Arbitration Guide
IBA Arbitration Committee

AUSTRALIA

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Doug Jones

Clayton Utz
Level 15, 1 Bligh Street
Sydney NSW 2000 Australia
PO Box H3, Australia Square
Sydney NSW 1215
DX 370 Sydney
djones@claytonutz.com

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. In recent years, arbitration in Australia has experienced significant growth. This growth can be attributed to the increasing familiarity of legal practitioners and their clients with this form of dispute resolution, as well as pro-arbitration reforms at the judicial and legislative level. Industry attitudes suggest that arbitration is increasingly being relied on as the preferred dispute resolution mechanism, as reflected in the growing caseload of the Australian Centre for International Commercial Arbitration (ACICA).

The freedom to determine the rules of the arbitral procedure, the preservation of party autonomy and the enforceability of arbitral awards are significant contributing factors to the popularity of arbitration. However, in recent times, arbitration has also been criticized for being increasingly time-consuming and costly.

(ii) Is most arbitration institutional or *ad hoc*? Domestic or international? Which institutions and/or rules are most commonly used?

Traditionally, institutional arbitration and *ad hoc* arbitration enjoyed equal popularity in Australia. However, since the introduction of the *ACICA Arbitration Rules* and the opening of the Australian International Dispute Centre (AIDC), there has been a significant shift towards the use of institutional arbitration.

Likewise, there has been a general increase in the number of domestic and international arbitrations since the revision of the *International Arbitration Act 1974* (Cth) (IAA) in June 2010 and recent amendments to the domestic arbitration regime.

The ACICA is Australia's premier international arbitration institution. Following the successful launch of the *ACICA Arbitration Rules* in 2005, ACICA has recently revised its *Expedited Arbitration Rules*. Further, the *ACICA Arbitration Rules* have been updated to include a set of 'Emergency Arbitrator' and 'Application for Emergency Interim Measures of Protection' provisions. In March 2011, ACICA adopted the *ACICA Appointment of Arbitrators Rules 2011* that establish a streamlined process through which a party can apply to have an arbitrator appointed to a dispute seated in Australia.

(iii) What types of disputes are typically arbitrated?

The building and construction industry has historically relied heavily upon arbitration and ADR. Additionally, the strong and steady growth of the Australian economy over the past decade and the opening of the Asian markets have further advanced the use of arbitration in other areas, particularly the energy and trade sectors. This has also lead to the increasing significance of the protection of foreign direct investment under the *International Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965* ('ICSID Convention').

(iv) How long do arbitral proceedings usually last in your country?

The length of arbitral proceedings will vary significantly depending on the complexity of the matter, the number of arbitrators and the willingness of the parties to cooperate. Approximate timeframes are provided below for broad stages of the arbitral process:

- Preparation (normally 2-3 months)
- Commencement of arbitration (1-2 months)
- Constitution of tribunal and preliminary meeting (1-2 months from the commencement of arbitration)
- Detailed submissions (3-5 months)
- Production of documents (if applicable) (1-3 months)
- Evidence (2-8 months)
- Hearing (1-4 weeks)
- Award (2-4 months)

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

A party may either represent itself, or choose to be represented by a duly-qualified legal practitioner from any legal jurisdiction or, in fact, by any other person it chooses. There are no restrictions on foreign lawyers representing parties to an arbitration conducted in Australia. As regards foreign nationals acting as arbitrators, the *UNCITRAL Model Law on International Commercial Arbitration* ('Model Law') expressly states that no person shall be precluded by reason of his or her nationality from acting as an arbitrator, unless otherwise agreed by the parties.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

Separate arbitration laws govern international and domestic arbitration in Australia. International arbitration is governed by the IAA. In 2010, the IAA was amended to adopt the 2006 revisions to the Model Law.

Domestic arbitration is governed by the relevant Commercial Arbitration Act of each state or territory where the arbitration takes place. These Acts are currently undergoing significant reforms aimed at introducing uniform arbitration legislation in all states and territories based on the 2006 Model Law. As of the time of writing, a new Commercial Arbitration Act had been passed in New South Wales [*Commercial Arbitration Act 2010* (NSW)], Tasmania [*Commercial Arbitration Act 2011* (TAS)], Victoria [*Commercial Arbitration Act 2011* (VIC)], South Australia [*Commercial Arbitration Act 2011* (SA)]

and the Northern Territory [*Commercial Arbitration (National Uniform Legislation) Act 2011* (NT)], collectively referred to as the 'CAAs'.

A new Commercial Arbitration Act has not yet been passed in Western Australia, Queensland and the Australian Capital Territory ('ACT'). In each of these states, the old Uniform Legislation still applies. The Uniform Legislation differs from the CAAs in several key respects, as it is not based upon the 2006 Model Law. However, the Uniform Legislation will not be addressed in this chapter, as it is expected that the remaining states will enter the new Commercial Arbitration regime during the course of 2012.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

The IAA provides that the Model Law has the force of law in Australia and governs all international arbitrations. Importantly, following amendments to the IAA in 2010, parties can no longer choose to opt out of the Model Law and have the proceedings governed by the relevant state or territory legislation. The CAAs similarly are based almost entirely on the Model Law, and provide that an arbitration is domestic if the parties' places of business are in Australia and, accordingly, the IAA does not apply.

(iii) What international treaties relating to arbitration have been adopted (eg, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Australia has ratified both the New York Convention and the ICSID Convention into domestic law. Both are annexed to the IAA at s 40. Australia's accession to the New York Convention is without reservation and extends to all external Territories.

Under the IAA, subject to any variation within Part IV of the IAA, Chapters II to VII of the ICSID Convention have the force of law in Australia.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The ability of the parties to choose the substantive law that will govern their dispute is codified in Art 28 of the Model Law and is unmodified by the IAA. Article 28(1) provides that an arbitral tribunal shall determine the dispute in accordance with the rules of law as chosen by the parties. It provides that any designation of the law or legal system of a particular state shall be regarded as directly referring to the substantive law of that state and not its conflict of law rules, unless otherwise expressed.

In the absence of an express or implied choice by the parties, Art 28(2) of the Model Law provides that the arbitral tribunal shall apply the conflict of law rules applicable at the seat of the arbitration to determine the substantive law governing the dispute.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

The arbitration agreement is required to be in writing for both international and domestic arbitrations. Under the IAA, the term 'agreement in writing' has the same meaning as under the New York Convention.

Under the CAAs, the more expansive definition contained in Art 7 of the Model Law is adopted. Art 7 provides that '[a]n arbitration agreement is in writing if its content is recorded in *any form* that provides a record of the agreement, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means'. Additionally, the CAAs provide that an arbitration agreement can be evidenced through electronic communication, in an exchange of statements of claim and defense, or incorporated by reference.

In regards to the content of the arbitration agreement, there are no particular requirements under the domestic or international legislation. Generally, the binding and enforceable nature of a valid arbitration agreement will not be affected unless the arbitration agreement is found to be null, void, inoperative, or incapable of being performed.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Australian courts support the autonomy of international arbitration and will stay court proceedings in the presence of a valid arbitration agreement broad enough to cover the dispute, provided that the subject matter of the dispute is arbitrable. Similarly, Art 8 of the Model Law mandates a stay of proceedings where there is a valid arbitration agreement. Pursuant to s 7(5) of the IAA, courts will refuse a stay only if they find the arbitration agreement is null, void, inoperative, or incapable of being performed.

The CAAs mirrors Art 8 of the Model Law by giving primacy to the arbitration agreement and leaving no room for the court to exercise discretion not to enforce an arbitration agreement.

(iii) Are multi-tier clauses (eg, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

The use of multi-tiered dispute resolution clauses is becoming increasingly common in Australia due to the increasing complexity and quantity of commercial disputes. While there is no statutory basis for the enforcement of dispute resolution clauses other than

arbitration, the trend in Australia has been for the courts to enforce multi-tier clauses as long as the obligation to follow pre-arbitration procedures is clear.

The consequences of failing to follow pre-arbitral steps specified by a multi-tiered clause will depend firstly upon whether the provisions of the clause constitute true conditions precedent to the commencement of arbitration or are merely contractual requirements, the breach of which will sound in damages.

(iv) What are the requirements for a valid multi-party arbitration agreement?

There are no particular requirements under the domestic or international legislation in regards to the content of a valid multi-party arbitration agreement. In light of the procedural complexities that often arise from multi-party arbitrations, it is advisable for parties to draft their arbitration agreements broadly enough to cover situations where a party claiming, or claimed against, is not named in the original contract. While Australian legislation allows parties 'claiming through or under' the arbitration agreement to rely upon the agreement and initiate proceedings, not all situations or relationships will fall within the ambit of those words.

Where multi-party arbitrations arise, the option of consolidating separate arbitration proceedings is available under both domestic and international arbitration to save time and money and avoid the risk of inconsistent awards.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

Under Australian law, arbitration agreements need not be mutual and may confer a right to commence arbitration on one party only. Some standard form contracts, particularly in the construction industry and the banking and finance sector, make use of this option.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

There are very limited circumstances in which a third party who is not privy to the arbitration agreement may be bound. There is Australian authority suggesting that a non-signatory third party can be bound in case of fraud, where the company structure used when entering into the arbitration agreement was a sham or façade or where the company was incorporated for the purposes of masking the real purpose of the parent company. It additionally may be possible to bind a parent company to the arbitration agreement entered into by its subsidiary. Although Australian courts have been reluctant to recognize this Groups of Companies doctrine, the issue has yet to be finally decided by the courts.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

The general approach is to treat most commercial matters as arbitrable for the purposes of jurisdiction, whilst reserving for the courts the ability to deal with the issue of arbitrability. However, some areas of commercial law are still reserved for resolution by the courts. As such, care must be taken when attempting to arbitrate disputes relating to competition law, patents, trademarks, copyrights, taxation, international carriage of goods to or from Australia, insurance disputes and allegations of fraud.

Particularly in relation to competition, bankruptcy and insolvency matters, courts have occasionally refused to stay proceedings, without expressly holding that these matters are inherently not arbitrable. Instead, most court decisions have considered whether the scope of the arbitration agreement is broad enough to cover such a dispute.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

Provided the subject matter of the dispute is arbitrable, where substantive or procedural challenges over jurisdiction are initiated in the courts, s 7(2)(b) of the IAA provides that the court must stay proceedings and refer the parties to arbitration if there is a valid arbitration agreement. For domestic arbitrations, s 8 of the CAAs provides that so long as there is an arbitration agreement which is not null or void, inoperative or incapable of being performed, the court must refer the parties to arbitration.

In Australia, the courts will recognise contracts that confer both an option to arbitrate and an option to litigate as valid arbitration agreements. Under such a contract, the right to arbitrate would not be automatically extinguished by taking steps toward court proceedings.

(iii) Can arbitrators decide on their own jurisdiction Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

Both the IAA and the CAAs embody the Model Law, s16(1) of which permits tribunals to rule upon their own jurisdiction.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

The parties are free to appoint the arbitrator of their choice, to determine the number of arbitrators and to set out the procedure for their appointment.

If the parties have not agreed on the number of arbitrators to be appointed, the defaults are three for international arbitrations under the Model Law and one for domestic arbitrations under the CAAs. If the parties adopt arbitration rules that contain provisions as to the number of arbitrators to be appointed, those provisions take precedence.

For both international and domestic arbitrations, the Model Law provides that where the parties fail to appoint the arbitrator, either party may request the court or the ACICA to make the appointment.

Since the introduction of the *ACICA Appointment of Arbitrators Rules* in March 2011 and the inclusion of 'Emergency Arbitrator' provisions as part of the *ACICA Arbitration Rules*, the role of the courts in selecting arbitrators has gradually declined.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

The Australian position on standards of independence and impartiality is reflected in Art 12 of the Model Law, which requires an arbitrator to disclose any circumstances likely to give rise to *justifiable doubts* as to his impartiality or independence. Section 18A of the IAA provides that justifiable doubts will arise 'only if there is a real danger of bias on the part' of the arbitrator. This duty to disclose remains throughout the duration of the arbitral proceedings. These provisions also apply to domestic arbitrations under the CAAs.

Pursuant to Art 13(1) of the Model Law, parties are free to agree on a procedure for challenging an arbitrator. Failing such an agreement, the parties can submit the challenge to the arbitral tribunal in the first instance. If this initial challenge is unsuccessful, Art 13(3) of the Model Law provides that 'the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court… to decide on the challenge'.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Australian laws impose no special requirements with regard to the arbitrator's professional qualification, nationality or residence. While there are no further secondary national rules that are unique to Australia, apart from well known international guidelines, ethical restrictions are inherent in the legal culture of Australia. These ethical duties require arbitrators to act in good faith in the course of their duties and remain impartial and independent.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

The *IBA Guidelines on Conflicts of Interest in International Arbitration* ('IBA Rules') are non-binding in Australia but provide a useful indication of examples of circumstances where disclosure should be made, or an appointment challenged on the basis of *justifiable doubts* as to the arbitrator's impartiality or independence. The *Guidelines* are frequently used and cited by both arbitrators and counsel in arbitration proceedings.

VI. Interim Measures

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

Tribunals seated in Australia are able to grant a wide variety of interim measures under Art 17 of the Model Law. Unless parties have agreed otherwise, the tribunal can order any party to take such interim measure of protection as the tribunal considers necessary regarding the subject matter of the dispute. Interim measures may be ordered to maintain or restore the *status quo*, to prevent harm or prejudice to the arbitral process, to preserve assets or preserve evidence. The *ACICA Arbitration Rules* also permit the parties to seek interim relief from any competent court or other judicial authority.

Article 17(2) of the Model Law clarifies that the tribunal may render an interim measure in the form of an award or in another form. With the adoption of Arts 17H and 17I of the Model Law, the IAA and CAAs both allow for the recognition and enforcement of interim measures, regardless of form.

Both the IAA, and the CAAs permit the relevant courts to exercise their jurisdiction to enforce interim measures. Specifically, under the CAAs the courts are now obliged to enforce an interim measure granted in any state or territory, except in limited circumstances.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?

Australian courts, under the IAA and the CAAs, are equipped with the same power to make interlocutory and provisional orders in relation to arbitration proceedings as they have in relation to judicial proceedings.

It is also important to note that an application to a court for an interim measure or any other instrument of an interlocutory nature does not preclude an application for a stay under the IAA or the CAAs. Nor are such requests incompatible with the arbitration agreement. Further, applying to the courts rather than to the tribunal for interim measures provides an added advantage in that the courts are able to issue interim measures of protection before the arbitral tribunal has been formally constituted and grant interim relief on an *ex parte* basis.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

Article 17(2) of the Model Law provides that courts may provide evidentiary assistance by way of provisional relief where interim measures are required to preserve evidence that may be relevant and material to the resolution of the dispute.

For international arbitrations, the IAA grants the courts broad powers to issue subpoenas requiring a person to produce particular documents to the tribunal. However, such an application may only be made by a party with the permission of the tribunal.

For arbitrations under the IAA and the CAAs, the court has the power to grant specific interim relief including orders allowing the tribunal or a person to inspect, photograph, observe or conduct experiments on evidence in possession of a party to the proceedings and allowing the tribunal or a person to take a sample of such evidence.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

The parties are given considerable freedom in determining the procedure for production of documents. Article 19(1) of the Model Law provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings. Failing agreement, the tribunal is empowered to determine the admissibility, relevance, materiality and weight of any evidence.

Given Australia's common law system, it is not uncommon for tribunals to order at least some form of document production resembling the discovery process used in the courts. However, as a matter of best practice, most tribunals will attempt to limit the extent and scope of the document production to maintain the celerity and cost-effectiveness of arbitration. This concern is also reflected in the *ACICA Expedited Rules*, under which parties are not permitted any form of discovery.

Orders for disclosure are typically granted by way of subpoena. Under the IAA, the court has broad powers to issue subpoenas requiring document production or examination before the tribunal. For domestic arbitrations under the CAAs, the arbitral tribunal can itself seek assistance from the court in taking evidence, independent of the parties.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

While arbitrators may order the production of documents, they can only do so with respect to the parties to the proceedings and, to a limited extent, tribunal-appointed or party-appointed experts. The permissible scope of disclosure is also limited to the extent that the information is regarded as confidential and/or subject to claims of legal professional privilege and without prejudice privilege.

(iii) Are there special rules for handling electronically stored information?

There are no specific rules on electronic disclosure in Australia. As such, procedures are dependent on the agreement of the parties and the discretion of the tribunal.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

International arbitration proceedings in Australia are not confidential as such. However, s 22(3) of the IAA allows the parties to opt-in to a confidentiality regime that prohibits the disclosure of confidential information. Statutory exceptions to this confidentiality regime permit disclosure in certain circumstances. The CAAs contain a similar confidentiality regime at ss 27E and 27D that applies unless the parties agree otherwise.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no specific provisions relating to the protection of trade secrets. Although it remains an unsettled area of law, the protection of trade secrets may be caught within the ambit of provisions protecting the disclosure of confidential information.

For international arbitrations, s 23C of the IAA provides that the parties and the tribunal must not disclose confidential information, except in circumstances where disclosure is permitted.

For domestic arbitrations under the CAAs, s 27E(2) expressly prohibits the disclosure of confidential information unless disclosure is allowed under one of the exceptions to confidentiality. Further, the application of the public interest test under the CAAs means that the protection of trade, personal or commercial secrets will need to be weighed against the public interest against maintaining confidentiality.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

Privilege will clearly arise in the context of the lawyer-client relationship. Where a party chooses lay representation however, the question of privilege is more indeterminate. This issue is not addressed in the IAA and has yet to be decided by the Courts. It has been suggested that legal privilege may not exist between lay representatives and their clients in relation to arbitral proceedings. Where a party is unrepresented, privilege may attach to certain confidential communications between that party and another person which occurred 'for the dominant purpose of preparing for or conducting the proceeding' (s 120 of the *Evidence Act 1995* (Cth)).

Ultimately, the way in which arbitral tribunals determine the applicable principles of privilege will vary significantly according to the individual decisions of the tribunal and the agreements of parties. However, Australia's common law tradition will mean that tribunals seated in Australia typically will be more willing to adopt privilege principles in accordance with the English position.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

It is common practice for parties and/or the tribunal to rely on the IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules on Evidence') While the tribunal is not bound by the IBA Rules on Evidence, the *ACICA Arbitration Rules* and *ACICA Expedited Rules* expressly recommend that the parties and the tribunal consider the IBA Rules on Evidence.

The agreement of the parties and the ACICA Rules have primacy over the provisions of the IBA Rules on Evidence, should there be inconsistencies.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Other than what is required to give effect to the principles of procedural fairness and natural justice, Australian tribunals do not prescribe rules as to how the hearing shall be conducted. For arbitrations conducted under the Model Law, the only requirement is that a tribunal to hold a hearing upon request by a party. Similarly, the *ACICA Arbitration Rules* provide that the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

In Australia, the freedom enjoyed by the parties and tribunal to tailor the arbitral procedure means that the role of witnesses is dependent on the individual agreements of the parties. Likewise, there are no limitations on the power of arbitrators to question witnesses so long as the parties are given proper notice and an opportunity to present their case.

Unless the parties have agreed otherwise, Art 24 of the Model Law and s 24 of the CAAs allow the arbitrator to decide whether evidence should be produced in written or oral form. In practice, witnesses in domestic arbitrations are often sworn in, examined and cross-examined in a manner similar to court procedure. International arbitrations have taken a more flexible approach, opting for written evidence and the use of cross-examination only in cases of contention.

For arbitrations conducted under the *ACICA Expedited Rules*, oral submissions are prohibited in favor of a documents only procedure.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are no specific provisions about who can or cannot appear as a witness. Rather, the parties and tribunal have discretion over the use of witnesses thanks to the freedom afforded them under Art 19 of the Model Law.

The tribunal is given the power under the Model Law to administer any necessary oaths or take any necessary affirmations from witnesses, although it is not common in commercial arbitrations to do so.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?

Arbitrators are free to determine the admissibility, relevance, materiality and weight of evidence. As such, there are no specific provisions that differentiate the treatment of witness testimony whether the witness related to one of the parties or not.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

There are no specific provisions governing the procedure of using expert witnesses. Generally, the parties or tribunal will instruct an expert to deliver an opinion on specific issues or questions. The expert will prepare a written report to the parties or the tribunal containing an expert opinion on the issues specified in his or her instructions. Any expert who has submitted an expert report will usually be required to be available to provide testimony at any subsequent hearings of the tribunal.

In Australia, expert witnesses have no statutory duty to the tribunal, but are expected to remain independent and impartial, delivering their honest opinions on the issues contained in their instructions to assist the tribunal to come to a just decision in an efficient manner.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

In Australia, it is not an uncommon occurrence for tribunals to appoint experts, and they may do so under the Model Law for the purpose of obtaining reports on specific issues. However, this is a non-mandatory provision which will have no effect where the parties have agreed that the tribunal should not have this power. Arbitrators are not restricted by particular lists in their selection of experts.

There are no specific provisions that differentiate the treatment of tribunal-appointed experts from party-appointed experts. As such, the tribunal is free to determine the admissibility, relevance, materiality and weight of the evidence of tribunal-appointed experts as they can with the evidence of party-appointed experts.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

There are no standard guidelines or rules provided by any arbitral institution to facilitate witness conferencing or hot-tubbing.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

In more involved proceedings, it is common for a tribunal secretary to be appointed. This may require the consent of the parties. The tribunal secretary's role is a purely technical one.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

Under the IAA, New York Convention and the Model Law, for an award to be valid, the following requirements must be met:

- the award must be in writing;
- where there is more than one arbitrator, the majority of the tribunal must sign the award, and the reason for any omitted signature must be stated;
- the award must state the reasons upon which it is based, unless the parties have agreed otherwise;
- the date of the award and place of arbitration must be stated in the award; and
- a signed copy of the award must be delivered to each party in the original form.

The same provisions apply to domestic arbitrations under the CAAs, although there is no requirement for the award to be signed.

Subject to any contrary agreement between the parties, there are currently no limits to the remedies an arbitrator can award under the Model Law or the IAA.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

The question of whether punitive or exemplary damages can be awarded by an arbitrator is doubtful and has yet to come before the courts.

Subject to a contrary agreement between the parties, the IAA and the CAAs enable the arbitrators to make an award for interest on the whole or any part of a principal claim at such reasonable rate as the arbitrator determines.

(iii) Are interim or partial awards enforceable?

While the CAAs do not make reference to interim or partial awards, the tribunal may make partial final awards that are dispositive of preliminarily matters at issue. Articles 17H and 17I of the Model Law, reflected in both the CAAs and the IAA, permit the enforcement of interim measures regardless of their form.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

While there are no specific provisions governing the issue of dissenting opinions by arbitrators, dissenting opinions may be provided as part of the explanation of the award.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

The Model Law provides that if the parties decide to settle the dispute during arbitral proceedings, the settlement shall be recorded in the form of a 'consent award' or 'an award on agreed terms' as agreed upon by both parties. Consent awards must be in writing, contain the signature of the majority of arbitrators and state the date and place of the arbitration. The tribunal is not required to give an explanation with respect to an award by consent.

In the domestic context, the CAAs are consistent with the Model Law on this point.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Reflecting Art 33 of the Model Law, arbitrations under the IAA and the CAAs enable the tribunal to correct an award, interpret it or make an additional award where necessary to cover those issues raised in the claim which were not dealt with in the award. Further under Art 33, the tribunal may correct 'any errors in computation, any clerical or typographical errors or any errors of similar nature'. This provision primarily contemplates corrections of flagrant mathematical errors or typing errors, which would otherwise complicate the execution of the award. This power of correction is mandatory and covers errors of omission as well as errors of commission.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

Under both domestic and international arbitrations, the tribunal is empowered to determine and award costs at its discretion, unless otherwise agreed by the parties. The IAA and the CAAs offer no guidance as to how the tribunal should exercise such discretion.

Regardless of which legislative regime applies, the general rule is that costs will follow the event unless there are special circumstances which indicate that a contrary result is warranted. The *ACICA Arbitration Rules* also follow this general approach by stipulating

that the unsuccessful party is expected to bear the costs of the arbitration unless the tribunal considers it appropriate to apportion the costs amongst the parties.

(ii) What are the elements of costs that are typically awarded?

The IAA and the CAAs do not provide any definition of the term 'costs'. However it is commonly accepted that this term includes costs of the award, which include amounts due to the tribunal for its fees and expenses, and costs of the reference, which include the expenses incurred by each party in the course of the arbitral proceedings and costs incurred by the parties' attorneys.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

For institutional arbitrations conducted in Australia, the tribunal fees are generally predetermined. Where the *ACICA Arbitration Rules* have been adopted, the claimant is required to pay to ACICA a non-refundable registration fee of AUS$2,500 (USD$3000). Further, depending on the amount in dispute the parties shall pay to ACICA an administrative fee. Art 40 of the *ACICA Arbitration Rules* also provides that the arbitrators will be remunerated at an hourly rate unless the parties agree otherwise.

In an *ad hoc* arbitration the arbitrator's fees, along with other procedural issues, are usually agreed upon between the parties and arbitrator(s) at the procedural meeting.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Under both international and domestic arbitrations, the allocation of costs shall be at the discretion of the tribunal, except where otherwise agreed by the parties. The arbitrator may determine who should bear the costs, the method of payment, and the amount to be paid. He or she may also arrange for an assessment of costs or award costs to be assessed or settled as between the parties or as between legal practitioner and client.

Further, the *ACICA Arbitration Rules* provide that the tribunal can apportion an award for costs where the circumstances of the case warrant doing so.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

The courts have no express power to review arbitrators' decisions on costs. However, the CAAs s 33B(5) provides that the court with jurisdiction to hear applications setting aside the award will be required to assess costs of an arbitration (other than the fees or expenses of an arbitrator) which have not already been taxed or settled by the tribunal.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do

challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

In Australia, the exclusive recourse against an international award made under the IAA is an application, pursuant to Art 34 of the Model Law, to have the award set aside. For domestic arbitrations, the CAAs provide two means of recourse. A party can apply to have an award set aside on the same grounds as contained in Art 34 of the Model Law, or seek leave to appeal on a question of law arising out of the award.

The time limit for applications is three months following the date the party making the application received the award.

Typically, challenge proceedings are resolved in a short timeframe, but this is dependent on the nature of the challenge in question. It is relatively rare for a challenge proceeding to last more than a few months.

Under the Model Law, the court, when asked to set aside an award, may suspend the setting aside proceedings for a period of time in order to enable the arbitral tribunal to take action to eliminate the grounds for setting aside.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

While there is no Australian authority suggesting that Art 34 of the Model Law cannot be waived by the parties to an international arbitration, it appears unlikely that an Australian court would allow parties arbitrating under either the IAA or the CAAs to derogate from that provision. In contrast, the right to seek leave to appeal on a point of law under the CAAs can be waived by the parties as it only arises where the parties have agreed.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

The IAA makes no provision for substantive challenges to an award by way of appeal. In contrast, s 34A of the CAAs allows appeals on a question of law arising out of a domestic award. However, appeals will only be permitted where the parties have agreed to allow recourse to the court on questions of law and where the court grants leave.

Under the CAAs, the court may only grant leave where it is satisfied that the decision of the arbitrator is obviously wrong or that the question is one of general public importance and the decision of the tribunal is at least open to serious doubt.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

Under the CAAs, upon hearing an appeal, the court may remand the award, together with the court's opinion on the question of law which was the subject of the appeal, to the arbitrator for reconsideration. This will be appropriate where the court's finding requires

the tribunal to reconsider an issue anew. Where an award is remanded, it is not final or binding and the arbitrator will have to render a new award. Where only part of an award is remanded, however, the remainder is final and binding and the tribunal may not alter those aspects of it.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Section 8 of the IAA implements Australia's obligations under the New York Convention and provides for foreign awards to be enforced in the courts of a state or territory as if they had been made in accordance with the laws of that state of territory. Under the IAA, parties can apply to the Federal Court or the State or Territory Supreme Courts for enforcement.

Under the Model Law, all that the party seeking recognition or enforcement must do is supply the court with the original award or a certified copy. The burden of proof is then on the party resisting the application to prove the existence of one of the limited grounds for refusal set out in Art 36 of the Model Law. The substantive grounds for refusal include lack of jurisdiction, lack of a valid arbitration agreement, lack of the capacity for the parties to enter into the arbitration agreement and public policy considerations. The procedural grounds for refusal relate to the composition of the arbitral tribunal, the agreement of the parties and whether the parties were given notice of the proceedings and a reasonable opportunity to present their cases.

Additionally, proceedings for recognition and enforcement of an award may be adjourned where an award has either not yet become binding or has been set aside or suspended by a state or territory court in which the award was made.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

There are no provisions which provide for the enforcement of a foreign award based on an *exequatur*.

(iii) Are conservatory measures available pending enforcement of the award?

Unless the parties have agreed otherwise, the Model Law allows the tribunal to order any party to take such interim and conservatory measures of protection as the arbitral tribunal considers necessary in respect of the subject matter of the dispute. Conservatory measures may be ordered to provide a means of preserving assets out of which a subsequent award may be satisfied. Such conservatory measures may be made at any time prior to the issuance of the award by which the dispute is finally decided.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Australian courts have an excellent track record for enforcing foreign arbitral awards. With recent 2010 revisions to the IAA, the efficient enforcement of foreign arbitral awards in Australia has been further enhanced.

The IAA provides that the court may, at the request of the party against whom it is invoked, refuse to enforce the award if the requesting party proves to the satisfaction of the court that the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

The time limit for bringing an application to enforce an arbitral award in Australia is dependent on the limitation periods prescribed by the relevant Limitation Acts of each state and territory. In New South Wales, for instance, s 20 of the *Limitation Act 1969* (NSW) stipulates that where the award is made under an arbitration agreement, parties have twelve years to seek enforcement.

The time it takes to enforce an award will vary depending on the particular circumstances of the matter and substance of the award rendered.

XIV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

Australia is committed to its obligations under international treaties. National courts are prepared to readily enforce proceedings against Australian federal or state entities, making any defence of immunity available in exceptional circumstances only. Foreign sovereign entities that are parties to an arbitration agreement will similarly be unable to assert sovereign immunity under the Foreign state Immunities Act 1985

The IAA specifically states that it binds the Crown.

To date, no arbitral awards have been enforced against Australia.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

There are no specific rules that apply to the enforcement of an award against a state or state entity.

Australia’s removal of provisions providing for investor-state dispute settlement in future 'BITs' and 'FTAs' does not affect Australia’s recognition of the final and binding nature of ICSID awards.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

The Washington Convention is annexed to schedule 3 of the IAA. Australia is a signatory to the ICSID Convention and recognises the final and binding nature of ICSID awards. Australia has also signed the Energy Charter Treaty, although this treaty has not yet been ratified.

(ii) Has your country entered into bilateral investment treaties with other countries?

Australia is a party to 21 bilateral investment treaties ('BITs'). Australia is a party to BITs with China (1988), Vietnam (1991), Papua New Guinea (1991), Poland (1992), Hungary (1992), Indonesia (1993), Romania (1994), Czech Republic (1994), Philippines (1995), Laos (1995), Argentina (1997), Peru (1997), Pakistan (1998), Chile (1999), India (2000), Egypt (2002), Lithuania (2002) and Uruguay (2003).

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Key publications

- Doug Jones, *Commercial Arbitration in Australia* (LawBook Co, 2011).
- Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Australia: Thomson Reuters 2011).
- Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (The Federation Press, 2010).
- Doug Jones and Björn Gehle, 'Rules and Practices of the Australian Centre for International Commercial Arbitration', in: Mistelis/Shore (eds) *World Arbitration Reporter*, 2nd ed (Juris Publishing 2010).

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

The ACICA regularly holds conferences that focus on international arbitration in Australia and the Asia-Pacific region. The ACICA Conference is generally held in November and December each year.

The IAMA holds a National Conference that addresses the practice and application of ADR in Australia. In 2011 the IAMA National Conference was held on 16 to 18 June.

The ICC also conducts annual seminars across Australia addressing International Arbitration. In August 2011, seminars were conducted across Sydney, Melbourne, Perth and the ACT.

The annual Clayton Utz International Arbitration Lecture held in conjunction with the University of Sydney is designed to promote and support the development and study of international arbitration and dispute resolution in Australia and the Asia-Pacific region.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Arbitration in Australia has experienced significant growth in recent years. This growth can be attributed in part to the growing familiarity of legal practitioners and their clients with the importance and advantages of international arbitration. While the increasing use of arbitration, in conjunction with other forms of ADR, has not had a dramatic effect in terms of reducing litigation, industry attitudes suggest that arbitration is increasingly being relied on as the preferred dispute resolution mechanism.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Following the recent amendments to the IAA, the Commonwealth Parliament has further entrenched the use of ADR processes by enacting the *Civil Dispute Resolution Act 2011* (Cth). The purpose of the Act is to 'ensure that, as far as possible, parties take "genuine steps" to resolve a civil dispute before proceedings are commenced in the Federal Court or the Federal Magistrates Court.' The Act provides a non-exhaustive list of examples of 'genuine steps' which includes participation in arbitration, mediation or direct negotiations. The Act is an explicit recognition by Parliament that litigation should be a last resort in resolving disputes, rather than the first port of call.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

Recent reforms to arbitration on the domestic level will lead to a harmonised system for domestic arbitration in Australia. The introduction of the Uniform Commercial Arbitration legislation is an innovative development which places Australia at the forefront of the global move towards the use of arbitration, as opposed to litigation.

As well as rejuvenating the use of domestic arbitration in Australia, the recent 2010 revisions to the IAA will further promote the efficiency and celerity of arbitration both domestically and internationally.

Also, the recent appointment of ACICA as the sole default appointing authority signals the final legislative reform, which along with the establishment of the AIDC, will position Australia as an attractive neutral venue for the resolution of international commercial disputes.