's case, setting out the party's case theory in detail supported by witness statements and expert reports. A memorial will normally include an executive summary, outline of facts, outline of legal issues and summary of requested relief. They are commonly used in public international law proceedings and are the preferred approach for the written phase of arbitral proceedings in investor-state arbitration and international commercial arbitration.

The rules of arbitral institutions do not typically indicate a preference for either memorials or pleadings. For example, the ACICA Rules provide that the Claimant "should, as far as possible, annex to its Statement of Claim all documents and other evidence on which it relies or contain references to them".[51] The ACICA Rules therefore seem to prefer the memorials approach, although commentary explains that this is optional and parties may also take a hybrid approach of using both memorials and pleadings.[52]

Parties can choose between these the two approaches to submissions or may choose a variation or hybrid of the two approaches. It is for the parties to determine the approach best suited to their dispute.

The advantages and disadvantages of pleadings and memorials

Some of the advantages of adopting memorials over pleadings[53] include:

- the arbitral tribunal is given a relatively complete picture of each party's case at the beginning of the arbitration. This promotes efficiency and speed in resolution of the dispute;
- memorials require parties and their legal counsel to consider their evidence and the strengths and weaknesses of their case early in the proceeding. This can encourage early settlement of proceedings, as each party can clearly assess the strengths and weaknesses of the other's case;
- memorials can deter frivolous claims because the preparation of memorials 'front loads' a lot of the costs of the proceedings, whereas under the pleadings approach significant costs are typically incurred later in the court process; and
- memorials can be better suited to accommodate parties and lawyers from different legal traditions.

Some advantages of adopting pleadings over memorials include:

- pleadings remove the need for parties to establish points of fact that are not in dispute because the process of admitting and denying evidence comes before any written submissions;
- pleadings might be preferable where the parties and the arbitrator hail from common law jurisdiction as the use of pleadings will be familiar and therefore may be suitable depending on other surrounding circumstances.

5 Consolidation and joinder applications

Consolidation and joinder are two of the mechanism available to parties involved in multi-party disputes.

Consolidation

Consolidation sees the merging of two or more arbitration proceedings into a single proceeding. The rules of most major arbitral institutions provide for the consolidation of proceedings in certain circumstances.

Under the rules of a number of institutions, parties seeking consolidation must submit a request to the relevant institution. This request should include, among other things, all the relevant party and matter details, the facts and legal arguments in support of the request, and copies of the relevant instruments.

51 ACICA Rules, Article 29(3).

52 Australian Centre for International Commercial Arbitration, ACICA Explanatory Note: Memorials or Pleadings? (ACICA Practice and Procedures Board, July 2020) 5.

53 For a comprehensive note on memorials and pleadings including the advantages and disadvantages of each approach, see Australian Centre for International Commercial Arbitration, ACICA Explanatory Note: Memorials or Pleadings? (ACICA Practice and Procedures Board, July 2020).

While courts can compel parties to consolidate matters, institutions will only order consolidation in certain prescribed circumstances and typically only where all proceedings are being administered by that institution. For example, under the ACICA Rules, ACICA will order consolidation of two or more proceedings where:[54]

- the parties to the arbitrations being consolidated have consented to consolidation;
- all the claims in the arbitrations are made under the same arbitration agreement; or
- the claims in the arbitrations are made under more than one arbitration agreement, but there is a common question of law or fact in both or all of the arbitrations; the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions; and ACICA finds the arbitration agreements to be compatible.

In addition, arbitration legislation at the seat of the arbitration might provide for consolidation by the tribunal or by a court in certain circumstances. For example, in Australia both the IAA and the CAA empower the tribunal to order the consolidation of proceedings in certain circumstances. The IAA provides an opt-in provision[55] and the CAA provides an opt-out provision.[56] By comparison, the Hong Kong Arbitration Ordinance provides for court-facilitated consolidation of arbitral proceedings in certain circumstances (e.g. where the arbitration agreement stipulates the place of arbitration is Hong Kong).[57]

Joinder

Joinder is the process by which a third party can be added to existing arbitral proceedings.

In the case of institutional arbitration, a request for joinder must typically be submitted to the relevant arbitral institution. However, if a tribunal has already been appointed, the request will generally be decided by the tribunal.

As with a consolidation request, a request for joinder must cover the party and matter details, facts, and legal arguments in support of an application for joinder.

Due to arbitration's consensual nature, joinder of parties to arbitral proceedings is available only if certain conditions are met (unlike joinder of parties in court proceedings).

For example, under the ACICA Rules, joinder is only permitted where:

- the additional party being joined is, on the face of the matter, a party to the same arbitration agreement between the existing parties; or
- all parties, including the additional party, have consented to the joinder.

6 Evidence

Evidence in arbitration

Litigation processes are based on formal rules of evidence and procedure of the relevant jurisdiction, which apply on a mandatory basis.

As discussed previously, one of the key attributes of arbitration is the broad discretion afforded to the parties and the tribunal to determine the applicable rules of procedure and, if relevant, evidence.

The parties' discretion is confirmed by Article 19 of the Model Law which provides that "the parties are free to agree on the procedure to be followed by the arbitral tribunal" and that, failing such agreement, the arbitral tribunal may "conduct the arbitration in such manner as it considers appropriate". Article 19(2) of the Model Law expressly confers on arbitral tribunals "the power to determine the admissibility, relevance, materiality and weight of any evidence".

Article 19 has been regarded as "the most important provision of the model law" – being a predominant source of procedural autonomy within arbitral proceedings.[58] This autonomy allows the parties and the tribunal, if they wish, to avoid the constraints and idiosyncrasies of traditional domestic rules of evidence, and proceed by reference to rules more specifically tailored to the features of the case.[59]

In the exercise of their autonomy, it is not uncommon for parties to agree an evidentiary procedure that is less than comprehensive, leaving at least some matters to be determined by the tribunal. Courts have been firm in maintaining the considerable latitude afforded to tribunals to make such determinations.[60]

The parties may also agree, either in their arbitration agreement or by adopting a set of institutional rules, that the IBA Rules on the Taking of Evidence in International Arbitration (**IBA Rules**) will govern evidentiary matters in their arbitration.

54 ACICA Rules, Article 16(1).
55 See IAA, section 24.
56 See CAA, section 27C.
57 Cap. 609 Arbitration Ordinance, Schedule 2, section 2.
58 *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration – Report of the Secretary-General*, UN Doc A/CN.9/264 (25 March 1985) 44.
59 *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006* (United Nations Publication, 2008) [35].
60 See e.g. *Hashwani v Jivraj* [2011] 1 WLR 1872, Lord Clarke JSC (with whom Lords Phillips, Walker and Dyson JJSC agreed) at [62]; *US Life Insurance Co v Superior National Insurance Co*, 591 F 3d 1167, 1175 (9th Cir, 2010); Cour de cassation [French Court of Cassation], *Arkhbaieff v Entreprise Roumaine d'Etat pour le Commerce Extérieur Arpimex*, 10 March 1981 reported in (1981) Bull civ n° 82, 69.

For example, where the ACICA Rules have been chosen to apply, Article 34(2) of the ACICA Rules provides that "[t]he Arbitral Tribunal shall have regard to, but is not bound to apply, the International Bar Association Rules on the Taking of Evidence in International Arbitration in the version current at the commencement of the arbitration".

Although reference to the IBA Rules is not always mandatory, the Rules have gained wide acceptance in international arbitration – particularly given their neutrality as between common law and civil law traditions.[61] The IBA Rules set out procedures in relation to, amongst other things:

- disclosure and the exchange of documentary evidence;[62]
- the giving of evidence by lay witnesses (termed 'witnesses of fact');[63]
- the giving of evidence by party-appointed and tribunal-appointed experts;[64] and
- the conduct of evidentiary hearings.[65]

The tribunal typically retains discretion in relation to evidence. Article 19(2) of the Model (as well as Article 9(1) of the IBA Rules) confers upon the arbitral tribunal "the power to determine the admissibility, relevance, materiality and weight of any evidence". Tribunals exercising this discretion tend to permit the presentation of the facts that a party desires to raise, rather than applying technical rules found in domestic litigation – such as rules regarding hearsay evidence that prevail in common law countries.[66] Defects in evidence tend to affect the weight or value that the material is afforded, rather than its admissibility.[67]

In this way, evidentiary rules in arbitration are more flexible, and often more pragmatic, than the equivalent rules in domestic litigation.

Burden and standard of proof

As a general principle, each party bears the burden of proving the propositions that it asserts in support of its case.[68] This general principle is occasionally reflected in arbitral rules, such as Article 27(1) of the UNCITRAL Arbitration Rules which provides that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defence".[69]

In many cases, the standard of proof is assumed to be the 'balance of probabilities', familiar to common law traditions.[70] Less often, and depending heavily on the circumstances of the case, a lower[71] or higher[72] standard of proof may be applicable.

Court assistance in taking evidence

An area of some complexity is the role of national courts in assisting the taking of evidence in arbitration. The starting point is Article 27 of the Model Law,[73] which empowers the arbitral tribunal or parties (with the approval of the arbitral tribunal) to request from a competent court assistance in taking evidence. If such a request is received, the competent court may execute it according to its rules on taking evidence.

This general provision is supplemented in Australia by the IAA, which sets out in sections 23 to 23J a series of specific processes by which a 'court' (defined in section 22A) may assist in the production of documentary evidence in arbitral proceedings. Equivalent processes are set out for the purposes of domestic arbitral proceedings in the uniform commercial arbitration acts of each Australian State and Territory.[74]

Foremost amongst these processes is the court's power in section 23 of the IAA (and equivalent State and Territory provisions) to issue, upon application by a party with the permission of the tribunal, a subpoena to attend for examination before the tribunal or to produce documents to the tribunal.

61 The Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) provide an alternative procedural code more closely resembling that found in civil law jurisdictions – in particular, by encouraging the arbitral tribunal itself to take a proactive role in fact-finding and evidence-gathering processes: See Articles 2–6.

62 IBA Rules on the Taking of Evidence in International Arbitration (2020) (**IBA Rules**), Article 3; ICC Rules, Appendix IV(d).

63 IBA Rules, Article 4.

64 IBA Rules, Articles 5 and 6; in relation to expert evidence, Model Law, Article 26; ACICA Rules, Article 36.

65 IBA Rules, Article 8; ACICA Rules, Article 35(4)–(6).

66 See Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) 377–8 [6.81]–[6.83]. See also SI Strong and James J Dries, 'Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?' (2005) 21(3) *Arbitration International* 301, 306–7.

67 See Gary B Born, *International Commercial Arbitration* (Kluwer Law, 3rd Ed, 2021) 2484–6.

68 See generally UNCITRAL, *Report on the Work of its Ninth Session*, UN Doc A/31/17 (1976) Annex II, [116]; J Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law, 2012) 762.

69 See also ACICA Rules, Article 35(1).

70 See Gary B Born, 'On Burden and Standard of Proof' in Meg Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law, 2015) 50.

71 Such as 'prima facie': See, e.g. *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990) [56].

72 Such as 'clear and convincing': See, e.g. *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) [325]–[326]; *cf Libananco Holdings Co Limited v Turkey*, ICSID Case No ARB/06/8, Award (2 September 2011) [125].

73 See also CAA, section 27.

74 See e.g. CAA, sections 27A–27I.

While this power operates with little difficulty where the arbitral proceeding in question is seated in Australia, there is some controversy as to the court's power to issue a subpoena in order to assist a tribunal seated in a foreign jurisdiction.

In *Re Samsung C&T Corporation* [2017] FCA 1169, Justice Gilmour of the Federal Court of Australia denied an application to issue a subpoena in a Singapore-seated arbitral proceeding on the grounds that the Federal Court did not have jurisdiction – relying on a narrow interpretation of sections 22A and 23 of the IAA.

Referring to the language of the provisions, their context, and other explanatory materials, his Honour concluded that the power of the Federal Court to issue a subpoena was limited to any case in which arbitral proceedings were conducted in a State or Territory of Australia, not a foreign seat.

This decision has received mixed reactions in subsequent commentary.[75] It has since been publicised that, in the course of the same arbitral proceeding, the Western Australian Supreme Court took the opposite view (albeit in an unreported decision), and ultimately issued subpoenas to assist the taking of evidence in a Singapore-seated arbitration.[76]

Separately from the application of section 23 of the IAA, parties may be able to seek much the same assistance from Australian courts in relation to foreign arbitral proceedings by resort to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (**Hague Convention**).[77]

Article 1 of the Hague Convention provides that a 'judicial authority' of one Contracting State may send a Letter of Request to the 'competent authority' of another Contracting State in order to facilitate the taking of evidence.[78]

This provision is given force and operation in all Australian States and Territories through statutes and procedural rules identifying the relevant 'judicial authorities' (typically, State and Territory Supreme Courts) and empowering them to issue Letters of Request.[79]

In this way, the supervisory court is able to act on behalf of the arbitral tribunal in circumstances where the latter would not amount to a 'judicial authority' under the Hague Convention.[80] It ought to be kept in mind, however, that the court is not a 'mere rubber stamp' – it will retain a discretion whether or not to issue a subpoena, even where the arbitral tribunal has permitted the party to apply to the court for such assistance.[81]

Documentary evidence

In international arbitration proceedings, it is important to be aware of differences in expectations based on differing jurisdictional norms.[82]

In common law litigation proceedings, the disclosure or discovery process allows parties to obtain from opponents all documents relevant to the issues in dispute, even if prejudicial to that party's case.[83]

In civil law proceedings, the approach is much more restrictive and places a high burden on the individual to keep documentary records. Some civil lawyers will have an aversion to any type of common law disclosure other than (at most) a system seeking specific or tightly defined categories of documents.

The extent of document production in international arbitration can be seen as a middle ground. It is common practice for the initial portion of document production to be provided early in the proceedings with the parties' written submissions. Parties can then make specific requests for further documentary evidence according to the procedure of the arbitration.

75 Criticising the decision, see Doug Jones and Janet Walker, *Commercial Arbitration in Australia: Under the Model Law* (Lawbook Co, 3rd Ed, 2022) 310–11 [8.920]. In support of the decision, see Albert Monichino and Alex Fawke, 'International Arbitration in Australia: 2017/2018 in Review' (2019) 29(4) *Australasian Dispute Resolution Journal* 215, 223–4. Taking a more neutral view, see Westlaw AU, *International Commercial Arbitration in Australia* (last reviewed 9 April 2020) [1.620.3].

76 Jones Day, *Court Limits Australia's Jurisdiction to Assist International Arbitrations* (October 2017).

77 *Re Samsung C&T Corporation* [2017] FCA 1169, [50]–[51].

78 Article 2 provides, relatedly, that each Contracting State shall designate a 'Central Authority', which will undertake to receive Letters of Request from the judicial authority of the other Contracting State and transmit them to the authority competent to execute them. The designated Central Authority in Australia is the Secretary to the Attorney-General's Department of the Commonwealth of Australia.

79 See, e.g. *Evidence on Commission Act 1995* (NSW) section 6; *Uniform Civil Procedure Rules 2005* (NSW) rr 24.1, 24.5. See also *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 142 at 149-50.

80 See *Commerce and Industry Insurance Co of Canada v Certain Underwriters at Lloyds of London* [2002] 1 WLR 1323; *BF Jones Logistics Inc v Rolko* (2004) 72 OR (3d) 255. Compare *Primarius Capital LLC v Jayhawk Capital Management LLC* [2009] HKCFI 304; Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) 393–4 [6.131].

81 *Aurecon Australasia Pty Ltd v BMD Constructions Pty Ltd* (2017) 52 VR 267, Croft J at [5]; *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd* [2018] VSC 316, Croft J at [11].

82 See Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) 380-381 [6.93]-[6.94].

83 There is significant variance within common law jurisdictions. For example, the US discovery process allows parties to obtain all documents 'relevant to any party's claim or defense and proportional to the needs of the case', Federal Rules of Civil Procedure, rule 26 and involves production of documents, deposition of witnesses and experts and inspection of the subject-matter of the dispute. In the UK, the term 'discovery' is no longer used. A party ordered to give 'standard disclosure' is under a wide duty to disclose all relevant documents it intends to rely on and those which adversely affect its case (Civil Procedure Rule 31.6).

Parties are free to determine the procedure applicable for document production, failing which the tribunal will do so. This will typically be set out in a procedural order. Arbitral rules will commonly provide for a case management conference early in the proceedings, in which matters such as the process for document production can be determined. Tribunals commonly have regard to international standards as reflected in the IBA Rules, which provide guidance on the factors that a tribunal may consider when determining a document production request.

Under Article 3 of the IBA Rules, a party seeking disclosure may submit a Request to Produce in which they:

- describe the specific documents requested, or narrow and specific categories of documents;
- state how they are relevant to the case and material to its outcome;
- explain that the documents are not in the possession, custody or control of the requesting party (or cannot be produced by that party) and why that party believes that the documents are in the other party's possession, custody or control.

The requirement to identify 'narrow and specific' categories or individual documents constrains the scope of document production, making it less costly and time consuming than the broader processes found in common law litigation. As parties must show relevance and materiality, there is less scope for 'fishing' expeditions. To be material, a document must be likely to provide clarity or influence the tribunal's decision on issues in dispute.[84]

Parties are given the opportunity to object to document production requests based on grounds such as lack of materiality or relevance, privilege and commercial or technical confidentiality.[85] A request to produce documents can also be refused where there is an unreasonable burden to produce the requested evidence. This requires the tribunal to balance relevance and materiality with the potentially burdensome nature of the discovery request.[86]

Where the parties are not able to resolve the objection by consultation, the tribunal will make a ruling.[87]

It is common for this process to be organised and presented in a 'schedule' – most typically a 'Redfern schedule', although other forms of schedules are coming into wider use. A Redfern schedule typically contains at least four columns, the first three being completed by the parties setting out the requested documents and categories, the reasons why they are material and relevant and any grounds for objection from the opposing party. The fourth details the tribunal's response. This process increases efficiency by concisely recording the parties' views so that the tribunal can make an informed decision.

Expert evidence

Where there are complex technical issues, experts are commonly appointed to assist the tribunal's decision-making.

Common and civil law jurisdictions take different approaches, with party-appointed experts almost always used in common law litigation[88] while civil law jurisdictions favour the use of court-appointed experts. This reflects historical cultural differences about adversarial and inquisitorial approaches.[89]

Arbitration draws from both traditions, although party-appointed experts are more commonly used.[90]

The IBA Rules and the Chartered Institute of Arbitrators "Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration' require experts to provide statements confirming their independence and disclosing any relationships that could call this into question.[91] This requirement seeks to ensure impartiality and avoid party-appointed experts being hired to advocate the cause of the party that appointed them.

Tribunal-appointed experts are considered less likely to be partisan, as the appointment by the tribunal reinforces the expert's independent role. The lack of party control may be a source of concern for parties from common law jurisdictions where the adversarial approach favours party autonomy. This may be partially addressed by appointment processes in which both parties can exchange preferred lists of experts to identify a commonly agreed person, with both parties having the opportunity to raise objections.

84 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law, 2012) 859.

85 IBA Rules, Article 9(2).

86 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law, 2012) 866.

87 IBA Rules, Article 3(6)–(7).

88 In Australia, while party-appointed expert witnesses are more common, civil procedure rules contemplate both court-appointed and party-appointed experts. See *Uniform Civil Procedure Rules 2005* (NSW), Part 31, Division 2.

89 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law, 2012) 932.

90 Doug Jones, 'Methods for Presenting Expert Evidence' in *The Guide to Evidence in Arbitration* (Global Arbitration Review, 1st ed, 2021).

91 Chartered Institute of Arbitrators, Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 8; IBA Rules, Article 5(2).

Parties may also prefer a process that provides the tribunal with more than one perspective and allows for debate. Witness conferencing or 'hot tubbing' is a process that facilitates such discussion. This involves a roundtable discussion with experts from similar disciplines appointed by both parties. In this setting, experts are able to engage directly with differing views. It is particularly useful in cases where complex technical questions require the appointment of multiple experts, which may be confusing when presented separately over a period of time.[92]

Lay witness evidence

In arbitration, witness evidence is usually presented in the form of written witness statements, with the witness then subject to cross-examination by the parties or questioning by the tribunal.

The IBA Rules provided guidance on the form of written statements. Where a witness fails to appear for testimony at the hearing without a valid reason, the tribunal has the power to disregard the witness statement.

Tribunals – especially those composed of arbitrators trained in civil law jurisdictions – commonly view lay witness evidence as less reliable than contemporaneous documents, as they will often have had involvement in the transaction and have a direct or indirect interest in the outcome of the case.[93] Civil law systems often view documentary evidence as having greater probative value.[94]

Prior to the oral hearing, lawyers will usually spend time helping witnesses prepare to be cross examined. In international arbitration, it is well recognised that witnesses may be interviewed and prepared before providing evidence.[95] This is recognised by Article 4(3) of the IBA Rules which state that "it shall not be improper" for a party's legal advisors to "interview its witnesses or potential witnesses and to discuss their prospective testimony with them".

There are, however, jurisdictional differences in the attitudes towards witness preparation, which may influence the approach taken by individual practitioners. It is often said that the US approach tolerates more extensive witness 'coaching', including rehearsing with the witness their answers to anticipated cross-examination questions, for example.

This is not supported by the English courts, which take a much more restrictive approach and this position is similar in Australia.

The difference in approach has raised concerns about the potential for an uneven playing field in arbitration where practitioners have been admitted in different jurisdictions, especially as there is not always a clear dividing line between behaviour that is appropriate[96] or inappropriate.

Typically, national bar codes will not have extraterritorial effect to regulate the behaviour of counsel in foreign jurisdiction, but this is not always clear where the rules are silent.[97] From a practical point of view, practitioners need to strike a balance by ensuring that witnesses are sufficiently familiar with the process (and their own evidence where there has been a lengthy gap since their written statements were prepared) without influencing the wording or content of their evidence.

It is also advisable for counsel to agree in advance on the rules governing witness preparation that will apply in an arbitration.

7 Hearing

The consent-based nature of arbitration means that it is often characterised by shorter, less prescriptive hearings than a litigation trial. At one end of the spectrum, a dispute submitted to arbitration may be determined solely on the documents submitted by each party to the tribunal where parties agree to dispense with the hearing all together (often referred to as a 'documents-only' procedure). If the parties elect to have the arbitration determined following an oral hearing, such hearing may be conducted in person, via telephone or via audio-visual link. The hearing typically takes place in a hotel, conference centre or even a private office.

When selecting a hearing type, parties may be attracted to the time and cost efficiency of a documents-only procedure. Equally, a party may feel that the evidence submitted will not be appropriately considered unless an oral hearing format is adopted.

92 Doug Jones, 'Methods for Presenting Expert Evidence' in *The Guide to Evidence in Arbitration* (Global Arbitration Review, 1st ed, 2021).

93 Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) 389 [6.120].

94 See Siegfried H Elsing and John M Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration' (2002) 18(1) *Arbitration International* 59, 62.

95 See e.g. Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) 391 [6.124], referring to Nigel Blackaby, 'Witness preparation: A key to effective advocacy in international arbitration' (2010) 15 *ICCA Congress Series* 118.

96 See e.g. *R v Momodou* [2005] 1 WLR 3442, 3450 [45]: "*There is no place for witness training in this country, we do not do it. It is unlawful*".

97 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law, 2012) 901, 910.

In deciding whether a documents-only procedure is suitable for the resolution of some or all of the issues in contention, the parties should consider a range of matters including:

- the nature of the dispute;
- the complexity of the issues in dispute;
- the amount at stake (financial or otherwise);
- the nature of the evidence and arguments to be adduced and by whom;
- any time and costs savings;
- whether it is an effective and efficient way of resolving all, or some, of the issues in dispute in the arbitration; and
- where allegations of fraud and dishonesty are made (oral examination of witnesses is valuable in this case).

If the parties wish to have their dispute determined following an oral hearing, the typical proceeding will involve:

- opening statements by each party;
- witness direct examination (which is typically short as witness statements are usually submitted prior to the hearing and take the place of or significantly reduce the time spent on oral examination-in-chief), followed by cross-examination and the possibility of a re-direct examination of witnesses;
- expert direct examination (which is often done via brief presentations by experts, aided by demonstratives), followed by expert cross-examination and the possibility of a re-direct examination; and
- closing statements (where applicable – oral closing submissions can and are often replaced by written post-hearing briefs).

As strict rules of evidence do not typically apply in arbitration (unlike civil proceedings before domestic courts), the hearing and taking of evidence in arbitral proceedings is flexible and can be tailored to the parties' dispute and individual preferences.

Arbitral proceedings are also generally shorter than proceedings before a court. The duration of the hearing is strictly prescribed in advance (usually in PO1) and each party is accorded an equal amount of time (subject to rules of procedural fairness) to use during the hearing as it sees fit (whether by opening or closing statements, direct examination, or cross-examination). Some time is reserved for questions of the tribunal. Once a party has exhausted the allocated time no further submissions or evidence are allowed. This is referred to as the 'stop-clock' procedure.

8 Closing statements or post-hearing briefs?

In an arbitration, the closing argument is the last opportunity for a party to weave together and present its submissions and evidence. Closing arguments are often presented in writing by way of an exchange of post-hearing briefs.

A post-hearing brief is a crucial piece of advocacy through which a party seeks to persuade the tribunal to find in its favour. An effective post-hearing brief will often be a draft for the award sought by a party.

An arbitrator will typically decide, in consultation with the parties, whether closing arguments should be delivered through closing statements, post-hearing briefs or a combination of the two. In all cases, a party's primary objective is to identify and deliver the submission type that will most effectively assist the tribunal.

In identifying the most appropriate type of closing submissions, the tribunal and parties might consider:

- whether post-hearing briefs are genuinely useful or necessary for a party to deliver its submissions to the tribunal;
- the estimated cost of preparing the post-hearing briefs, as compared to an oral closing statement; and
- whether the benefit of reviewing post-hearing briefs outweighs the time and monetary cost to prepare them.

Post-hearing briefs may be preferred where there are complex facts in dispute and the examination of witnesses or experts has been intensive. Conversely, the time and monetary cost of preparing such briefs may not be justified for simpler, less factually and technically complex disputes.

9 Award

The formal requirements for an arbitral award are spread across the New York Convention, national arbitration laws and national arbitration rules. National arbitration laws and rules will differ; however, generally speaking, these instruments provide that an arbitral award must:

- be in writing (i.e. not delivered orally);
- be signed by the arbitrator(s);
- state the date of the award;
- state the place of arbitration; and
- state the reasons for the award.

National arbitration legislation does not tend to set a time limit for the delivery of an award. However, some arbitration rules require a final award to be rendered within a certain timeframe. For example, the ACICA Rules provide that, unless the parties agree otherwise, the final award should be rendered within nine months from the date the file was transmitted to the Arbitral Tribunal or no later than three months from the date the Arbitral Tribunal declares the arbitration proceedings are closed, whichever is earlier. The time limit may be extended where there is a reasoned request from the Arbitral Tribunal or if ACICA otherwise deems it necessary.

In terms of content, an arbitral award will often include the following information:

- details of the parties and their counsel;
- the procedural history;
- details of the principal or 'matrix' contract, as well as the arbitration agreement;
- details of the background facts and circumstances;
- the claims and arguments advanced by each party;
- a list of issues in contention, where appropriate;
- the arbitral tribunal's detailed reasoning regarding jurisdiction (if applicable);
- the arbitral tribunal's detailed reasoning regarding the substantive merits of the case, dealing with each disputed issue discretely; and
- the operative part of the award.

Several arbitral institutions and industry bodies (like the ICC, IBA and the Chartered Institute of Arbitrators) have issued best practice guidelines regarding the content of arbitral awards. These guidelines often set out more onerous specifications than the minimum content requirements for an arbitral award to be considered valid and enforceable.

10 Recourse against awards

An important feature of arbitration is that it produces an award which is binding on the parties and, in principle, final. There are limited circumstances in which an arbitral award may be set aside or appealed.

Setting aside an award

Grounds for setting aside an award

A party may apply to the courts at the seat of the arbitration to have an award set aside based on one or more of the grounds prescribed in national arbitration legislation, which are typically limited and narrow.

Importantly, arbitral awards are not reviewable on the merits and there are no prescribed grounds for setting awards aside on the basis of a merits review.

The limited circumstances in which a court may set aside an award are set out in Article 34 of the Model Law and include the following:[98]

- the underlying agreement to arbitrate is invalid;
- the party seeking to set aside the award was not given proper notice of the proceedings or was unable to present their case;[99]
- the arbitrator purports to decide matters outside the scope of the arbitration agreement;
- the composition of the tribunal or arbitral procedure was not in accordance with the parties' agreement;
- the subject-matter of the dispute is not arbitrable; or
- the award is contrary to public policy.

The grounds for setting aside an award are identical to the grounds for refusing recognition and enforcement (discussed in Chapter 6, Recognition and enforcement of arbitral awards).

Process for setting aside an award

In Australia, applications to set aside a domestic award are made in the state or territory Supreme Courts,[100] while applications relating to international arbitration awards can be brought in either the Supreme Courts or the Federal Court.[101]

To set aside an arbitral award, a party has three months to bring an application from the date on which the party has received the award or, if a request for a correction or interpretation of an award has been made under section 33 of the CAA, from the date on which the request was disposed of by the tribunal.

98 Model Law, Article 34(2).

99 For an award debtor to show that it was unable to present its case, generally, a breach of the rules of natural justice in the form of a real unfairness or practical injustice will be required: *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [55].

100 CAA, sections 2(1) and 34.

101 IAA, section 3(1); Model Law, Article 34.

Consequences and effect of setting aside an award

Where an award has been set aside, it no longer has the effect of a final and binding decision between the parties. The dispute is available to be arbitrated again, as the setting aside has no impact on the effectiveness of the underlying arbitration agreement. However, the decision of the court setting aside the award could affect the scope of adjudication before a new arbitral tribunal, as a party may be prevented or 'estopped' from reopening certain matters in any subsequent arbitration.

While an award that has been set aside is no longer enforceable in the jurisdiction where the application for setting aside has been rendered, it may be possible (although in very limited circumstances) that the award is still enforceable in other jurisdictions. In a number of jurisdictions (including in the UK), courts have enforced awards set aside at the seat of the arbitration in circumstances where the judgment in which the award was set aside was found to be in violation of basic norms of justice, or contrary to the public policy of the enforcing forum.[102]

Appealing an award

Subject to provisions in national arbitration legislation, there is no ability to appeal an arbitral award on a question of law or fact.

In Australia, under the IAA, international arbitral awards are not subject to an appeal.

The rules are different for domestic arbitral awards. Under section 34A(1) of the CAA, parties may appeal a domestic arbitral award on a question of law if the parties have agreed that an appeal may be made under section 34A and if a court grants leave.

For a court to grant leave to appeal an award, it needs to be satisfied that:

- the appeal will substantially affect the rights of one or more parties;
- the question is one that the arbitral tribunal was asked to determine;
- the decision of the tribunal on the question was obviously wrong, or the question is one of general public importance and open to serious doubt; and
- despite the parties' agreement to resolve the dispute by arbitration, it is just and proper for a court to determine the question.

The party seeking to appeal an award must apply for leave to appeal and identify the question of law to be determined and the grounds on which the court should grant the leave to appeal. An application for leave to appeal must be made within three months of the date on which the party making the application received the award or, if a request for a correction or interpretation of an award is made under section 33 of the CAA, from the date on which the request had been disposed of by the tribunal.

Upon determining an appeal, the court may confirm the award, vary the award of remit the award with the court's opinion on the question of law back to the tribunal for reconsideration or set aside the award in whole or in part. This last option is only available if the court is satisfied that it would be inappropriate to remit the matter to the arbitral tribunal for reconsideration.

Where the court remits the matter back to the arbitral tribunal, the tribunal has three months from the date of the order to make an award.

If an arbitral award is varied on an appeal under section 34A of the CAA, the new award has effect as if it were the award of the arbitrator.

102 *Malicorp Ltd v Government of the Arab Republic of Egypt* [2015] EWHC 361 (Comm) (Walker J) at [22].

06

Recognition and enforcement of arbitral awards

One of the attractions of international arbitration is the (comparative) ease with which arbitral awards can be recognised and enforced around the world. This is a direct consequence of the New York Convention which, at present, has over 169 countries party to it. This stands in contrast to the recognition and enforcement of foreign court judgments for which at present there is no widely ratified global convention and there remain some countries that do not recognise and enforce foreign court judgments at all.

As discussed in Chapter 2, the New York Convention is given force of law in Australia under sections 8 and 9 of the IAA. The New York Convention approach is replicated in Articles 35 and 36 of the Model Law, which is reflected in sections 35 and 36 of the CAA.

The New York Convention operates as a minimum standard for the recognition and enforcement of arbitral awards; it does not, other than in the specific circumstances outlined above, limit the ability of national courts to recognise and enforce arbitral awards, and courts have consistently held that the New York Convention does not allow refusal to recognise and enforce an award on grounds other than those listed.[103]

As such, in Australia, it remains open for parties to seek enforcement of an arbitral award under common law, although in practice this is unlikely to be needed given the pro-enforcement bias of the New York Convention.

Grounds for refusing recognition and enforcement

There are only limited circumstances in which recognition and enforcement of an arbitral award may be refused. These are as follows:[104]

- **Incapacity of parties to the agreement or invalidity of the agreement under the applicable law.**[105] "Incapacity" is not defined in the New York Convention or equivalent Model Law, IAA and CAA provisions. It can refer to either a natural person or legal entity. The incapacity ground has been of limited relevance in practice.[106] In the case of companies, incapacity may relate to alleged lack of representative authority. The ground of invalidity is, on the other hand, invoked more often. It was considered by the Federal Court of Australia in *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd*.[107] The Court held that the award debtor resisting enforcement must affirmatively prove that an agreement governed by foreign law is invalid under the governing law. There is still contention regarding whether 'validity' is to be construed in the narrow sense (i.e. absence of illegality, fraud and duress) or broadly to include all questions related to the conclusion of the agreement.[108]
- **Lack of proper notice of the arbitrator or proceedings to the party against whom the award is invoked**. This ground addresses due process requirements. Australian courts have typically applied high standards for the burden of proving that notice was not properly given. For example, in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*,[109] the Federal Court of Australia accepted that valid notice had been given where the claimant asserted that the notice was sent to the address specified for notice in the contract by registered mail and the defendant could not provide contrary evidence that it had not received it.

103 See e.g. *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303.

104 Model Law, Article 36(1); New York Convention Article V.

105 *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd* (No 2) [2018] VSC 741 (Croft J). *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223 held that the award debtor must affirmatively prove that an agreement governed by foreign law is invalid under the governing law. There is still contention regarding whether 'validity' is to be construed in the narrow sense (i.e. absence of illegality, fraud and duress) or broadly to include all questions related to the conclusion of the agreement: see e.g. *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303.

106 See e.g. *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd* (No 2) [2018] VSC 741 (Croft J).

107 [2017] FCA 1223.

108 See e.g. *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303.

109 (2011) 277 ALR 415.

The court did not accept arguments that the notice was not received or signed for by a legal representative or authorised person to receive it. However, there have also been cases where courts have found that deemed notice was not enough to satisfy the requirement of proper notice.[110]

- **The award deals with matters outside the submission to arbitration**. This ground applies where the arbitral tribunal has considered matters that were not encompassed by the arbitration agreement, and were therefore not within the arbitral tribunal's jurisdiction. The Victorian Supreme Court considered this ground in *Giedo van der Garde BV v Sauber Motorsport AG*,[111] in which the court was asked to enforce a Swiss arbitral award under which Sauber Motorsports had been ordered to reinstate one of its drivers for the Formula 1 Grand Prix. This was resisted on the basis the award dealt with matters outside the submission to arbitration, being wrongly based on the assumption that the claimant had a personal contractual right enforceable against the respondent. The court rejected this on the basis that the contractual arrangements were intended to facilitate the claimant's position as a driver, so his rights were within the scope of the submission to arbitration. The court emphasised that in making this determination, the court was not engaging in a merits review of the award, but merely investigating the issue to determine that it was open to the arbitrator to make the relevant findings. This is consistent with international jurisprudence that this ground must be construed narrowly and does not permit an enforcing court to engage in a merits review.[112]
- **The composition of the arbitral tribunal was not in accordance with the parties' agreement**. This ground emphasises the primacy of party autonomy. It was recently considered by the Full Court of the Federal Court of Australia in *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company*[113] (as discussed in Chapter 2 of this Guide). Globally, in the majority of reported cases in which this ground has been raised, parties have been unsuccessful because it is unusual for the composition of the tribunal to deviate from the parties' agreement or the applicable rules.[114]
- **The award has not yet become binding on the parties or has been set aside in the country where the award was made**. This ground may be invoked where the award has been set aside in the place where it was made. Where an award has been set aside in the country or under the law of which it was made, Australian courts (like English courts[115]) retain discretion to enforce the award,[116] but that discretion is exercised judiciously. English courts have enforced awards where the decision by the seat court to set it aside was found to be in violation of basic notions of justice or otherwise contrary to public policy.[117] Where an application to set aside an award is pending at the seat of the arbitration, award debtors may apply for an adjournment of enforcement proceedings pending the resolution of the set aside application. Australian courts have the discretion to adjourn enforcement proceedings or order security against the award debtor when the award is being challenged at the seat of arbitration.[118] Courts will weigh several competing factors when exercising their discretion.[119] The award debtor resisting enforcement will typically need to establish that an application to set the award aside has been made appropriately and/or that, at least *prima facie*, it has prospects of success.[120]
- **The subject-matter of the award is not arbitrable under the law of the country where recognition and enforcement is sought**. As discussed in Chapter 2 of this Guide, arbitrability relates to whether the subject matter of the dispute can be resolved through arbitration or can only be resolved by courts. In the context of this ground, arbitrability is determined by reference to the law of the enforcing country, not the law of the country where the arbitration took place.

110 When there is only deemed notice, the court may find that the requirement of proper notice is not satisfied: see e.g. *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* [2016] HKCFI 1611.

111 (2015) 317 ALR 792.

112 See also *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 which sets out the parameters of the equivalent ground under Article 34 of the Model Law.

113 [2021] FCAFC 110.

114 UNCITRAL New York Convention Guide, Article V(1)(d) at [6].

115 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, [126].

116 IAA, section 8(5).

117 *Yukos Capital S.a.r.L v OJS Oil Company Rosneft* [2014] 2 Lloyd's Rep 435, [20]; *Malicorp Ltd v Government of the Arab Republic of Egypt & Ors* [2015] EWHC 361 (Comm), [26].

118 IAA, section 8(8).

119 Doug Jones and Janet Walker, Commercial arbitration in Australia under the Model Law (Thomson Reuters, 3rd ed) at [11.170].

120 *Toyo Engineering Corp v John Holland Pty Ltd* [2000] VSC 553; *Hallen v Angledal* [1999] NSWSC 552.

- **The recognition or enforcement of the award would be contrary to the public policy of the country in which recognition and enforcement is sought**. Infringement of public policy typically involves situations where the core values of a legal system have been deviated from. In *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* (No 2),[121] the Federal Court of Australia determined that "it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in [the] jurisdiction [where enforcement is sought] which enliven this particular statutory exception to enforcement". In some circumstances, public policy objections may relate to only part of the award. Where an award is void in part, it is possible to apply to sever and enforce part of an award, providing that the void portion of the award is clearly separate and divisible and the severance will not cause injustice.[122]

Process for recognition and enforcement

Under the CAA, domestic awards are enforced in the state or territory Supreme Courts.[123] Under the IAA, a foreign award may be enforced in either a state or territory Supreme Court or the Federal Court of Australia.[124]

Applications to enforce awards are subject to limitation periods in national law. In Australia, limitation periods apply to arbitral awards in all states, except South Australia. The limitation period is usually six years, unless the agreement was made by a deed, in which case a longer period is granted.

To have an award enforced, applicants are required to supply the authenticated original award and the arbitration agreement (or certified copies thereof). The party opposing recognition and enforcement has the burden of raising and proving the grounds for non-enforcement. The procedure for enforcement is provided for in court rules and practice notes.[125] The applicant must file an originating application in accordance with the court's prescribed requirements, attach the authenticated award and agreement and attach an affidavit stating the extent to which the foreign award has not been complied with at the date the application is made and the debtor's usual or last-known place of residence or business, or registered office in the case of a company.

The procedure for enforcement is provided for in court rules and practice notes.[126]

Applications for enforcing arbitral awards in the Federal Court can be made ex parte if certain requirements are met (including where the award creditor has not been formally notified of an award debtor's intention to object to enforcement and is not otherwise aware of any reasonably arguable basis for objection).[127] In Victoria, Queensland, South Australia and Western Australia, the State Supreme Court rules do not explicitly provide that an application for enforcement can be made ex parte, but the courts' originating application forms enable the applicant to apply for orders without notice.[128] In New South Wales, an applicant must file a summons seeking leave of the court to enforce the award.

121 [2012] FCA 276.

122 *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* (2014) 290 FLR 233.

123 CAA, section 2, which defines "court" as the Supreme Court.

124 IAA, section 18(4)–(5).

125 See e.g. in the Supreme Court of Victoria: *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic), order 9; Practice Note SC CC 3 *Commercial Arbitration Business*. In the Federal Court: *Federal Court Rules 2011* (Cth); Commercial Arbitration Practice Note CA-1.

126 See e.g. in *Victoria: Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic), order 9; Practice Note SC CC 3 *Commercial Arbitration Business. In the Federal Court: Federal Court Rules 2011* (Cth); Commercial Aritration Practice Note CA-1.

127 Federal Court Rules 2011 (Cth) rr 28.44(3), 28.49(3); Federal Court Commercial Arbitration Practice Note, Annexure B.

128 See Supreme Court of Victoria, Form 2-9B; Supreme Court of Queensland, Form 137B; Supreme Court of South Australia, Form 2H; Supreme Court of Western Australia, Form 2 – Originating summons to enforce foreign award.

07

Specific procedures

Expedited arbitration

Cost and delay are becoming discouraging characteristics of arbitration and there has been a need to simplify the arbitral process, particularly for lower-value disputes. As a result, over the past decade several arbitral institutions have closely examined how their rules and proceedings could be streamlined to reduce any unnecessary cost and delay. Several of these institutions have released separate 'Expedited Arbitration Rules', such as the ACICA Expedited Arbitration Rules and the ICC Expedited Procedure Rules. Other institutions have incorporated provisions within their rules which allow access to simplified procedural steps and strict time limits to complete the arbitration quickly and at a reduced cost, such as the HKIAC Arbitration Rules.

Expedited arbitration is not suitable for every dispute and is only seen as appropriate in circumstances where the quantum in dispute is below a particular monetary threshold and there is a low level of complexity involved. For example, the ICC Expedited Procedure Provisions can be utilised by parties where the dispute does not exceed US$2 million or US$3 million, depending on the date of the arbitration agreement. Parties can apply to ACICA to use the ACICA Expedited Arbitration Rules if the value in dispute is less than A$5 million.

However, the requirement for a dispute to be under a certain monetary value is not prescribed by all institutions or all rules. For example, it is not required under the recently-released 2021 UNCITRAL Expedited Arbitration Rules. Therefore, it is important that parties contemplating arbitration check whether an expedited framework is applicable to their matter when entering into an arbitration agreement.

Key differences between expedited and non-expedited arbitration

Expedited arbitration primarily aims to simplify procedures to minimise cost and shorten the time required to reach a final award. The key features of expedited arbitration include:

- **Use of a sole arbitrator**. Generally, expedited arbitration provides for the appointment of one arbitrator (unlike a three-person tribunal in standard arbitrations). Alternatively, some arbitral institutions give the parties the option to agree to a three-person tribunal or defer the decision to the President of the institution.
- **No oral hearing**. It is common for the decision to be made on the documents in expedited arbitrations, without any oral hearing. For instance, ACICA and HKIAC set documents-only arbitration as the default procedure under their expedited rules unless otherwise determined by the arbitrator.
- **Shorter timeframes and truncated procedures**. Expedited arbitrations often adopt shorter timelines for procedures, including for the appointment of the arbitrator and delivery of the award. It is also standard to cap the number of amendments to the statement of claim or defence and give the tribunal discretion to permit further written statements.

Factors for considering the suitability of a dispute to expedited arbitration

An expedited arbitration proceeding may, depending on the circumstances, be appropriate for a dispute to minimise cost and delay, without compromising the quality of the dispute resolution process. This requires carefully determining whether a speedy resolution will still ensure that the parties have been sufficiently heard and the issues in dispute have been properly examined.

To determine if a matter should embrace an expedited procedure, the following ought to be considered:

- **Whether the use of a sole arbitrator is in the best interests of your client**. On one view, it has the potential to save time when appointing arbitrators and makes the award process more efficient. However, on another view, it limits the award to the opinion of one person.

- **Whether the arbitration agreement permits or facilitates an expedited procedure**. There is a risk that an award will be rendered unenforceable if there is a discrepancy between the chosen arbitration rules and the arbitration agreement.[129]
- **Whether the nature of the dispute requires an oral hearing**. A documents-only arbitration is often cheaper and quicker, however there are times when an oral hearing is preferable. For instance, where testing a witness' credibility or recollection or explanations of highly technical expert evidence are required, these circumstances may warrant an oral hearing. An oral hearing may also be necessary where there is a lack of written evidence to substantiate the material facts of the case.
- **Whether short deadlines and a truncated procedure is desirable**. On one view, a streamlined timeline limits cost and avoids unnecessary delay. However, that may not be desirable if it will compromise a party's capacity to properly present their case, impact the enforceability of the award or encroach on broader concepts of natural justice.

Additionally, parties should take into account the urgency of resolving the dispute, the complexity of the issues in dispute, the number of parties involved, the financial resources available to meet the expedited process, and the likelihood of an award being rendered within the timeframes provided for in the expedited rules.

Emergency arbitration

Interim or provisional measures in arbitration are decisions that protect parties from harm during the course of proceedings.

Historically, a party seeking urgent relief prior to the constitution of the arbitral tribunal only had recourse to national courts. With the introduction of emergency arbitration provisions by many arbitral institutions, parties requiring interim measures of protection can now seek an order from an emergency arbitrator to be appointed by the institution before the tribunal is constituted.

In most jurisdictions, including Australia, courts retain residual authority to grant interim measures of protection. In other words, emergency arbitrators and national courts have concurrent jurisdiction to grant interim relief.

Emergency relief in arbitration

To be granted interim relief by an emergency arbitrator a party must demonstrate a number of elements. Under Article 3(5) of the ACICA emergency arbitrator rules (Schedule 1 of the ACICA Rules), the requesting party must show that:

- irreparable harm is likely to occur if interim measures are not ordered;
- the harm substantially outweighs the likely harm to the party affected by the interim measure; and
- there is a reasonable possibility that the requesting party will succeed on the merits.

An emergency arbitrator is appointed by ACICA within one business day and a decision on the application must be handed down by the emergency arbitrator within five business days of the arbitrator's receipt of the application.

The interim measures ordered may vary widely in scope, including orders to preserve evidence or assets, provide security for costs, maintain or restore the *status quo* pending determination of the dispute, or refrain from action likely to cause harm to the other party.

The granting of interim relief by an emergency arbitrator can take various forms. This can be in the form of a direction, or an interim or partial award. Some rules (like the ICC Arbitration Rules) require the decision to be rendered in the form of an order to ensure its expediency. Others, like the ACICA Rules, allow interim measures of protection to be either 'ordered' or 'awarded'.

Many other institutions have incorporated into their institutional rules emergency arbitrator mechanisms, including for example the ICC,[130] ICDR,[131] SIAC,[132] SCC[133] and LCIA.[134]

The advantages and disadvantages of seeking urgent relief in arbitration vs before a court

To determine if an emergency arbitration proceeding should be used, the following should be considered:

- **Speed**. How quickly urgent relief can be granted is a critical question. The speed of court proceedings varies widely between jurisdictions. Parties may prefer emergency arbitration over going to court where the time limits specified by institutional rules for the issuance of a decision are short in comparison with court proceedings.

129 See e.g. the Shanghai No. 1 Intermediate Court decision in *Nobles Resources Pte. Ltd. v. Good Credit International Trade Co. Ltd.* (2016) in which the Court refused to enforce a SIAC award on the basis that the expedited arbitration rules were applied and the hearing was conducted before a sole arbitrator, contrary to the arbitration agreement which provided for a three-member arbitration panel.

130 ICC Rules, Article 29, Appendix V (Emergency Arbitrator Rules).

131 International Centre for Dispute Resolution, International Dispute Resolution Procedures (including Mediation and Arbitration Rules) (2021) (**ICDR International Arbitration Rules**), Article 7.

132 Arbitration Rules of the Singapore International Arbitration Centre (2016) (**SIAC Rules**), Article 30, Schedule 1 (Emergency Arbitrator).

133 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017) (**SCC Arbitration Rules**), Appendix II (Emergency Arbitrator).

134 LCIA Arbitration Rules (2020) (**LCIA Rules**), Article 9B.

- **Cost**. The cost of emergency arbitration varies between institutions whose rules usually require the requesting party to pay fixed fees to cover the institution's administrative expenses and the emergency arbitrator's fees and expenses. For example, an emergency arbitration under the ACICA rules requires payment of an emergency arbitrator fee of A$10,000, with a further A$2,500 application fee payable to ACICA. The requirement to pay upfront may deter some parties from making an emergency arbitrator application. However, this may be more cost effective than court proceedings where the order is to be enforced in multiple jurisdictions, which would necessitate multiple court proceedings.
- **Confidentiality**. The departure from the arbitral process often means a loss of confidentiality, one of the key reasons why parties choose to arbitrate. Parties may wish to pursue an emergency arbitration proceeding rather than a court process so that confidentiality can be maintained.
- ***Ex parte* relief**. Courts may be the only viable option for parties seeking interim measures without giving notice of the application to the other party. If there is a risk that a party is likely to dissipate or divest assets or destroy information, the secrecy and urgency of an *ex parte* application to a court will best preserve the assets or information.
- **Third parties**. As arbitration only binds the contracting parties, there is no authority to compel non-contracting parties to obey interim orders (by way of, for example, a freezing injunction against accounts held at third-party banks). This is a significant disadvantage given the ease with which evidence and assets can be transferred across borders.
- **Enforcement and compliance**. While orders for interim relief granted by emergency arbitrators will be contractually binding on the parties, there are limited steps that can be taken if the respondent does not comply. For example, an emergency arbitrator has no power to impose contempt sanctions on a defaulting party. As discussed below, it remains uncertain whether a decision by an emergency arbitrator can be enforced as an award under the New York Convention.

Enforceability of emergency arbitrator decisions

There are two potential hurdles to obtaining enforcement of an emergency arbitrator's decision.

First, the nature of the relief is that it is interim and not final. The arbitral tribunal subsequently appointed to determine a dispute can review, modify, terminate or annul an emergency arbitrator's decision.

Second, the form of relief is commonly rendered as an order rather than an award. The New York Convention does not say anything about arbitral interim orders or awards. The Convention does, however, apply only to 'awards', which is not a defined term in the Convention but it is generally considered that an award is defined by its finality and binding characteristic (neither of which applies to interim orders or awards). Whether an emergency arbitrator's interim decision can be properly characterised as an 'award' for the purpose of the New York Convention is therefore uncertain.

The approach adopted by courts when ruling on enforceability of emergency arbitrator decisions differs across jurisdictions. Article 17H of the Model Law (as updated in 2006) provides that an arbitral interim measure, no matter the format (as an award, an order or a decision), "shall be recognised as binding and…enforced upon application to the competent court".

The Model Law (as updated) has been adopted by Australia, which requires interim measures to be recognised as binding and enforced irrespective of the country in which they have been issued, unless one of the enumerated grounds for refusing recognition in Article 17 I of the Model Law is met. However, the same may not be true in other jurisdictions; the position will depend on the individual jurisdiction's national arbitration legislation.

Virtual arbitration

The COVID-19 pandemic has normalised virtual arbitrations, prompting procedural adaptations specific to online formats. For example, the ACICA Rules include provisions providing for e-filing of submissions as a default, allowing electronic signing of awards, allowing tribunals to hold conferences and hearings virtually, and measures to protect data in line with the applicable law.

In addition, in 2020, ACICA released a Guidance Note for Online Arbitration, which covers a range of matters that need to be addressed in advance of an arbitration being conducted on an online platform with parties participating from different physical locations. These include the choice of video-conferencing platform, use of a third party online arbitration provider, methods of internal communications within legal teams, and considerations for the remote participation of witnesses.

Pros and cons of virtual hearings

The option to conduct hearings virtually has a number of benefits, including:

- **Reduced need for travel**. Virtual hearings are likely to be useful where parties are in relatively inaccessible parts of the world or the cost of travel renders physical a physical hearing difficult.
- **Reduced cost**. A virtual format reduces cost associated with travel for parties, counsel and witnesses.
- **Sharing of documents**. Technologies allowing the easy sharing and reading of large volumes of text may provide efficiencies. Electronic filings and exchanges have been widely used since before the COVID-19 pandemic.
- **Communication**. It may be easier for legal teams to communicate using online technologies where they would usually be separated in a physical courtroom.

However, parties should also be mindful of potential limitations of virtual hearings, which may include:

- **Uneven access to technology**. Witnesses in developing and least-developed countries may not have access to the same technology equipment or internet speed as those in developed countries. Parties should manage potential limitations by clarifying and settling the procedural and technical arrangements at an early stage, including arrangements for equipment, software and connectivity.
- **Witness and expert testimony**. There is a risk that the tribunal might subconsciously take into account the shortcomings of virtual hearings, such as technological difficulties or the more limited ability to analyse body language when evaluating witness or expert testimony. A 2021 study by Berkeley Research Group found that remote proceedings were associated with psychological side effects including bias against those with technical issues and 'Zoom fatigue'.[135] Expert witnesses reported juries, judges and arbitrators taking less interest in their testimonies, with decisions being reached more quickly compared to in-person hearings. However, the study did not find that the psychological impact was enough to have a significant impact on the outcome of proceedings.
- **Security and confidentiality**: There is increased risk of security breaches where multiple parties, witnesses and experts are using their home networks to attend virtual hearings. It may also be more challenging to confirm that witnesses are alone when giving testimony and that the hearing link has not been shared beyond what the parties have agreed.

Do parties have a right to a physical hearing?

In May 2022, an ICCA taskforce completed an investigation into parties' right to a physical hearing in international arbitration.

The report surveyed 78 jurisdictions, finding that none contained an express provision granting parties a right to a physical hearing, although in some cases a right could be inferred.

In Australia, the IAA does not provide for an express right to a physical hearing, but section 18 of the IAA requires that parties are given a reasonable opportunity to present their case. Australian courts have held that arbitral tribunals may decide whether or not to hold evidentiary hearings and determine the format of hearings,[136] and rejected challenges to awards issued after remote hearings.[137]

135 Berkeley Research Group, *The Psychological Impact of Remote Hearings* (Report, 2021) at 8.

136 See e.g. *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* (2020) 55 WAR 435, 489 [317] (Quinlan CJ)

137 See e.g. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131. See also Lucy Martinez and Jay Tseng, *Does a Right to a Physical Hearing Exist in International Arbitration? National Report - Australia* (ICCA Research Project, 2020).

Green arbitrations

The environmental footprint of arbitration processes has recently come under increased scrutiny. A study conducted by the Campaign for Greener Arbitration projected that almost 20,000 trees could be required to offset the total carbon emissions resulting from just one arbitration.[138]

Arbitrations can result in a number of carbon-producing activities, from travel to and from the hearing by witnesses, counsel, experts and tribunal members to the printing of lengthy submissions and even the use of multiple disposable coffee cups. The stated purpose of the Campaign for Greener Arbitration is to promote awareness of the environmental impact of arbitrations and produce best practice guides on the ways in which arbitration practitioners can act to minimise their carbon footprint. The Campaign sets out three areas in which practitioners can substantially reduce carbon emissions. These include:

- adopting clean forms of energy;
- reducing the use of long-haul travel; and
- reducing waste (such as by eliminating hard copy filings).

The campaign established 'Green Protocols',[139] which set out specific measures designed to reduce the environmental footprint of a new or existing arbitration, such as the use of virtual conferences, hearings and witness preparation as the default format, and electronic filing of all submissions and document production. The "Model Green Procedural Order" provides draft language that can be adopted by tribunals to implement sustainability measures in the procedural conduct of arbitration.

Over 1,000 individual practitioners, arbitrators, law firms, arbitral centres, arbitration service providers and corporates have signed the Green Pledge, a commitment to introducing greener practices by implementing the principles set out by the Campaign.

138 See Campaign for Greener Arbitrations, *A significant impact* (Web Page).
139 See Campaign for Greener Arbitrations, *Green Protocols* (Web Page).

08

Investment treaty arbitration between foreign investors and Host States

What is investment treaty arbitration?

Investment treaty arbitration is a dispute settlement mechanism for resolving disputes between a company or individual investor from one state and the country in which they invest (the 'Host State') concerning the investment made or acts or omissions of the Host State in relation to that investment. This type of arbitration is also commonly referred to as 'Investor-State Dispute Settlement' or **ISDS**.

The ability of an investor to commence an arbitration directly against the Host State derives from the consent of the Host State given under an investment treaty to submit itself to arbitration in the event of a dispute with a foreign investor.[140]

What are investment treaties?

Investment treaties are agreements between two or more states that give investors from one state party certain legal protections when investing in another state party to the treaty. Investment treaties are intended to promote cross-border direct investment by giving investors greater certainty in their investments and reducing the risk involved in investing in foreign countries.

Investment treaties are generally either standalone bilateral investment treaties (**BITs**) or they take the form of investment chapters within multilateral free trade agreements (**FTAs**). BITs are agreements between two states, where each state agrees to protect the investments of investors from the other, with their primary focus being the protection of private direct investment.

The substantive protections afforded under BITs are discussed in further detail below but generally protect qualifying investors from unfair, inequitable, discriminatory and expropriatory treatment by the Host State. In contrast, FTAs are agreements between two or more countries with a broader focus designed to reduce or eliminate certain barriers to trade and investment and may include a chapter on investment protection with a similar reach to BITs.

Dispute resolution under investment treaties

Many BITs and FTAs allow foreign investors who qualify for protection to bring a claim directly against the Host State for breaches of treaty provisions. These treaties contain a legal mechanism which allows parties to bring claims outside of the Host State's court system and before an independent international arbitral tribunal.

Generally, treaty arbitration will proceed before a panel of three arbitrators, one selected by each party and the president of the tribunal selected by the party-appointed arbitrators or an arbitral institution (a process not dissimilar to that adopted in commercial arbitration).

There are differences between ISDS and commercial arbitration. One way in which the two are distinguished is by the increasing adoption of transparency requirements in ISDS. Increasingly parties may be required to publish awards, submissions and evidence (with sensitive or confidential information redacted) and third party participation as amici curiae may be allowed.

140 See, generally, C. L. Lim, Jean Ho and Mārtiņš Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and Other Materials* (2018).

Advantages of investment treaty arbitration

There are a number of advantages of ISDS.

- **Extra-contractual treaty relief**. Relief available under an investment treaty is extra-contractual and is entirely separate from and additional to any relief available under any contract(s) the investor might have entered into, or under the Host State's domestic law. Therefore, a claim under an investment treaty can arise in circumstances where no contractual relief is available. Indeed, no contractual relationship between the Host State and the investor is required before investor-state arbitration can be invoked as the right to arbitrate emanates from the relevant treaty. Also, because a treaty claim is extra-contractual, it will not be frustrated by a limitation of liability period under domestic law.
- **Neutral decision-maker**. Disputes will be heard before a neutral arbitral tribunal in the appointment of which the parties can usually participate. In this sense, the parties are able to avoid having to litigate before national courts. This is particularly important where the national court before which the dispute would proceed has questionable judicial independence.
- **Damages**. Claims under investment treaties may entitle an investor to a greater quantum of damages than claims advanced under contract or domestic law. For example, investment treaty tribunals have awarded expectation damages for profits lost as a consequence of a contract not being performed, which may not be available under domestic laws. Moreover, there is no requirement to apply a particular valuation methodology when calculating damages, which leaves this choice up to the tribunal and can result in significant awards.
- **Leverage in settlement discussions**. The ability to invoke treaty protections can be a powerful negotiating tool in early settlement discussions as Host States are more likely to engage with an investor where the alternative means having to defend an expensive treaty claim. The existence of an investment treaty claim against a Host State is also generally publicised and, increasingly, transparency requirements are imposed resulting in the publication of written submissions, evidence and the ultimate award. Host States are also mindful that the amounts of compensation awarded in investment treaty cases are often large and are on the increase, with many awards ranging in the billions of dollars.

When is investment treaty arbitration available?

Investment treaty arbitration will be available if a number of requirements are met, including most importantly that:

- there is an applicable investment treaty between the home state of the investor and the Host State of the investment;
- the claimant is a qualifying 'investor' under the applicable treaty; and
- the claimant's assets in the Host State are a qualifying 'investment' under the treaty.

Is there a relevant investment treaty?

The first question an investor must consider is whether there is an applicable investment treaty that provides an avenue for an ISDS claim. An applicable investment treaty will be one to which the home state of the investor and the Host State of the investment are parties, and which contains consent of the Host State to submit itself to arbitration.

Australia is a party to 15 BITs currently in force with the following countries: Argentina; China; the Czech Republic; Egypt; Hungary; Laos; Lithuania; Pakistan; Papua New Guinea; the Philippines; Poland; Romania; Sri Lanka; Turkey; and Uruguay.

Australia has entered into bilateral FTAs with the following countries: Chile; China; Hong Kong; Indonesia; Japan; Korea; Malaysia; New Zealand; Peru; Singapore; Thailand; and the USA.

Australia also is a party multilateral FTA, including: the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA) (with: Brunei Darussalam; Burma; Cambodia; Indonesia; Laos; Malaysia; New Zealand; the Philippines; Singapore; Thailand; and Vietnam), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (with: Brunei Darussalam; Canada; Chile; Japan; Malaysia; Mexico; Peru; New Zealand; Singapore; and Vietnam), and the Pacific Agreement on Closer Economic Relations Plus (PACER Plus) (with: Cook Islands; Kiribati; Nauru; New Zealand; Niue; Samoa; Solomon Islands; Tonga; and Vanuatu have signed the agreement, but have not yet ratified it).[141]

Several of these BITs and FTAs contain ISDS provisions, but not all.

141 For a more detailed overview see International Comparative Legal Guides, ICLG Intestor-State Arbitration Laws and Regulations Australia 2022 (Report, 2022).

What if there is no investment treaty between the Host State and the investor's home state?

An investor can still have a treaty claim if there is no investment treaty between the Host State and the investor's home state, but the investment will have to be structured through a corporate vehicle incorporated in a country that has a relevant investment treaty with the Host State.

The time of corporate structuring is important in this context. A company is not entitled to bring a treaty claim where it changed its corporate structure and restructured its investment only to gain access to treaty protections in relation to a specific dispute. If an investment is structured – or restructured – too late, the treaty tribunal might determine that the bringing of a treaty claim is an abuse of process and inadmissible. What is 'too late' will depend on the point in time when the dispute in question with the Host State was 'reasonably foreseeable'. This point in time may be before the Host State actually adopted the measures which the investor claims were in violation of the relevant treaty.

This issue arose in the Philip Morris case against Australia under the Hong Kong-Australia BIT in relation to the plain packaging legislation – and it was the reason why Philip Morris lost its case in 2015.[142] Australia argued that the Phillip Morris Group decided to restructure its investment in Australia and transfer its shares to its corporate entity in Hong Kong, PM Asia, after it had become aware of possible claims in relation to Australia's future plain packaging legislation and solely for the purpose of obtaining protection under the Hong Kong-Australia BIT if the plain packaging legislation came to pass.

The tribunal agreed with Australia, having regard to the political developments around the time of the restructuring, even though the legislation in question had not yet been passed. The tribunal explained that "there was no uncertainty about the Government's intention to introduce plain packaging as of that point. Accordingly, there was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would eventually be enacted, which would trigger a dispute".[143] On this basis, the tribunal held that the commencement of treaty arbitration by Phillip Morris was an abuse of process and dismissed the claim.

Is the claimant a qualifying investor with a qualifying investment?

Certain jurisdictional hurdles must be met in order for a company or an individual investor to be afforded protection under an investment treaty.

The two primary hurdles are the requirement that the party meet the definition of an 'investor' in the relevant treaty (i.e. be a 'qualifying investor') and the requirement that the party's assets in the Host State meet the definition of an 'investment' under the relevant treaty (i.e. be a 'qualifying investment'). These terms are more broadly defined than the typical narrow sense of the holder of shares or equity.

The broad definition of 'investor'

There is no general definition of an 'investor', but to qualify as an 'investor' an individual or entity will usually need to be a national of a state party to the investment treaty that is not the state against which the dispute is being brought (the Host State).

For companies, nationality is typically determined by the place of incorporation. It may suffice to simply have a holding company incorporated within the relevant jurisdiction, although the precise requirements will depend on the individual treaty and some require that the company have real economic activity in its home jurisdiction before it can be considered to be its 'investor' for the purposes of the treaty.

In the case of Australian companies with investments overseas, they must be incorporated in Australia and their asset(s) must be located in a state with which Australia has concluded an investment treaty. Or it can be the other way around if it is a foreign entity doing work or investing in Australia.

The broad definition of 'investment'

Whether there is a qualifying 'investment' again depends on the specific terms of the applicable treaty.

Today most treaties use a broad asset-based definition of 'investment' which is not limited to shares or debt instruments in an enterprise, but includes 'every kind of asset', be it tangible or intangible. This includes assets like a long-term contracts, licenses, permits, intellectual property rights and other properly rights like leases.

In some cases (in particular where an investment claim is brought before the International Centre for the Settlement of Investment Disputes or ICSID), additional criteria may apply, including that:

- the investor made a substantial contribution in money or kind to the Host State, for example in capital, know-how, resources or labour;
- the investment was made for a certain duration;
- the investor took on risks relating to the investment; and
- the investment contributes to the economic development in the Host State.

142 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.
143 Ibid, Award on Jurisdiction and Admissibility (17 December 2015) [566].

In addition to the requirements of a qualifying investor and investment, investment treaties may contain further conditions that could hinder a treaty claim. For example, some investment treaties require that the investment be made in accordance with local laws for it to be protected under the treaty. This requirement is increasingly being invoked by Host States to allege that an investment procured by fraud or corruption, or where the necessary licences had been obtained in violation of domestic laws, cannot be the subject of ISDS.

Overview of substantive protections

Investment treaties afford a range of substantive protections. The following are some of the most common protections that form the basis of investment treaty claims.

Expropriation

Investment treaties usually prohibit Host States from expropriating an investment without prompt, adequate and effective compensation.

Expropriation can be direct (in the form of nationalisation, formal transfer of title or outright seizure of the investor's assets) or indirect (in the form of one or a series of measures adopted by the Host State without formal transfer of title or seizure of assets but which, alone or in combination, reduce the economic value of the investment).

Increasingly investment treaties expressly prohibit indirect expropriation. Recent investment treaties negotiated by Australia specify that whether an indirect expropriation has occurred requires a case-by-case, fact-based inquiry that considers, among other factors:

- the economic impact of the government's action (although the fact that an action or series of related actions by a state party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an indirect expropriation has occurred);
- whether the government action breaches the government's prior binding written commitment to the investor, whether by contract, license or other legal document; and
- the character of the government action, including, its objective and whether the action is disproportionate to its public purpose.[144]

Fair and equitable treatment

Investment treaties usually obligate Host States to protect investors against unfair, arbitrary and discriminatory treatment. This obligation is commonly referred to as the obligation to afford fair and equitable treatment (**FET**).

As part of the FET obligation, Host States will often be prohibited from acting contrary to a commitment previously made by the state's government which gave rise to the investor's 'legitimate expectations'. This standard is commonly relied upon in treaty cases and may be breached when, for example, the Host State gave the investor a legitimate expectation that it would be allowed to proceed with a project (by, for example, providing specific assurances that the investor would be granted necessary permits) but then breached that expectation.

State assurances may be contained in an authorisation or approval, or in a contract or a statement by public officials, or they may be implied from the Host State's conduct, including where the Host State carries out certain administrative processes like an assessment of a project's environmental impacts.

National treatment and Most Favoured Nation treatment

Investment treaties commonly prohibit Host States from treating foreign investors in a way which is discriminatory or less favourable than treatment afforded to comparable domestic investors or investments, or investors or investments from third countries. These protections are referred to as the 'national treatment' and 'most favoured nation (**MFN**) treatment' obligations.

A MFN provision in an investment treaty may require the Host State to afford the investor from the other state party to the treaty certain protections even where such protections are not expressly provided for in that treaty.

This is the result of an interpretation of MFN clauses which allows foreign investors to rely on standards of protection contained in another treaty to which the Host State is a party (i.e. not the treaty between the Host State and the investor's home state), where such standards require more favourable treatment than that prescribed under the treaty with the investor's home state.

Whether such an argument is available will depend on the treaty pursuant to which a claim is brought. Where it is available, the investor will be able to benefit from an expanded breadth of applicable investment protections.

144 See e.g. Australia-Indonesia Comprehensive Economic Partnership Agreement, Chapter 14, Annexure 14-B.

Full protection and security

Investment treaties also commonly obligate Host States to provide 'full protection and security' (or 'FPS') to foreign investments.

The application of this obligation has divided investment tribunals and commentators. Traditionally, it has been interpreted as requiring Host States to exercise diligence and protect foreign investors from violence and physical harm caused by state actors and private parties.[145] On this interpretation, it is understood that the FPS standard is meant to protect "specifically the physical integrity of an investment against interference by use of force", and obligates the Host State to take "all measures of precaution to protect the investments of [the foreign investor] in its territory".[146]

However, other tribunals have interpreted the FPS standard more liberally to include an obligation to guarantee to foreign investors and investments not only physical but also legal and commercial security.[147] Some have even accepted that the FPS obligation may be breached even if no physical violence or damage occurs – e.g. if the Host State does not have a well-functioning system of courts and legal remedies available to the investor.[148]

Umbrella clause

Umbrella clauses oblige Host States to observe contractual undertakings and other obligations or commitments they have assumed towards foreign investors or with regard to foreign investments.

There is a divergence of views regarding the content of this obligation and a variety of interpretations have emerged in practice. On one extreme, umbrella clauses have been interpreted to require the Host State to carry out its contractual and other undertakings under domestic laws, and failing to do so may result not only in a breach of any contract with the foreign investor or a violation of domestic legislation, but also a breach of the relevant investment treaty.[149]

The above interpretation could result in contractual breaches being elevated to treaty breaches where the applicable investment treaty contains an umbrella clause.

However, a number of tribunals have expressly disagreed with this interpretation,[150] while others have suggested that contractual breaches will only be elevated to an investment treaty breach where the Host State has acted in a sovereign capacity (and not in a purely private, commercial capacity).[151]

The significance of umbrella clauses remains heavily debated and no consistent view has emerged so far. Ultimately the interpretation of the umbrella clause will depend on the language used in a particular treaty.

145 See e.g. *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* ICSID Case No ARB/87/3.

146 *Saluka Investments B.V. v The Czech Republic,* Partial Award of 17 March 2006 [483]-[484]; citing *American Manufacturing & Trading, Inc. (AMT) (USA) v. Republic of Zaire,* ICSID Case No ARB/93/1, Award of 21 February 1997 [6.05].

147 See e.g. *Chemtura Corporation v Canada*, Award of 2 August 2010 [266]; LG&E Energy Corp. and others v Argentina, ICSID Case No ARB/02/1, Decision on liability of 3 October 2006 [195].

148 See e.g. *Frontier Petroleum Services Ltd v The Czech Republic*, Award of 12 November 2010 [272]–[273].

149 See e.g. *Noble Ventures Inc v Romania, ICSID Case No.ARB/01/11, Award of 12 October 2005 [53]–[61].*

150 See e.g. *Oxus Gold v Uzbekistan*, Award of 17 December 2015 [371]; *Joy Mining Machinery Limited v Egypt,* ICSID Case No ARB/03/11, Award on Jurisdiction of 6 August 2004 [81].

151 See e.g. *CCMS Gas Transmission Company v Argentina,* ICSID Case No ARB/01/8, Award of 12 May 2005 [299]-[303].

Common defences and counterclaims by Host States

A claim brought by a foreign investor can and often is met with defences and counterclaims raised by the Host State.

Defences

Broadly speaking, Host State defences fall into three categories: jurisdictional or admissibility objections, defences under customary international law, and defences on the merits.

- **Jurisdictional and admissibility defences**. Host States may argue that the claimant is not a qualifying investor (e.g. because it was incorporated in a state party to the treaty after the dispute arose only to gain treaty protection), that it does not hold a qualifying investment (because the asset does not meet the treaty's definition of an 'investment'), or that the investment was procured illegally in breach of local laws or through corruption or fraudulent conduct.
- **Customary international law**. Under customary international law, Host States may contend that circumstances exist which preclude wrongfulness under international law of their treaty breaches. Examples of such defences include the defence of necessity (where the challenged measure was "the only way" to safeguard "an essential interest" of the Host State against some form of "grave and imminent peril"[152]), or force majeure (where the measure in question was introduced in response to an unforeseen event that was beyond the State's control and made it materially impossible for the Host State to comply with its treaty obligations[153]).
- **Defences on the merits**. A commonly invoked defence is the police powers doctrine which allowed Host States to rely on their inherent power to regulate in the public interest and to protect the safety of their people and public order. On this basis, a Host State might not be liable for expropriatory measures if they are the consequence of general regulation in the public interest which is necessary and legitimate to protect human life, safety or public order.[154]

States also increasingly rely on the concept of 'social license to operate'. This principle invokes the notion that investors must secure a level of community acceptance and approval to carry out their investment projects.

Host States raise the absence of a social licence in a variety of contexts. They may challenge the admissibility of a claim, arguing that the claimant cannot claim as against the Host State when it had failed to obtain local support for the project, which was the cause of its demise. Or they can rely on the absence of a social license to argue that the challenged measure was necessary and legitimate to protect the rights of local communities. Finally, the lack of a social licence has also been raised in the context of damages assessment. Tribunals can reduce the amount of damages to reflect the claimant's contributory negligence in failing to consult with local residents, which contributed to community opposition to the project.[155]

Counterclaims

Whether the Host State is permitted to bring a counterclaim in an investment treaty arbitration depends on the applicable treaty. Not every tribunal will have jurisdiction to hear a Host State counterclaim.

Where arbitral jurisdiction to hear counterclaims has been provided for under the relevant investment treaty, examples of Host State counterclaims have included:

- claims for environmental damage caused by the investment;[156] and
- claims based on alleged human rights violations committed by the claimant investor.[157]

Despite difficulties in bringing a successful counterclaim, they are becoming increasingly more common, and the evolution in treaty drafting in modern BITs and FTAs provides for new avenues for Host States to bring counterclaims by incorporating environment protection and corporate social responsibility requirements applicable to foreign investments.

152 International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) ('Draft Articles on Responsibility of States for Internationally Wrongful Acts') Article 25 (**Articles on State Responsibility**). There have been cases where the Host State argued that civil unrest in opposition to the investment gave rise to a state of necessity justifying the measures resulting in the alleged breach. See *South American Silver Limited v Bolivia*, PCA Case No 2013-15, Award of 22 November 2018.

153 Articles on State Responsibility, Article 23.

154 See e.g. *Chemtura Corporation v Canada*, Award of 2 August 2010 [266]; LG&E *Energy Corp. and others v Argentina*, ICSID Case No ARB/02/1, Decision on liability of 3 October 2006 [195]

155 *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA Case No 2012-2, Award of 15 March 2016; *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award of 30 November 2017.

156 See e.g. *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim of 11 August 2015; *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Ecuador's Counterclaims of 7 February 2017.

157 *Urbaser S.A and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentina* ICSID Case No ARB/07/26, Award of 8 December 2016.

Enforcement of investment treaty awards

Like awards issued in commercial arbitration, ISDS awards benefit from international conventions which govern the recognition and enforcement of awards in various jurisdictions around the world. The two most important conventions include:

- the 1965 Convention on the Settlement of Disputes between States and Nationals of Other States (the **ICSID Convention**) (governing the enforcement of ICSID awards); and
- the New York Convention (governing the enforcement of non-ICSID awards).

The recognition and enforcement of ICSID awards is governed by Part IV of the IAA. Non-ICSID awards are enforced under Part II of the IAA.

With the exception of some States, voluntary compliance with awards is not uncommon and often no enforcement proceedings are necessary.

Under the ICSID Convention, contracting states are obliged to recognise an ICSID award as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that state.[158] In order to seek recognition of an ICSID award in an ICSID Convention state, all that the successful investor must do is to furnish to the competent court (in Australia a state or territory Supreme Court or the Federal Court of Australia[159]) a copy of the award certified by the Secretary-General of ICSID.[160]

Contrary to recognition and enforcement, execution is governed by national laws concerning execution of judgments,[161] subject to the application of national laws relating to foreign state immunity.[162]

Because ISDS awards are rendered against states, recognition and enforcement proceedings will often be met by sovereign immunity defences raised by respondent states. Sovereign award debtors may contend that the enforcement court lacks subject matter jurisdiction against states, or that its property is protected against execution.

The interaction between sovereign immunity laws and enforcement and recognition regimes is a complex area of law which was most recently dealt with by the Federal Court of Australia in a case against the Kingdom of Spain, where the Full Court of the Federal Court of Australia held that sovereign immunity cannot be relied upon to prevent a foreign investor from seeking recognition of an ICSID award.[163]

The Full Court held that Article 54(2) of the ICSID Convention distinguishes between 'recognition proceedings' and 'enforcement proceedings' and that the 'execution' of an award in Article 55 of the Convention (which provides that nothing in Article 54 shall derogate from the laws of state immunity) has no application to 'recognition proceedings'. According to the Full Court, Spain and other ICSID Convention contracting states cannot resist 'recognition' of awards by pleading foreign state immunity. However, the Full Court did not decide whether foreign states are immune from the subsequent steps of 'enforcement' and/or 'execution' under Article 55 of the ICSID Convention.

In March 2022, the High Court of Australia granted Spain special leave to appeal the Federal Court decision.[164] Spain argued that the mere act of becoming a party to the ICSID Convention does not amount to a waiver of immunity, as it is not a sufficiently clear and unambiguous act, which is required for immunity to be waived under the FSIA. Based on a proper construction of the ICSID Convention, Spain also argued that Article 55 preserves state immunity from the process for recognition and enforcement in Article 54. The High Court appeal is expected to be heard in the second half of 2022.

The process for seeking recognition and enforcement of non-ICSID awards is the same as that discussed in Chapter 6 of this Guide in regards to commercial arbitration.

158 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (**ICSID Convention**), Article 54(1).
159 IAA, Section 35.
160 ICSID Convention, Article 54(2).
161 ICSID Convention, Article 54(3).
162 ICSID Convention, Article 55.
163 *Kingdom of Spain v Infrastructure Services Luxembourg* S.à.r.l. [2021] FCAFC 3; *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157.
164 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l* [2022] HCATrans 039.

Annexure 1: Model arbitration clauses

ACICA

Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be [Sydney/ Melbourne/Perth/Brisbane/Adelaide], Australia [or choose another city]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three, or delete this sentence and rely on Article 11 of the ACICA Arbitration Rules].

RI

Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, Resolution Institute Arbitration Rules.

Unless the parties agree upon an arbitrator, either party may request a nomination from the Chair of Resolution Institute.

HKIAC

Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (**HKIAC**) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

The law of this arbitration clause shall be ... (Hong Kong law). *

The seat of arbitration shall be ... (Hong Kong).

The number of arbitrators shall be ... (one or three).
The arbitration proceedings shall be conducted in ... (insert language).

SIAC

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (**SIAC**) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (**SIAC Rules**) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].*

The Tribunal shall consist of _____** arbitrator(s).

The language of the arbitration shall be _____."

LCIA

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ]."

ICC

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

Annexure 2: Comparison of arbitration institutional rules

	ACICA Rules 2021	RI Rules 2020	HKIAC Rules 2018	SIAC Rules 2016	LCIA Rules 2020	ICC Rules 2021
Seat of arbitration	If the parties cannot agree, the seat is Sydney, Australia (r 27).	If the parties cannot agree, the seat is determined by the arbitrator having regard to the circumstances of the case, including by reason of convenience (r 18).	If the parties cannot agree, the seat is Hong Kong unless the Tribunal determines that another seat is more appropriate, having regard to the circumstances of the case (r 14).	If the parties cannot agree, the seat is determined by the Tribunal, having regard to the circumstances of the case (r 21).	If the parties cannot agree, the seat is London, England unless the Tribunal considers that another seat is more appropriate (r 16).	If the parties cannot agree, the seat is determined by the ICC Court (r 18).
Language	Unless otherwise agreed by the parties, the language is determined by the Tribunal (r 28).	Unless otherwise agreed by the parties, the language is English (r 19).	Unless otherwise agreed by the parties, the language is determined by the Tribunal (r 15).	Unless otherwise agreed by the parties, the language is determined by the Tribunal (r 22).	Unless otherwise agreed by the parties in writing, the language is the prevailing language of the arbitration agreement or determined by the LCIA Court if the arbitration agreement is written in more than one language of equal standing (r 17).	Unless otherwise agreed by the parties, the language is determined by the Tribunal, having regard to all relevant circumstances including the language of the contract (r 20).
Method of commencing arbitration	Party initiating arbitration submits a Notice of Arbitration to ACICA and the respondent(s) and pays the registration fee (r 6).	Party initiating arbitration submits a written notice to the respondent (r 3).	Party initiating arbitration submits a Notice of Arbitration to HKIAC and the respondent(s) (r 4).	Party initiating arbitration submits a Notice of Arbitration to the Registrar of the Court of Arbitration of SIAC and the respondent(s) (r 3).	Party initiating arbitration submits a written request for arbitration to the Registrar of the LCIA Court and the respondent(s) (r 1).	Party initiating arbitration submits a Request for Arbitration to the ICC Secretariat, and the ICC Secretariat will notify the respondent(s) (r 4).
Number of arbitrators	If the parties cannot agree, ACICA determines the number of arbitrators taking into account all relevant circumstances (r 11).	Dispute decided by one arbitrator, unless the parties otherwise agree (r 7).	If parties have not agreed, HKIAC determines whether the case is referred to a sole arbitrator or three arbitrators, taking into account the circumstances of the case (r 6).	Dispute decided by one arbitrator, unless parties otherwise agree or it appears the Registrar that the circumstances warrant the appointment of three arbitrators (r 9).	Dispute decided by a sole arbitrator, unless parties otherwise agree in writing or the LICA Court determines that three arbitrators is more appropriate, or exceptionally more than three arbitrators (r 5.8).	Dispute decided by a sole arbitrator or three arbitrators. If parties cannot agree, the ICC Court will appoint a sole arbitrator except where it decides that the dispute warrants appointment of three arbitrators (r 12).
Appointment of the arbitrator(s)	If a sole arbitrator, parties can agree or ACICA appoints the arbitrator if there is no agreement (r 12). If three arbitrators, each party nominates one arbitrator and the two arbitrators nominate a third arbitrator, who will act as Chairperson of the tribunal (r 13).	If the parties cannot agree, the arbitrator is the nominee of the Resolution Institute (r 8).	If a sole arbitrator, parties can agree or HKIAC appoints the arbitrator if there is no agreement (r 7). If three arbitrators, each party nominates one arbitrator and the two arbitrators appointed designate a third arbitrator, and HKIAC shall appoint any arbitrator if either of the parties or the two appointed arbitrators fail to do so (r 8).	If a sole arbitrator, parties can jointly agree or the President of SIAC appoints if there is no agreement (r 10). If three arbitrators, each party nominates an arbitrator and the third arbitrator is appointed by the President of SIAC if not otherwise agreed (r 11).	The LCIA Court appoints the arbitrator(s), but will take into account any written agreement or nomination by the parties (r 5.9).	If a sole arbitrator, parties can agree or the ICC Court appoints the arbitrator if there is no agreement (r 12.3). If three arbitrators, each party nominates one arbitrator and the ICC Court appoints the third arbitrator who will act as president of the Tribunal, except where the parties have agreed upon another procedure (r 12.4).

	ACICA Rules 2021	RI Rules 2020	HKIAC Rules 2018	SIAC Rules 2016	LCIA Rules 2020	ICC Rules 2021
Challenges to jurisdiction of the Tribunal	The Tribunal has the power to rule on objections that it does not have jurisdiction (r 32).	If seated in Australia or New Zealand, the applicable legislation applies, otherwise the arbitrator has power to rule on their own jurisdiction (r 23).	The Tribunal has the power to rule on its own jurisdiction (r 19). If the Tribunal is not constituted, HKIAC can determine whether there is prima facie an arbitration agreement under the rules or the arbitration has been properly commenced (r 19).	The Tribunal has the power to rule on its own jurisdiction (r 28). If the Tribunal is not constituted, the Registrar shall refer a challenge to the validity of the arbitration agreement or competence of SIAC to the Court of Arbitration of SIAC, which considers whether it is prima facie satisfied that the arbitration should proceed (r 28).	The Tribunal has the power to rule on its own jurisdiction (r 23).	The Tribunal has the power to rule on its own jurisdiction but the Secretary General may refer the matter to the ICC Court for determination (r 6.9).
Confidentiality and privacy	Unless the parties otherwise agree in writing, all hearings take place in private (r 26.1). The parties, the tribunal and ACICA shall treat the award, all materials created for the purpose of the arbitration and documents produced by another party in the proceedings as confidential and will not disclose this information except in specific circumstances (r 26.2).	If seated in Australia or New Zealand, the applicable legislation applies, otherwise the parties, the arbitrator and RI undertake to keep confidential all materials related to the arbitration, except in specific circumstances (r 46).	Unless the parties otherwise agree, no party or party representative may disclose any information relating to the arbitration under the arbitration agreement or the award or emergency decision except in specific circumstances (r 45.1). Confidentiality rules also apply to the Tribunal, an emergency arbitrator, experts, witnesses, tribunal secretaries and the HKIAC (r 45.2).	Unless the parties otherwise agree, any party involved in the arbitration shall at all times treat all matters relating to the proceedings and the award as confidential (r 39.1). All parties shall not disclose any matters relating to the proceedings and the award to a third party without prior written consent of the parties, except in secific circumstances (r 39.2).	The parties undertake to keep confidential all awards, materials created for the purpose of the arbitration and all other documents produced by the other party for the arbitration, except in specific circumstances (r 30.1). Confidentiality rules also apply to the Tribunal, any tribunal secretary and any expert (r 30.2). LCIA will only publish any award or part of an award with the prior written consent of all parties and the Tribunal (r 30.3).	No provision on confidentiality of information or materials relating to the arbitration. The ICC Practice Note on the Conduct of the Arbitration under the ICC Rules of Arbitration provides that un-redacted awards may be published within two years unless the parties object to the publication or require the award be anonymised.
Procedure	Subject to the Rules, the Tribunal can conduct the arbitration in such manner as it considers appropriate, provided the parties are treated equally and each party is given a reasonable opportunity of presenting its case (r 25.1). The Tribunal shall adopt suitable procedures to avoid unnecessary delay or expense, having regard to the complexity of the issues and amount in dispute (s 25.2).	The arbitrator can conduct the arbitration in such manner it considers appropriate, provided that the parties are to be treated equally and each party is given a reasonable opportunity to know the case to be presented by every other party and to present its case (r 17.1). The arbitrator, in exercising their discretion, shall conduct the arbitration to avoid unnecessary delay and expense, and provide a fair and efficient process for resolving the parties' dispute (r 17.1).	Subject to the Rules, the Tribunal will adopt suitable procedures for the conduct of the arbitration to avoid unnecessary delay or expense, having regard to the complexity of the issues, amount in dispute and effective use of technology, ensuring equality of the parties and affording the parties a reasonable opportunity to present their case (r 13).	The Tribunal can conduct the arbitration in a manner it considered appropriate after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute (r 19).	The Tribunal has discretion to discharge its general duties to act fairly and impartially as between all parties, giving each a reasonable opportunity to present its case and adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense (r 14).	The Tribunal can adopt procedural measures as it considers appropriate, provided they are not contrary to any agreement of the parties, making every effort to conduct the arbitration in an expeditious and cost-effective manner (r 22).

	ACICA Rules 2021	RI Rules 2020	HKIAC Rules 2018	SIAC Rules 2016	LCIA Rules 2020	ICC Rules 2021
Multi-party disputes (joinder, consolidation, concurrent hearings)	Provides for joinder where joining party is bound by the same arbitration agreement as the existing parties, or all parties expressly agree (r 17). Provides for consolidation of multiple arbitrations pending under the ACICA Rules, subject to certain requirements (r 16). Provides for multiple arbitrations to be conducted at the same time, one immediately after the other or suspend any arbitration until after determination of another arbitration where the same tribunal is constituted in each arbitration and a common question of fact or law arises in all arbitrations (r 19). Provides for claims arising out of or in connection with more than one contract to be made in a single arbitration, subject to certain requirements (r 18).	No provision on joinder or multi-party disputes. Provides for consolidation or concurrent hearing where a further dispute arises under the same contract and under the RI Rules (rr 22.3, 22.4).	Provides for joinder where joining party is bound by an arbitration agreement under the HKIAC Rules, or all parties expressly agree (r 27). Provides for consolidation where parties agree to consolidate, all claims are made under the same arbitration agreement, or a common question of law or fact arises in all the arbitrations or the rights to relief are in respect of the same transaction and the arbitration agreements are compatible (r 28). Provides for concurrent proceedings where the same Tribunal is constituted in each arbitration, and a common question of law or fact arises in all the arbitrations (r 30). Provides for claims arising out of or in connection with more than one contract to be made in a single arbitration, subject to certain requirements (r 29).	Provides for joinder where joining party is prima facie bound by the arbitration agreement or all parties have consented to the joinder (r 7). Provides for consolidation where all parties agree, all claims in the arbitration are made under the same arbitration agreement, or the arbitration agreements are compatible and either the disputes arise out of the same legal relationship(s), out of contacts consisting of a principal contract and its ancillary contract(s) or out of the same transaction(s) (r 8). Provides for claims arising out of or in connection with more than one contract to be consolidated into one arbitration (r 6).	Provides that the Tribunal can allow third persons to be joined to the arbitration where all parties have expressly agreed to such joinder (r 22.1(x)). Provides for consolidation if the parties all agree or the arbitrations are all subject to the LCIA Rules, commenced under the same or compatible arbitration agreements, and are either between the same disputing parties or arising out of the same transaction, provided that no Tribunal has been formed or, if already formed, the Tribunals are composed of the same arbitrator(s) (r 22A). Provides for concurrent arbitrations where arbitrations have already been constituted with the same Tribunal, are all subject to the LCIA Rules, commenced under the same or compatible arbitration agreements and either between the same disputing parties or arising out of the same transaction (r 22A).	Provides for joinder after constitution of the Tribunal where all parties agree or joining party accepts constitution of the Tribunal and agrees to the terms of reference and the Tribunal decides to grant the request for joinder (r 7). The Tribunal will take into account all relevant circumstances, including whether the Tribunal has prima facie jurisdiction over the additional party, the timing of the request, possible conflicts of interest and impact of joinder on the procedure. Provides for consolidation where the parties have agreed, all of the claims are made under the same arbitration agreements or the claims are not under the same arbitration agreements but the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the ICC Court finds the arbitration agreements to be compatible (r 10). Provides for claims arising out of or in connection with more than one contract to be made in a single arbitration, irrespective of whether the claims are made under one or more arbitration agreement under the ICC Rules (r 9).

	ACICA Rules 2021	RI Rules 2020	HKIAC Rules 2018	SIAC Rules 2016	LCIA Rules 2020	ICC Rules 2021
Emergency or expedited procedure	Provides for expedited procedure in accordance with the ACICA Expedited Rules if the amount in dispute is under AU $5,000,000, the parties agree, or it is a case of exceptional urgency (r 8).	No provision on emergency or expedited procedure.	Provides for expedited procedure if the amount in dispute is under the amount set by the HKIAC (HK $25,000,000 as at October 2022), the parties agree or it is a case of exceptional urgency (r 42).	Provides for expedited procedure if amount in dispute is under S $6,000.000, the parties agree or it is a case of exceptional urgency (r 5).	Provides for expedited procedure and appointment of an emergency arbitrator if approved by the LCIA Court (rr 9A, 9B).	Provides for emergency arbitration upon application of a party in accordance with the ICC Emergency Arbitrator Rules (r 29). Provides for expedited procedure if the amount in dispute is under US $2,000,000 if the arbitration agreement was concluded between 1 March 2017 and 1 January 2021, or under US $3,000,000 if the arbitration agreement was concluded after 1 January 2021, or the parties so agree (r 30).
Time limits on awards	No limit on time for making an award.	The arbitrator must use its best endeavours to deliver all awards within 365 days of its appointment, and provide reasons to the Resolution Institute and the parties if there is delay (r 16).	No limit on time for making an award.	The Tribunal must submit a draft award to the Registrar for review within 45 days from the date on which the Tribunal declared the proceedings closed (r 32.3).	The Tribunal will seek to make its final award as soon as reasonably possible and will endeavour to do so no later than three months following last submission from the parties, in accordance with a timetable notified to the parties and Registrar as soon as possible (r 15.10).	The Tribunal must make its final award within six months from the date of signature of the Terms of Reference (r 31.1). The ICC Court may fix a different time limit or extend the time limit following a request from the Tribunal (r 31.2).
Review of the award	No review of the award.	No review of the award.	No review of the award.	The Registrar can suggest modifications as to the form of the award and draw the Tribunal's attention to points of substance (r 32.3).	No review of the award.	The Tribunal must submit a draft of the award to the ICC Court, which approves the form of the award and may draw the Tribunal's attention to points of substance (r 34).
Costs						
Administrative fees	Costs are outlined in the Schedule of Fees effective 1 April 2021, including fees for registration, consolidation, joinder, emergency arbitrator, arbitrator replacement and cancellation.	Registration fee is AU $550.00 (excluding GST).	Costs are determined according to an hourly rate outlined in Schedule 2 or schedule of fees based on sum in dispute outlined in Schedule 3, depending on the parties' agreement (r 10).	Costs are outlined in the Schedule of Fees effective 1 August 2016, including fees for case filing, administration, arbitrator(s) appointment and assessment.	Costs are determined by the LCIA Court in accordance with the Schedule of Costs effective 1 October 2020, including fees for registration and hourly rates for the Secretariat of the LCIA and the LCIA Court (r 28.1).	Costs are determined by the ICC Court and outlined in schedule of fees, including fees for filing the arbitration, arbitrator's fees and administrative expenses (r 38).
Security for costs	The Tribunal can order a party provide security for costs as a condition for granting an interim measure (r 37.4).	No provision for security of costs.	The Tribunal can make an order requiring a party to provide security for costs (r 24).	The Tribunal can make an order requiring a party to provide security for all or any amount in dispute (r 27(j)).	The Tribunal can make an order requiring a party provide security for costs as a condition for granting an interim measure (r 25.2).	The Tribunal can make an order requiring a party provide security for costs as a condition for granting an interim measure (r 28.1).

	ACICA Rules 2021	RI Rules 2020	HKIAC Rules 2018	SIAC Rules 2016	LCIA Rules 2020	ICC Rules 2021
Costs (continued)						
Decision on costs of arbitration	Costs are fixed by the Tribunal either in the final award, in a separate award on agreed terms, or an order for the termination of the arbitration (r 51.1). In principle, the costs of the arbitration shall be borne by the unsuccessful party but the Tribunal may apportion costs as it determines reasonable (r 51.3).	Costs are at the discretion of the arbitrator (r 40).	Costs are determined by the Tribunal (r 34).	Costs are determined by the Tribunal, unless otherwise agreed by the parties (r 35).	Costs are determined by the LCIA Court in accordance with the Schedule of Costs (r 28.1). The Tribunal has the power to decide by an order or award that all or part of the legal or other expenses incurred by a party be paid by another party (r 28). In principle, the costs of the arbitration and legal costs should reflect the parties' relative success and failure in the award or arbitration or under different issues, except where the Tribunal considers it would be inappropriate (r 28.4).	Costs are determined by the ICC Court, taking into account circumstances it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner (r 38).
Third party funding	Provides for disclosure of third party funding (r 54).	No provision.	Provides for disclosure of third party funding (r 44).	No provision.	No provision.	Provides for disclosure of third party funding (r 11.7).

Authors

Nastasja Suhadolnik
Partner, Head of Arbitration

+61 3 9672 3176
+61 405 141 942
nastasja.suhadolnik@corrs.com.au

Lucy Goldsmith
Special Counsel

+61 3 9672 3290
+61 405 241 151
lucy.goldsmith@corrs.com.au

Alexandra Einfeld
Senior Associate

+61 2 9210 6110
+61 404 118 208
alexandra.einfeld@corrs.com.au

Matthew Singer
Associate

+61 7 3228 9562
+61 439 337 618
matthew.singer@corrs.com.au

Nicholas Garbas
Lawyer

+61 3 9672 3542
+61 422 106 098
nicholas.garbas@corrs.com.au

Michael Murdocca
Lawyer

+61 2 9210 6338
+61 425 951 711
michael.murdocca@corrs.com.au

Harrison Frith
Law Graduate

+61 3 9672 3478
+61 432 830 048
harrison.frith@corrs.com.au

Matthew Muir
Partner

+61 7 3228 9816
+61 407 826 224
matthew.muir@corrs.com.au

Cara North
Special Counsel

+61 3 9672 3059
+61 409 690 210
cara.north@corrs.com.au

Mariam Francis
Associate

+61 3 9672 3439
+61 413 490 859
mariam.francis@corrs.com.au

Betty Choi
Lawyer

+61 3 9672 3047
+61 497 788 766
betty.choi@corrs.com.au

Jonathan Hohl
Lawyer

+61 7 3228 9472
+61 466 847 818
jonathan.hohl@corrs.com.au

Eleanor Clifford
Law Graduate

+61 3 9672 3593
+61 466 723 249
eleanor.clifford@corrs.com.au

James Ye
Law Graduate

+61 2 9210 6321
+61 452 068 113
james.ye@corrs.com.au

Our arbitration team

Nastasja Suhadolnik

Partner, Head of Arbitration

+61 3 9672 3176
+61 405 141 942
nastasja.suhadolnik@corrs.com.au

Andrew Stephenson

Partner, Head of Projects

+61 3 9672 3358
+61 498 980 100
andrew.stephenson@corrs.com.au

Mark Wilks

Partner, Head of Commercial Litigation

+61 2 9210 6159
+61 419 387 288
mark.wilks@corrs.com.au

David Anthony

Partner

+61 2 9210 6801
+61 420 427 436
david.anthony@corrs.com.au

Joseph Barbaro

Partner

+61 3 9672 3052
+61 417 154 612
joseph.barbaro@corrs.com.au

Rod Dann

Partner

+61 7 3228 9434
+61 418 731 976
rod.dann@corrs.com.au

Ben Davidson

Partner

+61 3 9672 3500
+61 418 102 459
ben.davidson@corrs.com.au

Michael Earwaker

Partner

+61 2 9210 6309
+61 428 333 837
michael.earwaker@corrs.com.au

Chris Horsfall

Partner

+61 3 9672 3326
+61 405 035 376
chris.horsfall@corrs.com.au

Michael Kimmins

Partner

+61 7 3228 9377
+61 438 770 732
michael.kimmins@corrs.com.au

Rachael King

Partner

+61 8 9460 1627
+61 424 616 835
rachael.king@corrs.com.au

Carla Mills

Partner

+61 2 9210 6119
+61 449 562 089
carla.mills@corrs.com.au

Matthew Muir
Partner

+61 7 3228 9816
+61 407 826 224
matthew.muir@corrs.com.au

Joshua Paffey
Partner

+61 7 3228 9490
+61 437 623 559
joshua.paffey@corrs.com.au

Chris Ryder
Partner

+61 8 9460 1606
+61 412 555 388
chris.ryder@corrs.com.au

Todd Spiller
Partner

+61 7 3228 9758
+61 452 234 762
todd.spiller@corrs.com.au

Callum Strike
Partner

+61 8 9460 1619
+61 429 195 368
callum.strike@corrs.com.au

Kirsty Sutherland
Partner

+61 8 9460 1620
+61 418 316 527
kirsty.sutherland@corrs.com.au

CORRS
CHAMBERS
WESTGARTH

Sydney
Melbourne
Brisbane
Perth
Port Moresby

corrs.com.au