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Practical cross-border insights into investor-state arbitration law

Investor-State Arbitration 2023

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1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your jurisdiction ratified?

Currently, Australia has 15 bilateral investment treaties (**BITs**) 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 free trade agreements (**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 to 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).

On 4 February 2016, Australia signed the Trans-Pacific Partnership Agreement (**TPP**), alongside Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam. After the United States indicated its intention to withdraw from the TPP in January 2017, Australia participated in renegotiating the agreement and the CPTPP entered into force on 30 December 2018.

In January 2022, Australia also became party to the Regional Comprehensive Economic Partnership Agreement (**RCEP**) (with: Brunei Darussalam; Cambodia; China; Japan; Laos; Malaysia; New Zealand; Republic of Korea; Singapore; Thailand; and Vietnam).

1.2 What bilateral and multilateral treaties and trade agreements has your jurisdiction signed and not yet ratified? Why have they not yet been ratified?

On 17 December 2021, Australia and the United Kingdom signed the Australia–United Kingdom Free Trade Agreement (**Australia–UK FTA**), a comprehensive FTA covering a range of matters including trade, investment and competition. The Australia–UK FTA was tabled in Australia's Parliament on 8 February 2022, and ratification is expected to occur in 2022. The Australia–UK FTA does not provide for an investor-state dispute settlement (**ISDS**) mechanism, but there are provisions for state-to-state dispute resolution.

On 2 April 2022, Australia and India signed the Australia–India Economic Cooperation and Trade Agreement (**AI ECTA**), an interim FTA focused on trade liberalisation for goods and services, and ratification is expected to occur in the second half of 2022. AI ECTA does not provide for an ISDS mechanism. However, Australia and India have committed to negotiate a Comprehensive Economic Cooperation Agreement by the end of 2022. Presently, it is not known whether AI ECTA will contain an ISDS mechanism.

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Australia has a model Investment Promotion and Protection Agreement (**IPPA**) text. The IPPA provides a clear set of obligations relating to the promotion and protection of investments and takes full account of each party's laws and investment policies. The model IPPA text was adopted, for example, in the Australia–Egypt IPPA, the Australia–Uruguay IPPA and the Australia–Lithuania IPPA.

The Australian Government is conducting a review of its older BITs to align them with its modern treaties. The review commenced in July 2020 and is set to unfold over a four-year period. The Australian Government has received several submissions and continues to welcome submissions for the purposes of its review. The Government is considering a range of options in respect of each of its existing treaties including a full renegotiation, an amendment, the issue of unilateral or joint interpretative notes, and the replacement of the BIT with an FTA chapter. A new model BIT may also be considered.

1.4 Does your jurisdiction publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Presently, Australia does not appear to publish diplomatic notes with other states. It is noted, however, that the Australian Government is considering issuing unilateral or joint interpretative notes as regards existing treaties.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Australian Government has published high-level commentaries concerning the intended meaning of a small number of

FTAs. For example, the Australian Government has published Australian Guides to the AANZFTA, Australia–United States Free Trade Agreement (**AUSFTA**) and Thailand–Australia Free Trade Agreement, which outline the obligations contained in the FTAs and provide a general commentary on their contents.

2 Legal Frameworks

2.1 Is your jurisdiction a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Australia is a party to the New York Convention, the Washington Convention, and the Mauritius Convention.

Australia ratified the New York Convention on 26 March 1975 and it came into force on 24 June 1975. The *International Arbitration Act 1974* (Cth) (**IAA**) gives effect to Australia's obligations under the New York Convention (s. 2D(d), Schedule 1).

Australia ratified the Washington Convention on 2 May 1991 and it came into force on 1 June 1991. The IAA gives effect to Australia's obligations under the Washington Convention (s. 2D(f), Schedule 3).

Australia ratified the Mauritius Convention on 17 September 2020 and it came into force on 17 March 2021.

In October 2018, the IAA was amended by the *Civil Law and Justice Legislation Amendment Act 2018* (Cth) to implement aspects of the Mauritius Convention. Specifically, s. 22(3) of the Act carves out prohibitions on the disclosure of confidential information where the *United Nations Commission on International Trade Law* (**UNCITRAL**) *Rules on Transparency in Treaty-based Investor-State Arbitration* (**Transparency Rules**) apply to an arbitration. The parties to arbitral proceedings and the arbitral tribunal itself are no longer precluded from disclosing confidential information in relation to an arbitration subject to the Transparency Rules.

2.2 Does your jurisdiction also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The foreign investment legislative framework in Australia comprises the *Foreign Acquisitions and Takeovers Act 1975* (**FATA**), the *Foreign Acquisitions Takeovers Fees Impositions Act 2015* and their regulations. This legislative framework is supplemented by Australia's Foreign Investment Policy (**Policy**) and guidance notes. The substantive provisions of FATA and the Policy address the formal admission of foreign investment (discussed in question 2.3 below).

Effective on 1 January 2021, Australia's foreign investment regime was amended by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth) and *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020* (Cth). The changes affect companies seeking foreign investment approval, including for investments in a "national security business" (such as a business involved in or connected with a "critical infrastructure asset").

FATA continues to be refined through amendment, including the *Foreign Acquisitions and Takeovers Amendment Regulations 2022* (Cth) which commenced on 1 April 2022. This amendment changed certain aspects of the foreign investment framework, including definitions of "moneylending agreement", and streamlined the processing of less sensitive types of investment.

Consistent with the balance of the investment market in Australia, foreign investors are regulated by the Australian Securities and Investments Commission (**ASIC**). ASIC is an independent Commonwealth Government body responsible for (among other things) registering and ensuring companies, schemes and various individuals and entities meet their obligations under the *Corporations Act 2001*. Additionally, all dealings must be conducted in accordance with the *Corporations Act 2001* with regard to: insider trading; market manipulation; disclosure of shareholdings; takeovers; acquisitions; and capital raisings.

FATA (and its associated regulations) does not contain dispute resolution provisions.

2.3 Does your jurisdiction require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Under FATA, foreign investment must receive approval from the Commonwealth Government's Treasurer in certain circumstances that involve a "foreign person" as defined by s. 4 of FATA.

A foreign person includes:

- a natural person who is not ordinarily a resident in Australia;
- a corporation in which one foreign person (or two or more foreign persons together) or a foreign government holds a substantial interest; or
- the trustee of a trust estate in which one foreign person or corporation (or two or more foreign persons or corporations together) holds a substantial interest.

Whether a proposed foreign investment requires approval will depend upon the type of investor, the type of investment, the industry sector and also the value of the proposed investment. For example, there is greater scrutiny on investments by "foreign government investors" (as compared to foreign individuals or entities). Typical types of transactions requiring approval include real estate, agricultural, banking, or business investments, and investments impacting upon Australia's national security.

In deciding whether to approve a proposed foreign investment, the Treasurer is advised by the Foreign Investment Review Board (**FIRB**).

FATA itself does not prescribe criteria for approving foreign investment proposals. Rather, FATA empowers the Treasurer to veto foreign investment proposals that are contrary to the national interest (FATA, s. 67). The Policy is instructive as regards what is relevant to the national interest. The Treasurer and FIRB start from the general presumption that foreign investment is beneficial (Policy, p. 7). Matters that are relevant to the national interest include, for example, competition, impact on the economy, the investor's character and national security.

FATA also requires compulsory notification of certain business activities that are considered to be significant (or notifiable) actions. One of the tests used is a monetary screening threshold test (indexed annually). The threshold is met when either the amount paid for an interest, or the value of the entity or the asset, exceeds the threshold amount (depending on the type of transaction).

Other business activities are considered voluntary notice activities (i.e. the foreign person can choose to notify but does not have to). The benefit of giving voluntary notice is that if the Treasurer issues a notice of "no objection", the Treasurer can no longer make orders in relation to the proposal.

Certain persons and proposals are exempt from the notification requirements; however, as strict penalties apply for breaches of FATA, foreign investors in doubt should seek legal advice.

As at January 2022, notification and review is mandatory regarding certain investments that may concern national security.

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

The approach of Australia's courts to treaty interpretation is, subject to contrary legislation, generally consistent with the approach in international law reflected by arts 31, 32 and 33 of the *Vienna Convention on the Law of Treaties* (**VCLT**).

In *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157, the Federal Court referred to the VCLT as the "proper approach to the construction of an international convention or treaty", noting that primacy must be given to the written text of the treaty while also considering its context, object and purpose. The Federal Court stated that "treaties should be interpreted in a more liberal manner than ordinarily adopted by the court construing exclusively domestic legislation" (paragraph [84]). The Court referred to the testimonium (or formal words of conclusion) at the end of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* in its interpretation as forming part of the context of the convention, in reference to art. 31(2) of the VCLT (paragraph [87]).

Further notable cases include:

- *Wells Fargo Trust Company, National Association (as owner trustee) v VB Leaseco Pty Ltd (administrators appointed)* [2022] HCA 8: the High Court considered the meaning of the *Convention on International Interests in Mobile Equipment* and its *Protocol on Matters Specific to Aircraft Equipment*. The High Court applied the "applicable principles of interpretation", referring to art. 31 of VCLT, and stated that the operation of the Convention and Protocol were best understood by reference to the Official Commentary (paragraph [16]).
- In *Macoun v. Commissioner of Taxation* (2015) 257 CLR 519, the High Court of Australia determined that the *Convention on the Privileges and Immunities of the Specialized Agencies* did not require Australia to refrain from taxing the pension entitlements of former employees of certain specialised international agencies. Consistent with the VCLT, the Court first examined the ordinary meaning of the relevant words, then considered the *travaux préparatoires*, and finally considered the practice of parties to the Convention as reflected in international jurisprudence (paragraphs [76]–[82]). The Court's review of state practices was a significant factor in its decision. In this way, the High Court proved to be more receptive to extrinsic materials in aid of treaty interpretation than it had been previously, when it had found that subsequent materials (although relevant under the VCLT) cannot alter the meaning ascertained under the ordinary principles of Australian statutory interpretation (*Maloney v R* (2013) 252 CLR 168, 198–9 (Hayne J)).
- *Tech Mahindra Limited v. Commissioner of Taxation* [2015] FCA 1082: when interpreting the *Indian Double Taxation Agreement*, the Full Federal Court noted that India was not a party to the VCLT, but held that, as the VCLT is reflective of customary international law, the rules of interpretation codified by arts 31 and 32 of the VCLT applied to the construction of the Agreement (paragraph [53]). Further, the Court emphasised that where Parliament had adopted the exact text of a treaty into domestic legislation, it can be assumed that Parliament intended to fulfil its international obligations. Accordingly, it is appropriate to interpret such legislation in accordance with the VCLT (paragraph [51]).
- *Minister for Home Affairs v. Zentai* (2012) 246 CLR 213: the High Court considered Hungary's request for the extradition of the respondent to face questioning for an alleged war crime in 1944. The issue before the High Court was the interpretation of the *Australia-Hungary Extradition Treaty*, which had been incorporated into domestic law. Having ascertained the object and purpose of the treaty, the majority of the Court found in favour of a strict textual interpretation. The Chief Justice remarked that the VCLT rules of interpretation were "generally consistent" with Australian common law principles on treaty interpretation, which require treaties to be construed "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation" (paragraph [19]).

3.2 Has your jurisdiction indicated its policy with regard to investor-state arbitration?

The current Australian Government's policy is to consider ISDS provisions on a case-by-case basis. Recent trade deals reflect a policy position in favour of such a mechanism as ISDS provisions were included in the Australia–Hong Kong FTA, the Indonesia–Australia CEPA and the Peru–Australia FTA. However, it is relevant to note that ISDS provisions have not been included in the RCEP or two FTAs recently signed by Australia (the AI ECTA and the Australia–UK FTA).

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc., addressed or intended to be addressed in your jurisdiction's treaties?

None of Australia's current treaties contain anti-corruption provisions save for the CPTPP, which contains provisions that permit a state taking measures necessary to eliminate bribery and corruption in international trade, and the recently signed Australia–UK FTA, which contains a chapter on transparency and anti-corruption.

Australia's more recent FTAs:

- recognise a state's right to adopt measures necessary to protect the environment or conserve natural resources;
- contain obligations that reflect each state's commitment to addressing climate change (Australia–UK FTA);
- expressly exclude procedures for the resolution of disputes provided for in other investment agreements from the ambit of the most favoured nation (**MFN**) clause;
- protect assets owned or controlled "directly or indirectly" by an investor of a party; and
- provide for minimum standards of transparency requiring prompt publication of laws, regulations, administrative rules, procedures and rulings relating to matters covered by the treaty.

3.4 Has your jurisdiction given notice to terminate any BITs or similar agreements? Which? Why?

No, it has not (other than where replaced by new treaties).

4 Case Trends

4.1 What investor-state cases, if any, has your jurisdiction been involved in?

Australia has only been a party to one reported investor-state case. A second case against Australia was not pursued. There is a

third potential case against the Australian Government, although at the time of writing, proceedings have not been commenced.

In 2012, Philip Morris commenced UNCITRAL arbitral proceedings against Australia under the Hong Kong–Australia BIT. The dispute arose out of Australia's implementation of tobacco plain-packaging laws. Philip Morris alleged, among other things, that Australia had not afforded Philip Morris fair and equitable treatment and that Australia had indirectly expropriated its assets. Ultimately, the tribunal dismissed Philip Morris' claims for jurisdictional reasons.

In November 2016, an American power generation company, APR Energy, commenced UNCITRAL arbitral proceedings against Australia under the AUSFTA. Broadly, the dispute related to the seizure of the claimant investor's power turbines by one of Australia's major private banks. Australia responded to the Notice of Dispute stating that APR Energy could not bring a dispute under the AUSFTA because, *inter alia*, the treaty does not provide for investor-state arbitration.

Australia may be subject to a future investor-state claim under the Singapore–Australia Free Trade Agreement (**SAFTA**) from Zeph Investments Pty Ltd (**Zeph**), the Singaporean parent company of Australia-incorporated Mineralogy Pty Ltd (**Mineralogy**). This is a result of legislation passed by the Western Australian State Parliament, the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ("**2020 Amendment Act**"), which unilaterally amended an agreement between the State of Western Australia and Mineralogy, with the effect of invalidating previous arbitral awards issued in favour of Mineralogy and terminating an existing arbitration proceeding. On 14 October 2020, Zeph issued a request for consultation to the Commonwealth under SAFTA in relation to alleged breaches of Chapter 8, arts 4, 5 and 6 of SAFTA arising as a consequence of the 2020 Amendment Act. In October 2021, the High Court considered a challenge to the 2020 Amendment Act found in favour of the State of Western Australia, stating that Australia's arbitration legislation allowed changes to the law applicable to the arbitration agreement which included the legislation at issue.

In terms of Australian claimants, since 2010, a number of arbitrations have been registered by investors whose home country is Australia. Known arbitrations have been brought against the Dominican Republic, Egypt, Georgia, India, Indonesia, Mongolia, Pakistan, Papua New Guinea, Poland, and Thailand. Several proceedings remain pending. Two disputes have been decided in favour of the investor and one in favour of the host state.

4.2 What attitude has your jurisdiction taken towards enforcement of awards made against it?

There have been no awards made against Australia.

4.3 In relation to ICSID cases, has your jurisdiction sought annulment proceedings? If so, on what grounds?

Australia has not had cause to bring any annulment proceedings.

4.4 Has there been any satellite litigation arising, whether in relation to the substantive claims or upon enforcement?

There is a lack of case law involving Australia on which to make any relevant observations. However, recent case law in Australia has clarified principles relevant to the recognition, enforcement and execution of awards against states. This is discussed in question 7.3 below.

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

There is a lack of case law involving Australia on which to make any relevant observations. However, recent case law in Australia has clarified principles relevant to the recognition, enforcement and execution of awards against states. This is discussed in question 7.3 below.

5 Funding

5.1 Does your jurisdiction allow for the funding of investor-state claims?

In Victoria, New South Wales, South Australia and the Australian Capital Territory, third-party funding has been legalised. The High Court of Australia in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386 held that litigation funding was not contrary to public policy or an abuse of process (at least where maintenance and champerty had been abolished by statute). This decision is applicable to third-party funding of other dispute resolution proceedings, including arbitral proceedings.

The position in Queensland, Western Australia, Northern Territory and Tasmania is not as clear as maintenance and champerty have not been abolished in these states. However, the Queensland Court of Appeal's recent decision in *Murphy Operator Pty Ltd & Ors v. Gladstone Ports Corporation Ltd* (2020) 384 ALR 725 provides some guidance as to how these jurisdictions might consider the torts. At first instance, in *Murphy Operator Pty Ltd & Ors v. Gladstone Ports Corporation Ltd* [2019] 3 Qd R 255, the Supreme Court of Queensland held that in order for a third-party funding agreement to be champertous, it must not only provide for a percentage interest in the proceeds of the litigation as a condition on the provision of funds, but also an entitlement of the funder to control the litigation by selecting and appointing counsel. Having regard to the historical evolution of the tort of maintenance, the Court of Appeal held that unless an aspect of public policy renders the third-party funding improper, the law of maintaining has now been subsumed in the law of abuse of process (paragraph [82]). The Court observed that a degree of control maintained by litigation funders in expensive and complex litigation is inevitable, and found that as long as the solicitor/client relationship is preserved and the funding is not contrary to public policy, the funding will be allowed.

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

There is no case law directly relating to the funding of investor-state claims.

5.3 Is there much litigation/arbitration funding within your jurisdiction?

The Australian litigation funding market, measured by revenue, was A$128.4 million in 2020–2021, a slight reduction compared to 2020, which may be due to increased regulations applicable to third-party funders under the *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth) (Jason Geisker and Dirk Luff, *The Third Party Litigation Funding Law Review*, The Law Reviews, 5th edition, 2021). A significant proportion of litigation funding relates to insolvency disputes and class actions for tort claims,

investor claims, product liability claims and environmental claims. Funding claims referred to arbitration in Australia is occurring more frequently, albeit still less often than litigation funding.

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

In other countries, claims have been initiated against host states for allegedly targeting officers and directors of foreign investors through unlawful criminal proceedings. In these instances, claimants have relied on standard treaty provisions such as national treatment and minimum standard of treatment, which exist in many of Australia's FTAs. For example, in the Singapore–Australia FTA, the minimum standard of treatment includes an express "obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings". Therefore, although the provisions have not been tested in the context of Australian treaties in this way, it is conceivable that similar provisions could be invoked to call into question a criminal investigation or domestic judgment.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

International arbitrations in Australia are governed by the IAA, which gives effect to the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**). Where the Model Law applies, national court intervention is limited to matters permitted by the Model Law (art. 5). Permissible court interventions include the usual matters such as assistance with the appointment of an arbitral tribunal, providing parties with interim measures of protection, assistance in the taking of evidence, and determining whether an award can be set aside, recognised and enforced.

In contrast with the Model Law, arbitrations under the Washington Convention are self-contained; that is, all procedural issues are resolved by the International Centre for Settlement of Investment Disputes (**ICSID**) and the arbitral tribunals themselves. For example:

- the Chairman of ICSID's Administrative Council is responsible for appointing arbitrators where the parties cannot agree (Washington Convention, art. 38; Rules of Procedure, art. 4);
- the tribunal can order provisional measures if necessary (Washington Convention, art. 47; Rules of Procedure, art. 39); and
- ICSID, the tribunal, and *ad hoc* committees can (upon a party's application) interpret, revise, stay or annul awards (Washington Convention, arts 50–52; Rules of Procedure, arts 50–55).

Accordingly, the Australian courts' role in relation to ICSID arbitrations is limited to recognising and enforcing awards (Washington Convention, art. 54; IAA, s. 35).

6.3 What legislation governs the enforcement of arbitration proceedings?

The IAA governs the recognition and enforcement of arbitral awards (giving the Washington Convention the force of law in Australia; s. 32). Part. IV of the IAA provides for the recognition and enforcement of ICSID awards. Arbitral awards made under the UNCITRAL Model Law are enforced under Part. II of the IAA.

6.4 To what extent are there laws providing for arbitrator immunity?

S. 28 of the IAA provides arbitrators with immunity for anything done or omitted to be done in good faith in his or her capacity as arbitrator.

6.5 Are there any limits to the parties' autonomy to select arbitrators?

Under the UNCITRAL Model Law, the principle of party autonomy enables the parties to select party-appointed arbitrators and determine how a tribunal is to be constituted (subject to the requirements of impartiality and independence). No requirement of nationality applies (art. 11(1)).

In respect of ICSID arbitrations, the requirements of the Washington Convention apply:

- arbitrators shall be nationals of states other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the tribunal is appointed by party agreement (art. 39); and
- if a party appoints an arbitrator from outside the Panel of Arbitrators, the arbitrator must be "of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment" (arts 14(1) and 40(2)).

Parties should also be aware of any limits imposed by the relevant treaty or agreement.

6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes, there is.

Under the IAA, if an appointment procedure is agreed by the parties and either a party fails to act as required by the procedure, the parties or arbitrators are unable to reach an agreement expected under the procedure, or a third party fails to perform any function under the procedure, any party may then request a State or Territory Supreme Court (depending on the place of arbitration) or prescribed authority to take necessary measures to apply the default procedure for the appointment of arbitrators (Model Law, art. 11(4)).

In respect of ICSID arbitrations, the default procedure in the Washington Convention has the force of law in Australia. If the tribunal has not been constituted within 90 days after the notice of arbitration or any other agreed period, at the request of either party and after consultation, the President of the World Bank shall appoint the arbitrator or arbitrators not yet appointed (Washington Convention, art. 38).

6.7 Can a domestic court intervene in the selection of arbitrators?

Generally, a domestic court will only intervene where the parties are unable to agree on the arbitrator or the method of appointment fails.

However, arbitrations conducted under the Washington Convention are effectively insulated from the interference of domestic courts. The Washington Convention provides a mechanism for

tribunal constitution where the parties are unable to agree on the number of arbitrators or the method of appointment (art. 37(2)(b)), or where the tribunal has not been constituted within time (art. 38). Similarly, the Washington Convention provides a mechanism in respect of the proposed disqualification of an arbitrator (art. 56).

For non-ICSID arbitrations, if an appointment procedure is agreed by the parties and it fails, any party may request a State or Territory Supreme Court (dependent on the legal seat of arbitration) or prescribed authority to take the necessary measure to apply the default procedure for the appointment of arbitrators (Model Law, art. 11(4)).

6.8 Are there any other key developments in the past year in your jurisdiction related to the relationship between international arbitration tribunals and domestic courts?

There have been no key developments in Australia concerning jurisdictional overlaps between national courts or investment tribunals reviewing domestic court conduct. However, there have been some key cases concerning domestic court support of investor-state arbitration, especially as concerns the recognition and enforcement of ICSID awards.

For example, the Australian courts have recently held that sovereign immunity cannot be relied upon to prevent a foreign state from seeking recognition of an award against that state. The original of the case was an application in the Federal Court of Australia by Eiser Infrastructure Ltd (**Eiser**) for the enforcement of its award against Spain under the Energy Charter Treaty (ICSID Case No. ARB/13/36). Spain contested the jurisdiction of the Federal Court on the basis that it was immune from suit pursuant to s. 9 of the *Foreign State Immunities Act 1985 (Cth)* (**FSIA**), which provides that "[e]xcept as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding". One exception to an assertion of foreign state immunity is where a state has submitted itself to jurisdiction, including by agreement in writing (FSIA, s. 10(2)). Eiser argued that by being a signatory to the Washington Convention, Spain had submitted to the jurisdiction of the Federal Court. The Federal Court agreed with Eiser, finding that Spain had waived its ability to rely on foreign sovereign immunity to prevent recognition and enforcement of arbitral awards through its ratification of the Washington Convention. The Federal Court made orders, among others, that Spain pay the awarded sum to Eiser and that Eiser has leave to have the award enforced.

On appeal to the Full Court of the Federal Court of Australia, the principle question was the same; i.e., whether Spain's accession to the Washington Convention constitutes a submission to the jurisdiction of the Federal Court. The Full Court upheld the lower court's decision, but concluded that there was an issue as to the relief granted by the lower court. The issue was that the orders provided for Spain to pay the damages awarded by the ICSID tribunal in circumstances where proceedings in the lower court, properly characterised, were "recognition proceedings" rather than "enforcement proceedings". While noting that, practically speaking, an application to enforce an award implicitly involves the recognition of that award, the Full Court held that art. 54(2) distinguishes between "recognition proceedings" and "enforcement proceedings" and that the "execution" of an award in art. 55 of the Convention (which provides that nothing in art. 54 shall derogate from the laws of state immunity) has no application to "recognition proceedings". The Full Court explained that recognition under art. 54(2) of the Convention "may be afforded by entry of judgment on the award or by making an order granting leave to enforce the award 'as if it were a final judgment' of" the court. Against that background, the Full Court concluded that art. 54(2) operates as an agreement by Spain to submit to the jurisdiction of the Court as a competent court under art. 54(2) in a recognition proceeding.

Thus, the Court held that Spain and other Contracting States to the Washington Convention 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 art. 55, and its orders (unlike those at first instance) do not grant leave for the applicant to enforce the award. Contracting States may be entitled to rely on foreign state immunity at the steps of enforcement and execution.

In March 2022, the High Court of Australia granted Spain special leave to appeal the Federal Court decision (*Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l* [2022] HCATrans 039). 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 Washington Convention, Spain also argued that art. 55 preserves state immunity from the process for recognition and enforcement in art. 54. The High Court appeal is expected to be heard in the second half of 2022.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

Art. 48(2) of the Washington Convention requires awards to be in writing and signed by the arbitrators. The award shall also state the reasons upon which it is based (art. 48(3)).

7.2 On what bases may a party resist recognition and enforcement of an award?

An ICSID award is binding and not subject to any appeal or any other remedy otherwise than in accordance with the Washington Convention.

Under art. 54 of the Washington Convention, a state must enforce an ICSID award as if it were the final judgment of a court in that state. The Federal Court of Australia and the Supreme Courts of the States and Territories are designated for the purposes of art. 54. A party cannot resist, and a court cannot deny, enforcement on grounds of public policy. Art. 55 provides that art. 54 of the Washington Convention is not to be construed as derogating from the law in force of any Contracting State relating to foreign sovereign immunity.

The grounds for resisting enforcement of an award under the New York Convention do not apply to an ICSID award (IAA, s. 34).

For non-ICSID awards, the grounds for resisting recognition and enforcement under art. V of the New York Convention apply.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Sovereign immunity from jurisdiction and execution is provided for under the FSIA. It provides for limited state immunity.

A foreign state is generally immune from the jurisdiction of the Australian courts unless it has submitted to the court's

jurisdiction (s. 10) or the proceedings concern the state's commercial activities (s. 11).

The property of a foreign state will generally not be subject to any order of the Australian courts for the enforcement of an arbitral award unless the foreign state has waived immunity (s. 31) or the property is commercial (s. 32).

Firebird Global Master Fund II Ltd v. Republic of Nauru (2015) 258 CLR 31 considered these provisions. A private fund, Firebird, held bonds issued through the Nauru Finance Corporation (**NFC**) and guaranteed by the Republic of Nauru. NFC defaulted and Nauru refused to guarantee the debt owing. Firebird obtained judgment against Nauru in a Tokyo District Court. Firebird then sought to register that judgment in Australia and to freeze Nauru's Australian bank accounts. The High Court of Australia held that Nauru was immune to any freezing order over its Australian bank accounts because Nauru used those accounts for non-commercial purposes. Although registered, the judgment against Nauru was practically toothless.

In *Lahoud v. The Democratic Republic of Congo* [2017] FCA 982, the Federal Court of Australia held that the Democratic Republic of Congo was not immune because it had submitted to the jurisdiction of the ICSID tribunal by ratifying the Washington Convention.

More recently, in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* (2021) 387 ALR 22, the Full Court of the Federal Court of Australia found that Spain and other Contracting States to the Washington Convention cannot resist "recognition" of awards by pleading foreign state immunity. This decision is discussed in detail in question 6.8 above.

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The FSIA expressly provides that separate entities (which are defined to include a body corporate that is an agency or instrumentality of the foreign state) are covered by the immunity from jurisdiction provided under s. 9 and execution of an arbitration award against state property under s. 30 (ss 22 and 35, respectively).

The Full Court of the Federal Court of Australia considered the definition of separate entity in *PT Garuda Indonesia v. ACCC* [2011] FCAFC 52. It held that an instrumentality is a body created by the state for the purpose of performing a function for the state.

Therefore, a separate entity will be covered by sovereign immunity unless one of the exceptions under the FSIA (discussed in question 7.3 above) applies.

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