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# Australia's Reputation as a Centre for International Arbitration: Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie Sas Missing a Critical Opportunity to Reverse the Eisenwerk Decision

## **Abstract**

*[The Queensland Court of Appeal handed down its decision in Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH, in which the legal framework governing Australia's international commercial arbitration was reviewed and the 'Eisenwerk' principle was established. What was ascertained was that the adoption of arbitration rules were believed to comprise a displacement of UNCITRAL Model Law on International Commercial Arbitration, with a number of legal practitioners and scholars criticising the approach taken by the Eisenwerk decision. On 11 August 2010, the New South Wales Supreme Court reviewed the Eisenwerk principle in Cargill International SA v Peabody Australia Mining Ltd, and nine days later, the Queensland Court of Appeal provided a different interpretation to that of Cargill, in Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS. The diverse approaches taken by both cases have generated controversy regarding the Eisenwerk principle, and also to the amended 2010 legislation governing international commercial arbitration in Australia. Therefore, in order to provide an analysis of Australia's reputation as a centre for international commercial arbitration, this essay will explore both Eisenwerk and Wagners. In doing so, it will discuss s 21 of the International Arbitration Amendment Act 2010 (Cth) and will argue that Wagners did miss a critical opportunity to reverse the Eisenwerk decision, in the hope of restoring Australia's reputation as a centre for international commercial arbitration. In the process of providing an analysis of both cases, the issue of whether the impact of the Eisenwerk decision was negated by amendments to the International Arbitration Act 1974 (Cth) will be reviewed. This essay will finally provide a detailed analysis on new reforms to current legislation in the hope of demonstrating Australia's future prospects as a 'centre' for international commercial arbitration.]*

## **Keywords**

International Commercial Arbitration, Eisenwerk, UNCITRAL Model Law, Choice of Law

**AUSTRALIA'S REPUTATION AS A CENTRE FOR  
INTERNATIONAL ARBITRATION: WAGNERS NOUVELLE  
CALEDONIE SARL v VALE INCO NOUVELLE CALEDONIE SAS:  
MISSING A CRITICAL OPPORTUNITY TO REVERSE THE  
EISENWERK DECISION**

SOPHOCLES KITHARIDIS\*

*[The Queensland Court of Appeal handed down its decision in Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH, in which the legal framework governing Australia's international commercial arbitration was reviewed and the 'Eisenwerk' principle was established. What was ascertained was that the adoption of arbitration rules were believed to comprise a displacement of UNCITRAL Model Law on International Commercial Arbitration, with a number of legal practitioners and scholars criticising the approach taken by the Eisenwerk decision. On 11 August 2010, the New South Wales Supreme Court reviewed the Eisenwerk principle in Cargill International SA v Peabody Australia Mining Ltd, and nine days later, the Queensland Court of Appeal provided a different interpretation to that of Cargill, in Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS. The diverse approaches taken by both cases have generated controversy regarding the Eisenwerk principle, and also to the amended 2010 legislation governing international commercial arbitration in Australia. Therefore, in order to provide an analysis of Australia's reputation as a centre for international commercial arbitration, this essay will explore both Eisenwerk and Wagners. In doing so, it will discuss s 21 of the International Arbitration Amendment Act 2010 (Cth) and will argue that Wagners did miss a critical opportunity to reverse the Eisenwerk decision, in the hope of restoring Australia's reputation as a centre for international commercial arbitration. In the process of providing an analysis of both cases, the issue of whether the impact of the Eisenwerk decision was negated by amendments to the International Arbitration Act 1974 (Cth) will be reviewed. This essay will finally provide a detailed analysis on new reforms to current legislation in the hope of demonstrating Australia's future prospects as a 'centre' for international commercial arbitration.]*

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## I Introduction

There is no doubt as to the importance of international arbitration to 'global commerce'.<sup>1</sup> However, the role and reputation of Australia as a centre for international commercial arbitration has been examined, and its importance questioned, by legal scholars, judges and practitioners.<sup>2</sup> Notably, the Chief Justice of the Federal Court Patrick A Keane states that '[a]rbitration as a method of dispute resolution is seen to offer the major benefits of enforceability, neutrality, speed and expertise over court based determinations'.<sup>3</sup> Importantly, he further asserts that from a practical standpoint, as arbitration provides practitioners with the ability to resolve issues more quickly, it is therefore likely to be cheaper than the 'lengthier and more elaborate proceedings in court'.<sup>4</sup> This much needed commercial arbitration in Australia has been regulated by two main statutory sources: the *International Arbitration Act 1974* (Cth) (IAA) and uniform state legislation, with the Victorian legislation being the *Commercial Arbitration Act 1984* (Vic) (CAA).

While Australian legislation and case law were generally supportive of international arbitration, there is no doubt that the existence of separate legislative schemes added considerable complexity. Subsequently, the *International Arbitration Amendment Act 2010* (Cth) was enacted<sup>5</sup> to provide a clearer cornerstone for Australia's international arbitration regime.<sup>6</sup> The amendments made by that Act were intended to emphasise 'the importance of speed, fairness and cost effectiveness in intentional arbitration, while clearly defining and limiting the role of the courts in international arbitration without compromising the important protective function that the courts exercise'.<sup>7</sup> One of the most significant amendments to the IAA is the repeal of the existing s 21 which previously allowed parties to choose to resolve their dispute 'other than in accordance with the *Model Law*'. This change means it is no longer possible to contract out of the *Model Law* in international arbitration where Australian procedural law is selected. Section 21 had 'long been a source of confusion and

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<sup>1</sup> Justice Patrick A Keane, 'Judicial support for arbitration in Australia' (2010) 34 *Australian Bar Review* 1.

<sup>2</sup> *Ibid* 2.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid*.

<sup>5</sup> The *International Arbitration Amendment Act 2010* (Cth) received Royal Assent on 6 July 2010, as Act No 97 of 2010.

<sup>6</sup> Luke Nottage, & Richard Garnett, 'Introduction' in Luke Nottage & Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 1, 2.

<sup>7</sup> Commonwealth, *Parliamentary Debates – International Arbitration Amendment Bill 2009 Second reading speech*, House of Representatives, 25 November 2009, 12791-12792 (Robert McClelland, Attorney-General).

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concern'.<sup>8</sup> In addition to this, it is therefore important to note that the IAA concerns international arbitration specifically, while the CAA regulates domestic arbitration. However, disagreement remains as to whether this distinction was resolved with appropriate certainty. Tension exists where the IAA is 'contracted out of' leaving the State based CAA's to apply.

The amendments came as Australian courts were considering the decision in *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH (Eisenwerk)*;<sup>9</sup> a much-criticised decision of the Queensland Court of Appeal. *Eisenwerk* is authority for the position, under the unamended IAA, that where the parties have selected ICC Arbitration Rules, they have contracted out of the *Model Law* and as a result, the state-based *Commercial Arbitration Act* will apply.<sup>10</sup> However, in *Wagners Nouvelle Caledonie SARL v Vale Inco Nouvelle Caledonie SAS (Wagners)*,<sup>11</sup> the Queensland Court of Appeal was again faced with this argument, but in relation to UNCITRAL rather than ICC Rules.<sup>12</sup> In this case, the Court found that the construction of the arbitration clause did not expressly exclude the *Model Law*, and so there was no need to review *Eisenwerk*.<sup>13</sup> Notwithstanding the construction point, the court did not endorse the *Eisenwerk* decision as it distinguished it and commented that '[w]hat is said to be "the principle contained in paragraph 12" of *Eisenwerk* is, in truth, no principle at all'.<sup>14</sup> This is because the *Eisenwerk* judgment related to the construction and application of a particular set of contractual terms in a specific context: 'pronouncements in the reasons of a court construing particular contractual provisions should rarely be regarded as propounding generally applicable principles of law, especially when the contract is not in standard form'.<sup>15</sup>

## II Should the *Eisenwerk* decision have been overruled in the amended IAA?

The Attorney-General's Department released a Discussion Paper, *Review of the International Arbitration Act 1974* on 21 November 2008, announcing a formal review

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<sup>8</sup> Ibid.

<sup>9</sup> [2001] 1 Qd R 461.

<sup>10</sup> Ibid 470 [29].

<sup>11</sup> [2010] QCA 219.

<sup>12</sup> Rules of Arbitration of the International Chamber of Commerce, adopted 1 January 1998.

<sup>13</sup> [2010] QCA 232 [42].

<sup>14</sup> Ibid.

<sup>15</sup> Ibid 233 [43].

of the IAA.<sup>16</sup> The Discussion Paper sought submissions from the public on a series of questions, with the most important question being whether the IAA, including the UNCITRAL *Model Law*, should be made the exclusive regime for international commercial arbitrations with their seat in Australia.<sup>17</sup> The Discussion Paper also sought submissions regarding whether the *Eisenwerk* decision should be overruled in the amended IAA.<sup>18</sup> The Queensland Court of Appeal in the *Eisenwerk* decision held that the inclusion by the parties of arbitral rules in their agreement to arbitrate in Australia had the effect that the *Model Law* was excluded from the arbitration under s 21 of the IAA.<sup>19</sup> Pincus JA stated:

The Rules may contain a provision which “differs” from the Model Law, without necessarily manifesting any intention to exclude the operation of the Model Law in its entirety. The provisions of the Model Law are capable of being varied by agreement of the parties and the Rules are capable of applying as a partial modification of the Model Law, leaving other provisions of the Model Law.<sup>20</sup>

Notably, the ‘present authors in their submission to the Attorney-General’s Department discussed this issue at length’ and certified the perspective taken in the Singaporean legislation that parties should be entitled to exclude the *Model Law* in favour of the choice of the ‘CAA or a foreign arbitral law’.<sup>21</sup> Legal scholar, Luke Nottage argues that s 21 of the IAA would most likely be more beneficial if it permitted a limited opt-out of the *Model Law*.<sup>22</sup> He goes further in stating that by parties having a choice of arbitral rules, ‘either of an institution or ad hoc’, would not amount to an exclusion of the *Model Law*, and therefore such rules under Art 19(1) are declared admissible by the *Model Law*.<sup>23</sup> In stating this, Nottage argues that the consequences of the contrary view that are evident in the *Eisenwerk* decision was that the ‘CAA “reappeared” as the arbitral procedural law, a result at complete odds with the parties’ expectations’.<sup>24</sup>

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<sup>16</sup> Attorney-General’s Department ‘Review of the International Arbitration Act 1974’ (Discussion Paper 1, Parliamentary Library, Parliament of Australia, 2008).

<sup>17</sup> *Ibid* 2 (Question C).

<sup>18</sup> *Ibid* 3 (Question D).

<sup>19</sup> [2001] 2 Qd R 461, 463 [15].

<sup>20</sup> *Ibid* 464 [20].

<sup>21</sup> Nottage and Garnett, above n 6, 21.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*.

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## A Clarity of Section 21 and the *Eisenwerk* decision

The amendments to the IAA have gone further in overturning the *Eisenwerk* decision by suggesting that 'although the wording is not entirely clear, that no arbitration law other than the *Model Law* can ever apply to an international commercial arbitration with its seat in Australia'.<sup>25</sup> Nottage asserts that provided the 'difficulty and confusion' which is present in the existing position; such an absolute view may be interpreted as the 'safest option' notwithstanding its elimination of any 'scope for party autonomy.'<sup>26</sup> According to Garnett, however, it makes Australia unusual among *Model Law* jurisdiction countries.<sup>27</sup> In stating this, both Garnett and Nottage therefore agree with the need to reverse the decision in *Eisenwerk*, based on the argument that the Queensland Court of Appeal held that the parties intended to imply that it is best to opt-out of the *Model Law* by specifying the ICC arbitration Rules as also governing their arbitration, otherwise given force of law through IAA s 21, and applying generally where Australia is the seat (*Model Law* Art 1(2)).<sup>28</sup> According to Nottage and Garnett, that judgment fundamentally misunderstands the relationship between (opt-in) Arbitration Rules, incorporated by reference into the parties' arbitration agreement, and arbitration legislation (mostly now opt-out default rules), in addition to some mandatory rules.<sup>29</sup> Arguably, the uncertainty surrounding the old s 21 has continued in the *Wagners* case and in *Cargill International SA v Peabody Australia Mining Ltd (Cargill)*.<sup>30</sup>

In *Cargill*, the NSW Supreme Court correctly refused to follow *Eisenwerk* and held that a choice of ICC rules is not an exclusion of the *Model Law* under s 21. A careful analysis of *Eisenwerk* was undertaken by Ward J in which her Honour stated:

[The *Eisenwerk* decision] does not properly recognise or give effect to the distinction between the *lex arbitri* and the procedural rules governing an arbitration. I am not satisfied that there is any inability to reconcile the application of the *Model Law* with the adoption of the ICC Rules as the procedural rules to govern the conduct of the parties' arbitration. Accordingly,

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<sup>25</sup> *Ibid* 21.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid* 22.

<sup>28</sup> *Bitannia Pty Ltd v Rossfield Nominees (ACT) Pty Ltd* [2008] NSWSC 939.

<sup>29</sup> Luke Nottage, & Richard Garnett, 'The Top 20 Things to Change In or Around Australia's International Arbitration Act' in Luke Nottage & Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 149, 170.

<sup>30</sup> [2010] NSWSC 887 [27].

insofar as *Eisenwerk* is authority...I have formed the view that the decision...should not be followed by the court.<sup>31</sup>

The *Eisenwerk* case was expressly disapproved as 'plainly wrong', and the Court held that party selection of ICC Rules did not constitute opt-out.<sup>32</sup> However, in *Wagners* case, the Queensland Court of Appeal, while finding that a choice of UNCITRAL Rules was not an exclusion of the *Model Law*,<sup>33</sup> nevertheless declined to state that *Eisenwerk* was wrongly decided.<sup>34</sup> The effect of this has been that the uncertainty effected by the *Eisenwerk* decision continues to make Australia less attractive as a venue for international commercial arbitration, as parties cannot have certainty that the choice of rules in their agreements will be given effect. This has been exacerbated by the time taken to mitigate the effects of *Eisenwerk* in the amendments to the IAA.

### III *Eisenwerk*, *Wagners* and the exclusion of the model law

In analysing whether the *Wagners* case missed a critical opportunity to reverse the *Eisenwerk* decision, and therefore to restore Australia's reputation as a centre for international commercial arbitration, it is necessary to analyse the scope of application of the *Model Law* in Australia, and its exclusion. Garnett contends that once the parties' agreement is found to fall within Art 1, the *Model Law* applies in order to govern the procedure of the arbitration.<sup>35</sup> However, the IAA, as amended in 1989, then proceeds to provide parties with a choice as to whether they require the application of the *Model Law*.<sup>36</sup> Nevertheless, under s 21, the parties may agree that 'any dispute that has arisen between them is to be settled otherwise than in accordance with the [*Model Law*]'. Garnett argues that the intention of the drafters in enacting s 21 is obvious, as it appears to have been to grant further flexibility to the parties by allowing them to choose a procedural law other than the *Model Law* to govern their arbitration.<sup>37</sup> He then goes on to provide an example of agreement where parties were found to have excluded the *Model Law* in favour of the uniform

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<sup>31</sup> Ibid [91].

<sup>32</sup> Ibid [92].

<sup>33</sup> Richard Garnett and Luke Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (Sydney Law School Research Paper No 10, University of Sydney, 14 September 2010) 12.

<sup>34</sup> [2010] QCA 219 [17].

<sup>35</sup> Richard Garnett, 'The Legal Framework for International Arbitration in Australia' in Luke Nottage & Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 38, 49.

<sup>36</sup> Richard Garnett, 'International Arbitration but Subject to National Law: The Rejection of Delocalisation in Australia' (2000) 28 *Australian Business Law Review* 351.

<sup>37</sup> Ibid 353.

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legislation in the NSW case of *Aerospatiale Holding Australia Ltd v Elspan International Ltd*.<sup>38</sup> Here, the court determined the construction of the following clause:

Any dispute...shall be referred to arbitration for determination by a single arbitrator to be agreed between the parties or failing such agreement by a single arbitrator appointed by the President of the Institution of Engineers in accordance with the Commercial Arbitration Act NSW ...<sup>39</sup>

The Court concluded that parties, by their reference to the NSW commercial arbitration legislation, had excluded the *Model Law* under s 21 of the IAA.<sup>40</sup> Garrett contends that this case allowed courts to construe any reference to the CAA in the parties' agreement as an exclusion of the *Model Law*.<sup>41</sup> However, as Garrett argues, 'mere silence as to the procedural law would not likely amount to an exclusion',<sup>42</sup> and a clause which provides, for example, 'arbitration in Sydney' would be interpreted as applying the *Model Law*.<sup>43</sup>

A separate issue then arises when an arbitration agreement that incorporates the rules of 'an arbitral institution, such as the ICC, or ad hoc rules such as the 1976 UNCITRAL Rules',<sup>44</sup> amounts to an exclusion of the *Model Law* under s 21. The *Eisenwerk* decision provides that such an arbitration agreement would constitute an exclusion of the *Model Law*. Deputy Secretary General of the ICC, Simon Greenberg, however, views the approach as problematic in nature as it 'equates a choice of arbitral rules by the parties with a choice of a national or state arbitral procedural law when it has always been understood that arbitral rules, as contractual terms, are subordinate to legislation.'<sup>45</sup> Further, the approach assumes an inconsistency between a choice of arbitral rules and the *Model Law*, a view that is repudiated by the text of the *Model Law* itself, and more specifically, Art 19(1) which provides that the parties 'are free to agree on the procedure' in arbitration.<sup>46</sup>

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<sup>38</sup> (1992) 28 NSWLR 321.

<sup>39</sup> *Ibid* 322.

<sup>40</sup> *Ibid* 325.

<sup>41</sup> Garnett, above n 35, 50.

<sup>42</sup> *Ibid*.

<sup>43</sup> Simon Greenberg, Luke Nottage and Romesh Weeramantry, Richard Garnett, 'The 2005 Rules of the Australian Centre for International Commercial Arbitration-Revisited' in Luke Nottage & Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 79, 82.

<sup>44</sup> Garnett, above n 35.

<sup>45</sup> *Ibid* 51.

<sup>46</sup> *Ibid* 50.

## A Avoiding the *Eisenwerk* dilemma

The Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules of 2005 sought to avoid the *Eisenwerk* issue by providing in Art 2(3) that 'the parties, by selecting these Rules do not intend to exclude the operation of the *Model Law*'.<sup>47</sup> Here, legal scholar Richard Garnett contends that courts will most likely give effect to the provision and therefore allow the *Model Law* to 'operate concurrently with the Rules'.<sup>48</sup> Essentially, s 21 of the IAA 'needed amendment by the Federal Parliament to provide that a choice of other institutional rules does not amount to an exclusion of the [*Model Law*']'.<sup>49</sup> Such an approach was taken in Singapore under s 15(2) of the *International Arbitration Act 1995* (Sing) where a similar problem appeared with its legislation. An amendment to the IAA along those lines would have had the effect of confining the CAA to domestic arbitrations, unless the parties had expressly chosen the CAA in their arbitration clause.<sup>50</sup> Critically, Garnett states that such an outcome would 'render the law simpler' in addition to avoiding 'the injustice of foreign parties being subjected to an arbitral regime which they would likely not have anticipated' when the agreement was entered into.<sup>51</sup>

Partly along these lines, the 2010 amendments to the IAA introduced a new version of s 21:

If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.

While this new version is not entirely clear on its face, the aim of this provision, 'according to the Explanatory Memorandum', is to make the *Model Law* mandatory for all international commercial arbitrations with their seat in Australia.<sup>52</sup> According to Garnett, there will no longer be any scope for excluding the *Model Law* either by express choice of the CAA, foreign arbitration law, institutional or ad hoc rules.<sup>53</sup> However, what does arise is the effect of a choice of each of those legal regimes under the new provisions. First, in the case where parties select the ICC rules in their arbitration agreement, it seems that such a choice will be given effect under Art 19(1)

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<sup>47</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192.

<sup>48</sup> Garnett, above n 43.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Explanatory Memorandum, International Amendment Bill 2009 (Cth) 42[114]-[119].

<sup>53</sup> Garnett, above n 48.

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of the *Model Law*.<sup>54</sup> However, the *Model Law* will remain in place as the 'supervisory, procedural law of the arbitration'.<sup>55</sup>

## **B Case law interpretation on the exclusion of the model law**

What writers such as Garnett and Nottage argue is that if parties choose the CAA to govern their agreement, this choice will be invalid as the new s 21 will not allow state legislation to apply 'if the *Model Law* applies'.<sup>56</sup> While, according to the literal terms of the new provision, an express opt-out in favour of the CAA still appears to be possible, the legislative history emphatically supports the idea that a choice of law other than the *Model Law* is not permissible. Garnett contends that if this view is correct, then the same conclusion must also follow in the case where the parties chose a foreign arbitration law.<sup>57</sup>

This approach may be viewed as an 'unusual encroachment on party autonomy', even if a choice of foreign arbitration law would generally be inadvisable.<sup>58</sup> Yet, the new provision may also be defended on the ground that if parties choose arbitration, they should accept greater finality and speed in the decision-making process than under litigation. What can be argued is that in the case of the CAA, the issue may be 'soon of less practical significance' given that such legislation is also being reformulated nationwide from 2010 to track the *Model Law* regime more closely.<sup>59</sup> It is important to note that in this regard, the NSW Supreme Court in *Cargill* held that a choice of institutional rules does not amount to an exclusion of the *Model Law* under s 21.<sup>60</sup> More specifically, s 2D of the IAA provides that the legislation is intended to give effect to the New York Convention, the revised *Model Law* and the 1965 ICSID Convention 'on investor-state arbitration'.<sup>61</sup> This section is further reinforced by the new s 39 which provides that whenever a court is exercising a power under the IAA or the *Model Law*, 'such as a power to enforce an award, stay a court proceeding in

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<sup>54</sup> Subject to the provision of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

<sup>55</sup> Garnett, above n 48.

<sup>56</sup> *Ibid* 52.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid*. The Parliament of New South Wales enacted the *Commercial Arbitration Act 2010* (NSW) which came into effect on 1 October 2010 and in the process reformulated the act to repeal the 1984 legislation. This move developed a new regime for the State *Model Law*.

<sup>60</sup> [2010] NSWSC 887 [80].

<sup>61</sup> Nottage and Garnett, above n 21, 24.

breach of an arbitration agreement, appoint or remove an arbitrator or grant an interim measure of protection'<sup>62</sup> then the court must also demonstrate the objects in s 2D as well as two other facts in s 39(2). According to this section, these facts are that 'arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes'<sup>63</sup>, and that 'awards are intended to provide certainty and finality'.<sup>64</sup>

The *Eisenwerk* case was expressly disapproved, but the NSW Supreme Court did acknowledge that the choice of an arbitral procedural law other than the *Model Law* would remain a valid exclusion. Regrettably, the clarity and logic in the decision in *Cargill* were less apparent in *Wagners* case.<sup>65</sup> While the decision on the facts of *Wagners* was plainly correct, 'that being that a choice of UNCITRAL Rules in an arbitration agreement did not amount to an exclusion of the *Model Law* under s 21',<sup>66</sup> the Court refused to state that its earlier decision in *Eisenwerk* was evidently wrong. The Court distinguished that case on the grounds that it involved a choice of the ICC Rules at a time when the *Model Law* was less widely known.<sup>67</sup> Significantly, the *Model Law* had already been in force in Australia for almost 15 years at the time of the *Eisenwerk* decision and, more importantly, this approach repeats the error of 'equating a contractual choice of arbitral rules with a choice of a national or state arbitral procedural law' for the purposes of applying s 21.<sup>68</sup>

### C The final verdict – *Eisenwerk* finally answered

With the new provision being implemented, the decision of whether international commercial arbitration in Australia is now exclusively governed by the *Model Law* is clear. Under the new s 21 of the *International Arbitration Amendment Act 2010* (Cth), parties are no longer able to opt-out of the *Model Law* and therefore, it is not possible for the operation of the various state or territory Commercial Arbitration Acts to be enlivened, provided that they will now always be displaced by s 109 of the *Commonwealth Constitution*.<sup>69</sup> Further, with this being stated, the new s 21 provides for

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<sup>62</sup> *Ibid.*

<sup>63</sup> *International Arbitration Act 1974* (Cth) s 39(2)(b)(i).

<sup>64</sup> *International Arbitration Act 1974* (Cth) s 39(2)(b)(ii).

<sup>65</sup> [2010] QCA 210.

<sup>66</sup> Garnett, above n 57.

<sup>67</sup> [2010] QCA 210 [43].

<sup>68</sup> Garnett and Nottage, above n 33.

<sup>69</sup> Hayward B, 'Eisenwerk Reconsidered (Twice) – A Case Note on *Cargill International SA v Peabody Australia Mining Ltd, and Wagners Nouvelle Caledonie SARL v VALE Inco Nouvelle Caledonie SAS*' (2010) 15(2) *Deakin Law Review* 242.

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the legislative reversal<sup>70</sup> of *Eisenwerk* as it 'came into force on 6 July 2010, the date upon which the amending legislation received royal assent'. Legal academic Benjamin Hayward therefore contends that 'as of the 6 July 2010, the continuing relevance of *Eisenwerk* is an answered question'.<sup>71</sup> However, according to Nottage, its authority concerning international commercial arbitrations 'conducted pursuant to arbitration agreements entered into before that date'<sup>72</sup> is still unclear and uncertain. This is as a result of the conflicting interpretations provided by both the Supreme Court of New South Wales in *Cargill* and the Queensland Court of Appeal in *Wagners*, whereby in *Cargill*, the court unambiguously rejected the *Eisenwerk* reasoning, and in *Wagners*, the court 'characterised the decision in *Eisenwerk* as being on of fact and did not go so far as to suggest that *Eisenwerk* was decided incorrectly'. Arguably, provided the applicability of the *International Arbitration Amendment Act 2010 (Cth)*,<sup>73</sup> the 'uncertainty' which has been generated by the decisions concluded in *Cargill* and *Wagners* will persevere until future amendments.

#### IV Australia's future in international arbitration and recent developments

The Attorney-General, the Honourable Robert McClelland addressed the *Australian Maritime and Transport Arbitration Commission (AMTAC)* on 1 July 2010, and outlined the need for Australia to develop as a leader in the international arbitration community. As recognised by McClelland, international arbitration is typically considered as the 'most effective way for businesses to resolve cross-border disputes ... [with] a vibrant international arbitration culture'<sup>74</sup> being a fundamental and indispensable tool for the current Australian market in the 'modern, global economy'.<sup>75</sup> Australia's presence in the international arbitration community further enhances economic growth in general,<sup>76</sup> and is illustrated by the success of regional

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<sup>70</sup> See *Revised Explanatory Memorandum, International Arbitration Amendment Bill 2010 (Cth)* 16[113].

<sup>71</sup> Hayward B, 'Eisenwerk Reconsidered (Twice) – A Case Note on *Cargill International SA v Peabody Australia Mining Ltd, and Wagners Nouvelle Caledonie SARL v VALE Inco Nouvelle Caledonie SAS*' (2010) 15(2) *Deakin Law Review* 243.

<sup>72</sup> Nottage, 'The 2010 Amendments', above n 33, 13-16.

<sup>73</sup> See the *International Arbitration Amendment Act 2010 (Cth)* ss 2(1) & 3; Sch 1, Pt 2.

<sup>74</sup> Attorney-General the Hon Robert McClelland, 'Address to the Australian Maritime and Transport Arbitration Commission (AMTAC)' (Speech delivered at the Australian Maritime and Transport Arbitration Commission (AMTAC), Sydney, 1 July 2010).

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

commercial arbitration centres<sup>77</sup> in China such as the *Hong Kong International Arbitration Centre (HKIAC)*, and in Singapore, most notably the *Singapore Commercial Arbitration Centre (SIAC)*, where over 700 disputes were heard in 2009. Both countries are known to have gained positive publicity, in that they are both considered to be successful centres for international commercial arbitration. Their attitude towards legal reform was positive from the beginning, with the Hong Kong Department of Justice constructing a Consultation Paper which was attached to a draft Arbitration Bill, calling for commentary to be made on Hong Kong's development as an international leader. The Consultation Paper contended that in order for arbitration to be successful in Hong Kong, the new arbitration law should be as 'user friendly' as possible.<sup>78</sup> Further, in terms of domestic and international arbitration, Hong Kong has an Arbitration Ordinance (Cap 341),<sup>79</sup> and this governs arbitration at both levels. More specifically however, the *Model Law* has a greater application at an international level (in Hong Kong), whilst separate provision from the current Arbitration Ordinance govern domestic arbitration. These provisions are based mainly on the United Kingdom *Arbitration Act 1996*.<sup>80</sup>

Notably, in order to 'develop' Australia into a world leader in international commercial arbitration, a 'cutting-edge and internationalised model'<sup>81</sup> needs to be present. As demonstrated in the analysis above, the Australian Government has initiated the reform's to develop Australia's presence in the international commercial arbitration community through the amendments made to the *International Arbitration Act*, to which key objectives were verified. The amendments include:

- 'amendments to adopt the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration;
- Provide guidance to the courts on the interpretation of the Act;
- Provide additional tools to help parties resolve their disputes quickly and fairly, including assistance for the parties to obtain evidence;
- Clarify the relationship between the Act and State and Territory legislation relating to domestic arbitration; and

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<sup>77</sup> Ibid.

<sup>78</sup> Hong Kong Department of Justice, *Consultation Paper – Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill*, LC Paper No. CB(2)2261/08-09(02), December 2007, 9.

<sup>79</sup> A Monichino, 'Reform of the Australian Domestic Arbitration Acts – It's Time', (2009) 28(1) *The Arbitrator & Mediator* 83, 90.

<sup>80</sup> Ibid.

<sup>81</sup> McClelland, above n 72.

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- Improve the general operation of the Act'.<sup>82</sup>

In stating these objectives, the Australia Government seeks to provide a more thorough guidance to the court in exercising its judicial powers and functions under the new Act, and in further interpreting key provisions in regards to international jurisdictions. Among other things, the new amendments invite the court 'to bring certainty and finality' to the conclusions and resolutions of international disputes involving Australia. Albeit, this does however, restrict the court's interference with arbitral proceedings and awards, limiting them to, as the Attorney-General states, 'considerable circumspection'.<sup>83</sup> The very recent case of *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*<sup>84</sup> demonstrates the support for arbitration in Australian courts by outlining that parties may now have a greater confidence that Australian courts will uphold their agreement to arbitrate. This case, however, demonstrated that parties facing the enforcement of a foreign arbitral award in Australia, should understand and recognise that any award provided in the arbitration will legally be imposed in Australia in the same fashion as an Australian court judgment. Critically, *Uganda Telecom Ltd* demonstrates the court's encouragement and support, that arbitration in Australia is a suitable and highly effective tool.

Further, though the new amendments seek to rarely involve the courts in the arbitration process, the reforms seek to place emphasis on the 'importance of speed, fairness and cost-effectiveness in international arbitration'.<sup>85</sup>

## **A State and Territory reforms – enhancing arbitration at a domestic level**

In a submission made by the Chief Justices of the State and Territory Supreme Courts, on 10 December 2008, to the Commonwealth Attorney-General, in respect of the proposal for the Federal Court of Australia to be given exclusive jurisdiction for matters arising under the IAA, the Chief Justices stated:

Any proposal for exclusive jurisdiction raises the prospect of consequential jurisdiction disputes. In the context of the [IAA] those disputes could emerge over such issues as whether or not an arbitration can be classified as one relating to "international commercial arbitration" or whether or not the parties have agreed ... that the arbitration should be governed otherwise than under the Law .... It would not assist Australia's position in relation to international

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> [2011] FCA 131.

<sup>85</sup> McClelland, above n 74.

arbitration if the law with respect to domestic arbitration develops in a significantly different manner. Creating a barrier between international and domestic commercial arbitration systems, in way that does not exist, most relevantly, in Hong and Singapore, would constitute a significant disadvantage. Any attempt to hold out Australia as centre for international arbitration will not succeed if the domestic arbitration system does not operate consistently with the international arbitration regime.<sup>86</sup>

Arguably, Australian domestic arbitration standards must align themselves with the standards provided in the international arbitration regime, and further enhance their domestic arbitration culture. States and Territories have therefore agreed to adopt 'new uniform national laws' on domestic arbitration based on the UNCITRAL *Model Law*. This approach demonstrates that Australia has the ability to provide clients with a harmonised system of international and domestic arbitration, and as stated by McClelland, will 'certainly increase [Australia's] attractiveness to international customers and establish Australia as a global leader in the arbitration field.'<sup>87</sup> McClelland however, contends that Australia, as an arbitration leader, will need to 'create and promote a local arbitration culture' in order to demonstrate itself as a more suitable alternative to other arbitration centres.<sup>88</sup> In this regard, this 'culture' requires Australia to demonstrate that it can deliver a 'swift and cost-competitive outcome'.<sup>89</sup>

## V Conclusion

The decision in *Eisenwerk* had a negative impact on Australia's reputation as a centre for international commercial arbitration, as it limited the certainty that parties could have regarding the procedural rules which would be applied to a dispute despite clear selections made by contractual agreement. Although the clarification provided by the Court in *Wagners* which is that the original decision in *Eisenwerk* should be regarded as a discrete statement of contractual construction rather than a statement of general application, goes some way to mitigating the effects of the decision, it is regrettable that the Court did not take the opportunity to make an unambiguous statement along the lines of the decision in *Cargill*. However, it seems that the amended IAA has negated the effect of *Eisenwerk* on the basis of the terms of the

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<sup>86</sup> See, Comments by the Chief Justices of the States and Territories, *Review of the International Arbitration Act 1974* (10 December 2010) Attorney General's Department <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Comments+by+the+Chief+Justices+of+the+States+and+Territories.PDF/\\$file/Comments+by+the+Chief+Justices+of+the+States+and+Territories.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Comments+by+the+Chief+Justices+of+the+States+and+Territories.PDF/$file/Comments+by+the+Chief+Justices+of+the+States+and+Territories.PDF)>.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

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statute and the intention of Parliament demonstrated through the explanatory memoranda. Whether Parliament's intent will be supported by the courts through application of the revised s 21 remains to be seen. Further, in regards to Australia being viewed as a 'centre' for international arbitration, one may come to the conclusion that this can only be achieved through a system that ensures to individuals that their legal problems can be fixed 'fast and fairly'. As the Attorney-General the Honourable Robert McClelland contends, 'the promotion of this uniquely Australian brand will allow the undoubted talents and reputation that exist in the arbitration community to flourish'.<sup>90</sup> In stating this, one can come to the conclusion that Australia does have the ability to be classified as a 'centre' for international arbitration, though only when 'cutting-edge and internationalised models'<sup>91</sup> are implemented.

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.