

WHAT LAW (IF ANY) NOW APPLIES TO INTERNATIONAL COMMERCIAL ARBITRATION IN AUSTRALIA?+

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I INTRODUCTION

On 6 July 2010 Royal Assent was given to amendments passed by the Australian Federal Parliament relating to the *International Arbitration Act 1974* (Cth) ('IAA'). These were the first substantial changes to the IAA since 1989, when Part III was added to give force of law to the 1985 United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration ('Model Law'). The 2010 amendments to the IAA adopted most of UNCITRAL's 2006 revisions to the Model Law, as well as some other new provisions.¹ From around the time when the IAA amendments were enacted, the Australian states and territories embarked on updating their *Commercial Arbitration Acts* ('CAA') using the Model Law as their template, but with a new focus solely on domestic arbitration. The result of that process has seen the enactment of the *CAA 2010* (NSW), the *CAA 2011* (Vic), (SA) and (Tas), the *CAA 2012* (WA), and the *Commercial Arbitration (National Uniform Law) Act 2010* (NT) – with legislation of the remaining states and territories

+ Thanks are due especially to Sarah Lancaster, for helping discern the 'black hole' problem re-emphasised in Part II of this article, in private conversation following a Sydney Law School seminar held at the Australian International Disputes Centre on 2 September 2011; to Chief Justice Wayne Martin, for information on developments regarding the *Commercial Arbitration Bill 2011* (WA) described in Part IV; to Adjunct Professor Lawrence Boo, Professor Tatsuya Nakamura and Dr Romesh Weeramantry, for feedback related to the comparative analysis in Part IV; and to three anonymous reviewers. This article draws on research for Nottage's project entitled 'Fostering a Common Culture in Cross-Border Dispute Resolution: Australia, Japan and the Asia-Pacific', supported by the Commonwealth through the Australia-Japan Foundation which is part of the Department of Foreign Affairs and Trade. Views remain personal to the authors.

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1 For the Government's Discussion Paper released on 21 November 2009, see <<http://www.ag.gov.au/Documents/Review%20of%20the%20International%20Arbitration%20Act%201974%20-%20Discussion%20Paper.pdf>>. For a summary of Submissions (including one by the present authors), see <http://www.law.usyd.edu.au/scil/documents/2009/ArbitrationTableSummary_Nottage.pdf>. For recent amendments see *International Arbitration Amendment Act 2010* (Cth), available at <<http://www.comlaw.gov.au/Details/C2004C00517>>.

expected to follow.² In the words of the then federal Attorney-General, who spearheaded this process, it aimed to spark a broader ‘cultural reform as to how arbitration is conducted’ – advancing Australia as a leader in resolving commercial disputes swiftly and cost-effectively.³

One of the complexities in the Australian legal position governing international commercial arbitration prior to the amendments to the *IAA* was that there was scope for operation of both the federal *IAA* (applicable to international arbitration) and the original uniform state *CAAs* enacted from the mid-1980s (applicable in principle to both domestic and international arbitration). This problem was compounded by the fact that the *IAA* and *CAA* provided very different legal regimes for international commercial arbitration. While the *IAA* adopted the Model Law regime with strong emphasis on the autonomy of the parties and the arbitral process, the *CAAs* followed the traditional approach of English law and provided for greater scope for judicial intervention, including wider rights of appeal (notably, for serious errors of law by arbitrators) and grounds for challenge to awards and arbitrators. Further uncertainty surrounding which legislation was to apply to international commercial arbitration in Australia arose out of the original section 21 of the *IAA*, added to the *IAA* along with Part III in 1989. As a compromise for those uneasy about the transition away from the English tradition of greater judicial scrutiny of the arbitral process, the original section 21 allowed parties to exclude or ‘opt out’ of the Model Law as the governing law (*lex arbitri*) for international arbitrations with the seat in Australia, in favour of the relevant *CAA*.⁴

Australian courts subsequently interpreted section 21 widely. Some judges even held that a choice of rules of an arbitral institution such as the International Chamber of Commerce (‘ICC’) also amounted to an exclusion of the Model Law with the result that the *CAA* applies as the default governing law. This principle became known as the *Eisenwerk* doctrine,⁵ and attracted strong criticism from

2 The new *CAA* statute is presently before the legislature in Queensland but not yet the Australian Capital Territory.

3 Hon Robert McClelland MP, ‘International Commercial Arbitration in Australia: More Effective and Certain’ (Speech delivered at the Australian Centre for International Commercial Arbitration Conference, Melbourne, 4 December 2009) <www.acica.org.au/downloads/conference-2009/opening_address.pdf>, cited in Luke Nottage and Richard Garnett, ‘Introduction’ in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 1, 16. That introduction and the Preface to the book provided by the then Chief Justice of New South Wales (at v–viii), also provides further background to the legislative reforms to the *IAA* and *CAA* regimes.

4 For further background to and legislative history of the 2010 reforms and other indications of historical ambivalence towards commercial arbitration in Australia, see *ibid* 1–18.

5 *Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH v Australian Granites Ltd* [2001] 1 Qd R 461 (‘*Eisenwerk*’).

commentators because it demonstrated a ‘category error’.⁶ To try to avoid the operation of the doctrine, the Australian Centre for International Commercial Arbitration (‘ACICA’) Arbitration Rules (first published in 2005) even had to set out an unusual provision: ‘By selecting these Rules the parties do not intend to exclude the operation of the UNCITRAL Model Law ...’ (Article 2.3).⁷

Eisenwerk was not followed in a recent decision of the Supreme Court of New South Wales in *Cargill International SA v Peabody Australia Mining Ltd*,⁸ even though the parties had also agreed on the ICC Arbitration Rules. However, the doctrine was partially endorsed by the Queensland Court of Appeal in *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS*.⁹ In *Wagners*, the Court held that the choice of UNCITRAL Rules did not constitute an exclusion of the Model Law under section 21; but it opined that a choice of ICC Rules would remain an implied ‘opt out’, given the significant differences between the Model Law and the latter Rules.

The newly enacted section 21, by contrast, gives the Model Law exclusive application for international commercial arbitrations with an Australian seat, and allows no scope for ‘opting out’. Consequently, a key question to resolve in the case of such arbitrations is the timing of operation of the new section 21; specifically, to which arbitration agreements does the provision apply? The importance of this issue has been heightened by possibly conflicting recent

6 Specifically, the Model Law is adopted as legislation, but it mainly comprises provisions which can be varied by contrary party agreement – either spelled out in an arbitration clause or agreement, or (more commonly) by parties incorporating by reference detailed arbitration rules. The fact that arbitration rules may happen to include provisions that are identical or very similar to provisions in the Model Law, or considerably different provisions, should be irrelevant. For criticism of the *Eisenwerk* doctrine, see Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) 64; Luke Nottage and Richard Garnett, ‘The Top 20 Things to Change in or around Australia’s International Arbitration Act’ in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 149, 170–1 (with further references); Albert Monichino, ‘International Arbitration in Australia – 2010/2011 in Review’ (2011) 22 *Australasian Dispute Resolution Journal* 215, 225.

7 See generally Greenberg, Kee and Weeramantry, above n 6, 84–6. Those authors, and Garnett, were founding members of the ACICA Rules Committee.

8 (2010) 78 NSWLR 533 (‘*Cargill*’). For a more detailed summary of *Cargill*, see Albert Monichino, Luke Nottage and Diana Hu, ‘International Arbitration in Australia: Selected Case Notes and Trends’ (Sydney Law School Legal Studies Research Paper No. 12/53, Sydney Law School, 22) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133763>.

9 [2010] QCA 219 (‘*Wagners*’). Partial endorsement of the *Eisenwerk* approach is evident from the reasoning of Muir JA (with whom McMurdo P agreed), particularly at [41]–[46] (although his Honour held, at [46], that *Eisenwerk* was ‘plainly distinguishable’) and from the reasoning of White JA at [50]–[53] (although fn 38 did remark that ‘Ward J in *Cargill International SA v Peabody Mining Ltd* [2010] NSWSC 887 (judgment of 11 August 2010) has argued, persuasively, that *Eisenwerk*’s reasoning was plainly wrong and should not be followed: at [42]–[91]’). In a recent conference presentation comparing Hong Kong’s new *Arbitration Ordinance*, after reviewing also *Eisenwerk* and *Wagners*, a judge from Hong Kong suggested that: ‘if the same issue came before the courts in Hong Kong it is submitted that the reasoning of Ward J in *Cargill* would be found to be persuasive’. See John Saunders, ‘Arbitration in Hong Kong’ in KE Lindgren and N Peram (eds), *International Commercial Law, Litigation and Arbitration* (Ross Parsons Centre of Commercial, Corporate and Taxation Law Publication Series, 2011) 157, 173. For a more detailed summary of *Wagners*, see Monichino, Nottage and Hu, above n 8.

decisions of the Federal Court of Australia in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*,¹⁰ and the Court of Appeal of Western Australia in *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*.¹¹

While examining the temporal scope of section 21 in this article, it will also be useful to determine the timing of the other 2010 amendments as this issue has also been canvassed in recent decisions. The need to examine the issue of timing becomes pressing when it is recalled that most states and territories (NSW, Victoria, South Australia, Tasmania and Western Australia and the Northern Territory) have adopted the new *CAA* regime that largely follows the Model Law, while other states and territories have not.

II THE PROBLEMS DEFINED

From the outset, four situations need to be considered, assuming that the arbitration agreement satisfies the definitions of ‘international’ and ‘commercial’ in article 1 of the Model Law.¹² The first is where the parties’ arbitration agreement has a NSW, Victorian, South Australian, Tasmanian and Western Australian or Northern Territory seat, and it was entered into *on or after* 6 July 2010. The second situation is the same as the first except that the seat of arbitration is in a different Australian state or territory. The third and fourth situations are the same as the first and second above, except that the arbitration agreement in each case was entered into *before* 6 July 2010.

Under the first situation, the Model Law (given force of law under section 16 of the *IAA*) will mandatorily apply as the procedural law of the arbitration to such an agreement, pursuant to the new section 21. This provision prevents parties from excluding the Model Law in any circumstances, and it would clearly apply to an agreement entered into on or after 6 July 2010 as this was the date the amendments entered into force. The same result would be reached in the second situation, namely the case of an arbitration agreement which stipulated a seat in a state or territory other than NSW, Victoria, South Australia, Tasmania and Western Australia or the Northern Territory.

Under the third situation – where the parties have entered an arbitration agreement prior to 6 July 2010 that stipulates an Australian seat other than NSW, Victoria, South Australia, Tasmania and Western Australia or the Northern Territory – the problem is that the new section 21 may not apply to such an agreement. While this provision clearly applies to agreements entered into on or after the date the amendments entered into force (6 July 2010) it is not at all clear that it applies to agreements *before* that date.

10 (2012) 201 FCR 209 (*‘Castel’*).

11 (2012) 287 ALR 315 (*‘Rizhao’*).

12 In particular, an arbitration is defined as ‘international’ under the Model Law if, for example, ‘parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states’ (art 1(3)(a)), such as Australia and the People’s Republic of China.

The *International Arbitration Amendment Act 2010* (Cth) (*IA Amendment Act*) contains not only section 2 specifying times for commencement in respect of specific amendments to the *IAA*. It also contains schedule 1, which specifies in part 2 thereof the scope of ‘application’ for certain ‘amendments’ to the *IAA* listed in part 1 of the *IA Amendment Act*. Section 3 then gives effect to those listed amendments. For example, schedule 1 part 2 specifies (in items 29–30) the application of the amendments to section 8 of the *IAA* (items 5–10, set out in schedule 1 part 2 of the *IA Amendment Act*), being amendments related to the recognition and enforcement of foreign arbitration awards. However, section 21 is not referred to in schedule 1 part 2. That, combined with the effect of an existing provision in the *IAA*, section 30, casts doubt as to the correct temporal application of section 21.

Section 30 was not altered in the *IA Amendment Act* and provides:

Application of this Part (III)

This Part does not apply in relation to an international commercial arbitration between parties to an arbitration agreement that was concluded before the commencement of this Part unless the parties have ... otherwise agreed.

Section 30 was also inserted in the *IAA* in 1989 when the original UNCITRAL Model Law was incorporated into Australian domestic law. The undoubted intention and effect of section 30 was to apply the original part III of the *IAA* (which includes section 21) to any arbitration agreement entered into on or after 12 June 1989, which was the date of the ‘commencement of this Part’. Thus, earlier arbitration agreements were ‘grandparented’ and unaffected by the new regime based on the Model Law. This too seems to have been a compromise for ‘traditionalists’ wedded to the then *CAA* regime inspired by the English arbitration law tradition, although section 30 did expressly allow ‘progressives’ or ‘internationalists’ nonetheless to agree to adopt instead the Model Law regime.

The question now before us, however, is whether the expression ‘commencement of this Part’ in section 30 refers not simply to the *original* Part III in 1989 but also the *amended* Part III in 2010. In other words, does section 30 prevent the new section 21 applying to an agreement entered into before 6 July 2010 on the basis that such agreement was concluded ‘before the commencement of this Part’?

The current authors have argued elsewhere¹³ that the new section 21 cannot apply to an arbitration agreement entered into before 6 July 2010, for to do so

13 Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 27; Richard Garnett, ‘The Legal Framework for International Arbitration in Australia: The Old and the New’ in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 38, 58–61; Richard Garnett and Luke Nottage, ‘The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?’ (2011) 7(1) *Asian International Arbitration Journal* 29, 45–9 (referring also to the Explanatory Memorandums laid before Parliament as well as a public lecture by the then federal Attorney-General in regard to the *IA Amendment Act*).

would give the provision unwarranted retrospective effect.¹⁴ Australian courts have long recognised a general presumption against retrospectivity for legislation, subject to any clear contrary intention of the Parliament.¹⁵ Recently, three judges of the High Court confirmed that:

clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality, which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law.¹⁶

If Parliament had wanted the amended section 21 to apply retrospectively to pre-July 2010 agreements, it could have expressly so stipulated – as indeed occurred regarding Part II of the *IAA*. Relevantly, section 14 of the *IAA* provides that '[t]he application of [Part II] extends to *agreements* and awards *made before* the date [of commencement of the legislation]' (emphasis added).¹⁷ The effect of this contention concerning section 30 is that a number of the other 2010 amendments to Part III of the Act (sections 15, 16(2), 18, 18A–C, 19, 22, 22A, and 25–28) will also not apply to arbitration agreements entered into before 6

14 Malcolm Holmes and Chester Brown, *The International Arbitration Act 1974: A Commentary* (LexisNexis Butterworths, 2012) 122 remark that the view expressed by Garnett, above n 13, 60, namely that the old s 21 will continue to apply to agreements made before 6 July 2010 due to the general presumption against legislation having retrospective impact, 'appears to have some considerable force'. However, they disagree with the view that the expression 'commencement of this Part' in s 30 could be interpreted as relating to not just the original part III in 1989 but also the amended part III in 2010. Holmes and Brown argue that this 'is contrary to the text of s 30' and that the clear legislative intention was the only relevant commencement date be and remain 12 June 1989. The present authors submit that the text and intention do remain unclear given the subsequent *IA Amendment Act*. In particular, the amending legislation not only has a different commencement date but also schedule 1 part 2, which sometimes restricts the application of certain amendments to arbitration agreements concluded at different times (as elaborated further in the text below). The uncertainty previously highlighted is also acknowledged in Albert Monichino, 'International Arbitration in Australia: The Need to Centralise Judicial Power' (2012) 86(2) *Australian Law Journal* 118, 122 n 28, as well as Albert Monichino and Alex Fawke, 'International Arbitration in Australia: 2011/2012 in Review' (2012) 23 *Australian Dispute Resolution Journal* 234, 235.

15 See, eg, *R v Kidman* (1915) 20 CLR 425 (and more recently *Polyukhovich v Commonwealth of Australia* (1991) 172 CLR 501, both regarding criminal offences) as well as *Clissold v Perry* (1904) 1 CLR 363 (and more recently *Clunies Ross v Commonwealth* (1984) 155 CLR 193, both regarding vested property rights). However, as noted by Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process* (Hart Publishing, 2009) 306, the widely-shared 'principle that laws with retrospective effect will not be intended by the legislature to remove vested rights in the absence of clear words to that effect' is applied with varying rigour depending 'largely on a number of considerations such as, for example, whether the legislation deals with substantial or procedural matters or with criminal or civil matters, whether it has an effect on pending proceedings and whether it is of benefit or detriment to those affected'. More generally on possible definitions as well as pros and cons of various types of retrospectivity, see Charles Sampford, *Retrospectivity and the Rule of Law* (Oxford University Press 2006).

16 *Australian Education Union v General Manager of Fair Work Australia* (2012) 286 ALR 625, 635 [30] (French CJ, Crennan and Kiefel JJ) ('*Australian Education Union*').

17 This retrospective effect of s 14 does raise other difficulties, however, which are considered below.

July 2010, even though an operation antecedent to 6 July 2010 may have been intended by the legislature or otherwise desirable.

Returning to section 21, the consequence of the view that it is not retrospective is that the old version of the provision and its problematic interpretation will now continue to operate in respect of arbitration agreements made prior to 6 July 2010. Many such agreements are likely to be still in circulation, especially for long-term supply contracts. Hence, in the context of arbitration agreements which choose a seat of arbitration in a state or territory other than NSW, Victoria, South Australia, Tasmania and Western Australia or the Northern Territory, the old *CAA* will apply, either where the parties expressly choose such law or (following the *Eisenwerk* case) if they choose institutional rules such as the ICC Arbitration Rules. By contrast, if the decision of the NSW Supreme Court in *Cargill* is followed, and if parties have chosen institutional rules to govern their arbitration, the Model Law will apply. The only real difference between the *Cargill* approach and that reached under new section 21, therefore, is that *Cargill* would allow parties to exclude the Model Law in favour of the *CAA*, whereas the new section 21 makes the Model Law applicable in all cases.

What would be the position in the fourth situation above, where the parties entered into an arbitration agreement before 6 July 2010 but had stipulated NSW, Victoria, South Australia, Tasmania and Western Australia or the Northern Territory as the seat? The above analysis would equally apply (that is, the old section 21 would operate to allow parties to exclude the Model Law in favour of the *CAA*) but with one important difference; the new uniform *CAA* legislation is now in force. Further, it is expressly retrospective and applies to ‘arbitration agreements whether made *before or after* commencement [of the legislation]’.¹⁸ Hence, in this respect the new *CAA* legislation could apply to an arbitration agreement entered into before 6 July 2010. Yet the legislation goes on to provide that it only applies to *domestic* commercial arbitrations (sections 1(3)(a) and (c)), with ‘domestic’ defined as where the parties to the agreement have their places of business in Australia and where the Model Law does not apply.

The disturbing consequence of this ‘domestic’ limitation in the new *CAA* legislation is that there exists a category of international arbitration agreements that fall neither within the new *CAA* legislation nor the Model Law. Take the example of two parties located in different countries who entered into an arbitration agreement before 6 July 2010 with a NSW, Victorian, South Australian, Tasmanian and Western Australian or Northern Territory seat, who expressly chose the respective *CAA* as the arbitral procedural law. The old *CAA* cannot apply because it has been repealed by the new *CAA*. The new *CAA* cannot apply to the agreement because the arbitration is not ‘domestic’ for the purposes of section 1 of the *CAA*. Yet, because the agreement was entered into before 6 July 2010, the new section 21 of *IAA*, which makes the Model Law compulsory

18 *CAA 2010* (NSW) sch 1 item 2(1) (emphasis added). See also *CAA 2011* (Vic) s 43(1)(a); *CAA 2011* (SA) sch 2 pt 3 item 8(1)(a).

for international arbitrations conducted in Australia, also cannot apply because of the operation of section 30 and general principles of statutory interpretation presuming no retrospectivity. The arbitration therefore has no discernible governing procedural law or *lex arbitri*, and so is effectively unworkable. The current authors have referred to this situation as the ‘legislative black hole’¹⁹ in the new Australian regime for international commercial arbitration.

The same invidious result would apply if the parties in the above example chose a set of institutional rules to govern their arbitration, and the *Eisenwerk* rather than the *Cargill* case were followed. In this situation the *CAA* would have applied by default as the law governing the arbitration; Australian courts have not been open to ‘delocalised’ arbitrations with essentially no *lex arbitri*.²⁰

In addition, Part II of the *IAA* gives effect to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and contains important provisions dealing with the enforcement of foreign arbitration agreements as well as awards. As noted above, section 14 appears to give retrospective effect to the provisions of Part II, which would include the 2010 amendments. However, in the case of at least one provision in Part II of the *IAA*, there may be the reverse problem to that witnessed in the case of Part III of the Act.

This further difficulty arises because section 3 of the *IAA* was amended in 2010 to provide an expanded definition of an ‘agreement in writing’. Section 3(4) now provides that an agreement is in writing if:

- (a) its content is recorded in any form whether or not the agreement or the contract to which it relates has been concluded orally, by conduct, or by other means; or
- (b) it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference; or
- (c) it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

Since section 3(4) is contained in Part II of the *IAA* it would be expected that due to the operation of section 14 it would be available in respect of arbitration agreements entered into before 6 July 2010. This conclusion is significant since in both an application to stay court proceedings brought in breach of a foreign arbitration agreement under section 7 of the *IAA* and an application to enforce a foreign award in an Australian court under section 8 the applicant is required to produce ‘an agreement in writing’. Yet, confusingly, Schedule 1 Item 28 of the amending legislation provides that the revised version of section 3 of the *IAA* will only apply ‘in relation to agreements entered into on or after the commencement of those items’, namely 6 July 2010. Thus, it seems that while section 14 would

19 Richard Garnett and Luke Nottage, ‘The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?’ (2011) 7(1) *Asian International Arbitration Journal* 29, 49–51.

20 Richard Garnett, ‘International Arbitration but Subject to National Law: The Rejection of Delocalisation in Australia’ (2000) 28 *Australian Business Law Review* 351. See also the restrictive approach to delocalisation nowadays, including within the Asia-Pacific region, outlined in Greenberg, Kee and Weeramantry, above n 6, 66–80.

apply section 3(4) retrospectively to arbitration agreements made before 6 July 2010 the *IA Amendment Act* has the opposite effect. Hence, there is uncertainty as to whether an arbitration agreement entered into before 6 July 2010 in electronic form, for example, will be enforceable in the context of an application to stay court proceedings or enforce a foreign award.

Interestingly, this problem does not arise in the case of the 2010 amendments to section 8 of the *IAA* since the temporal provisions in Schedule 1 of the *IA Amendment Act* do not conflict with section 14. Specifically, Item 29 of Schedule 2 provides that the amendments dealing with recognition and enforcement of foreign arbitral awards apply ‘in relation to proceedings to enforce a foreign award brought on or after [6 July 2010]’, with the exception of section 8(3) which applies to proceedings to enforce an award brought on or after 7 December 2009. Section 8(3) removes the requirement for leave of the court to enforce a foreign award. Item 30 provides that the revisions to section 8 dealing with stay of enforcement proceedings pending resolution of a challenge application in the seat of arbitration ‘apply whether the [enforcement] proceedings are adjourned before or after [6 July 2010]’.

III THE COURTS’ RESPONSE

It is now necessary to consider how Australian courts in decisions since 6 July 2010 have addressed the issue of the timing of the 2010 amendments. A first group of decisions has involved applications for recognition and enforcement of foreign awards in Australia in which the temporal scope of the amendments to section 8 of the *IAA* has been considered.

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd concerned an application to enforce a foreign award made on 29 April 2009.²¹ The Federal Court applied the amended section 8(3) to the proceedings but none of the other amendments to section 8, on the basis that the proceedings had been commenced after 7 December 2009 but before 6 July 2010. In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*,²² the Victorian Court of Appeal had to consider an application to enforce a foreign award which had been given on 15 September 2009 arising out of an arbitration agreement dated 13 February 2008, with the Australian proceeding to enforce brought on 14 July 2010. The Court applied the amendments to section 8 (in particular section 8(3A) and (7A)) to the application. Most recently, in *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No. 2)*,²³ the Federal Court applied all the amended provisions of section 8 in the context of an application to enforce a foreign award dated 22 June 2011 arising out of an agreement dated 2 July 2009. All three decisions are consistent with the view that the amendments to section 8 may apply retrospectively both to arbitration

21 (2011) 277 ALR 415. For a more detailed summary, see Monichino, Nottage and Hu, above n 8.

22 (2011) 282 ALR 717 (*Altain Khuder*). For a more detailed summary, see Monichino, Nottage and Hu, above n 8.

23 (2012) 201 FCR 535. For a more detailed summary, see Monichino, Nottage and Hu, above n 8.

agreements and awards dated before 6 July 2010. This approach accords with section 14 of the *IAA* referred to above.

A second set of recent Australian decisions have also briefly addressed the issue of timing of the 2010 amendments. For example, in *Passlow v Butmac Pty Ltd*,²⁴ the Supreme Court of NSW assumed that the new section 16(2) of the *IAA* (inserted into Part III on 6 July 2010, also providing a more expansive definition of ‘arbitration agreement’) applied to an agreement entered into in 2004.²⁵ Such an approach would seem inconsistent with the view expressed above that these amendments to Part III were intended to have only prospective effect. Yet a similar approach to *Butmac* was taken in two other recent Australian decisions, *ENRC Marketing AG v OJSC ‘Magnitogorsk Metallurgical Kombinat’*,²⁶ and *teleMates Pty Ltd v Standard Soft Tel Solutions Pty Ltd*.²⁷

In *ENRC* it was assumed that the new article 17J of the Model Law (enacted by section 16(1) of the *IAA*, and allowing an Australian court to award interim measures to support a foreign arbitration) applied to an arbitration agreement originally dated 17 February 2007, which was incorporated in a subsequent contract dated 14 March 2011. If the relevant arbitration agreement had been the one entered into in 2011 as opposed to that in 2007, there would have been no issue of retrospectivity. The Court, however, did not address the issue of temporal application. In any event, the successful application resulted from *ex parte* proceedings, as permitted under the Federal Court Rules for freezing orders, and the matter did not proceed to a full hearing as the parties subsequently settled their arbitration in Switzerland.²⁸

In *teleMates* it was assumed that the new section 18 of the *IAA* (also contained in Part III of the Act) applied to an arbitration agreement dated 5 March 2009. New section 18(1) provides that ‘[a] court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(3) of the Model Law.’ Article 11(3) concerns the appointment of arbitrators in the absence of an agreement between the parties. Section 18 was supplemented on 24 February 2011 by a regulation which provided that ‘[f]or ss 18(1) and (2) of the [*IAA*], the Australian Centre for International Commercial Arbitration (ACICA) is prescribed [as authority]’.²⁹ The plaintiff sought a declaration that the parties were entitled to seek the nomination by ACICA of an arbitrator under article 11 of the Model Law. The

24 [2012] NSWSC 225 (‘*Butmac*’).

25 Ibid [6]. On liberalisation of writing requirements for arbitration agreements, under the Model Law as well as the New York Convention, see generally Nottage and Garnett, above n 13, 158–62.

26 (2011) 285 ALR 444 (‘*ENRC*’).

27 (2011) 257 FLR 75 (‘*teleMates*’). For a more detailed summary, see Monichino, Nottage and Hu, above n 8.

28 Don Robertson and Danielle Sirmay, ‘Case Note: *ENRC Marketing Ag v OJSC “Magnitogorsk Metallurgical Kombinat”* [2011] FCA 1371’ (2012) 4(1) *ACICA News* 26. The new art 17 of the Model Law (including art 17J) was also assumed to apply to an arbitration agreement made prior to 6 July 2010 in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2012] WASC 228 [126]–[127].

29 (2011) 257 FLR 75, 81 [31].

Supreme Court of NSW rejected the application, finding that the arbitrator had already been validly appointed. Significantly, however, it was assumed that the new section 18 could apply retrospectively to an arbitration agreement made prior to 6 July 2010, despite the presence of section 30 of the *IAA* referred to above.

The most controversial and significant issue, however, is the temporal operation of section 21 of the *IAA*. This matter has been addressed in a series of three recent decisions. The first was *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB*,³⁰ concerning an application to stay Australian proceedings brought in breach of an agreement to arbitrate in Sweden dated 2 October 2003. Both section 7 of the *IAA* and article 8 of the Model Law (enacted in the *IAA* through section 16(1)) were relied upon to support the stay application, but it was in the context of article 8 that the Court applied section 21 of the *IAA* (the version antecedent to the 6 July 2010 version). The Australian Capital Territory ('ACT') Supreme Court held that as the parties had adopted the Rules for Expedited Arbitration of the Institute of the Stockholm Chamber of Commerce, the Model Law was excluded as the law governing the arbitration under section 21 – with the result that Article 8 was not available to the applicant. The Court specifically relied upon the *Eisenwerk* case, particularly in asserting that an exclusion of section 21 occurs where 'the parties showed an intention ... to adopt a different system'.³¹ Because the Stockholm Rules for Expedited Arbitration exhibited 'real differences' with the Model Law,³² the ACT Court found that the parties had impliedly excluded the Model Law.

Incidentally, it is not clear that section 21 was even relevant to this case since the provision has usually been considered to apply only to international commercial arbitrations taking place *in Australia*. It seems unlikely that the Federal Parliament would have intended to regulate the conduct of international arbitrations with seats in foreign countries, if only because of the significant risk of overlapping and conflicting jurisdiction.³³ The Court also relied on the *Eisenwerk* doctrine that a choice of arbitral rules in an agreement amounts to an implicit exclusion of the Model Law, a view criticised above (Part I) and which was not followed by the NSW Supreme Court in *Cargill*.

Relevantly for the main theme in this article, although *Lightsource* was argued on 28 May 2008 and judgment only delivered on 12 April 2011, the ACT Supreme Court seems to have assumed that the new section 21 does not apply retrospectively to an arbitration agreement entered into prior to the *IAA* amendments enacted on 6 July 2010. This approach accords with the authors' view expressed above. Subsequently, however, the issue of the temporal operation of section 21 has been more directly and fully discussed in two more

30 (2011) 250 FLR 63 ('*Lightsource*').

31 *Ibid* 92 [177].

32 *Ibid* 92 [178].

33 Cf generally Greenberg et al, above n 6, 40–41, criticising some judgments from Indian and Indonesian courts purporting to 'set aside' international arbitration awards from proceedings with the seat abroad.

recent Australian cases, which instead involved enforcement of arbitral awards rendered in Australia.

Castel concerned an application to enforce an award made on 23 December 2010 in the Federal Court arising out of an arbitration agreement entered into between an Australian and a Chinese party dated December 2003, which specified Victoria as the seat.³⁴ The central issue concerned another lacuna in the *IAA* as amended in 2010; the statute did not specify which Australian courts had jurisdiction to enforce awards from international arbitrations with seats in Australia. Murphy J relied upon section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) to enforce the award under articles 35 and 36 of the Model Law, as section 39B(1A)(c) conferred jurisdiction on the Federal Court ‘in any matter arising under [a federal law]’. The 2010 amendments to section 21 the *IAA* were not relevant to this determination, but Murphy J did make some obiter observations on the temporal scope of the amendments to Part III of the Act.

First, Murphy J noted that it was common ground that the parties had not excluded the Model Law under the old section 21, even if it had been applicable to the present case. (Thus, it should be noted, the case did not fall within the ‘legislative black hole’ identified above.) Yet, the Court found, the old section 21 was not applicable in any event. Murphy J expressly rejected the view of the present authors that section 30 of the *IAA* had the effect of only applying the July 2010 amendments to Part III on a prospective basis – that is, to arbitration agreements dated on or after 6 July 2010.

Justice Murphy relied principally on the view from the High Court decision in *Maxwell v Murphy*,³⁵ rendered in 1957, that legislation may operate retrospectively where it does not ‘determine the rights and liabilities of the parties’ but has only procedural effect. Since the Model Law only ‘set out rules for the commencement and conduct of international commercial arbitrations and provides limited supervisory, interim and enforcement functions for the courts’ it is not substantive, according to Murphy J.³⁶ His Honour drew a distinction between the law governing the arbitration (for example the Model Law or the *CAA*), which was considered procedural, and the law governing the principal contract or the merits of the case, which was regarded as substantive. Murphy J felt that the impact of the new section 21, by subjecting parties exclusively to the Model Law, does not affect ‘the rights and liabilities of the parties’ to an arbitration. Hence, the provision could apply retrospectively to an arbitration agreement entered into before 6 July 2010.

With respect, this view underrates the effect of section 21 on the rights of the parties to an international commercial arbitration. It must be remembered that the

34 (2012) 201 FCR 209. This judgment only dealt with the Court’s jurisdiction to hear the setting aside application. Murphy J reserved judgment on the substantive points of that application. Before that judgment was rendered, the applicant also lodged a constitutional claim before the High Court of Australia: *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia & Anor* [2012] HCATrans 172 (23 July 2012).

35 (1957) 96 CLR 261, 267.

36 *Castel* (2012) 201 FCR 209, 222 [67].

new version of this provision renders it impossible to exclude the Model Law in an international commercial arbitration with an Australian seat. Consequently, an arguably more accurate view of the provision is that it takes away the rights of parties which existed under the old section 21 to choose an alternative law governing the arbitration – whether it be the *CAA* or (less likely) a foreign arbitral law. As noted above, a comparison of the old uniform *CAAs* and the Model Law reveals great differences between the texts, particularly in the wider scope for judicial intervention in the arbitral process under the *CAAs*.

Choice of the old *CAA* would remain available to parties if the new section 21 was only given prospective effect (that is to agreements entered into on or after 6 July 2010) at least in states or territories other than NSW, Victoria, South Australia, Tasmania and Western Australia or the Northern Territory, where the old *CAA* legislation still operates. Therefore it is not entirely accurate to say that applying the new section 21 retrospectively will not affect the rights and liabilities of the parties.

Murphy J also rejected the view that section 30 gives the amendments to Part III only prospective effect because it would create inconsistency of application between provisions – that is, the amended provisions would only apply to arbitration agreements entered into on or after 6 July 2010, while the existing provisions would apply to all agreements. According to the Court, ‘Parliament gave no indication that [the amended provisions] were only to operate on arbitration agreements entered after the date of the amendment’.³⁷

With respect, Murphy J appears to have overlooked Item 32(1) of Schedule 1 of the *IA Amendment Act*, which expressly provides that the amended sections 23, 23A–K, 25, 26 and 27 of the *IAA* will only apply to agreements entered into on or after 6 July 2010. In other words, the amending legislation itself has declared that some of the amendments are to have only prospective effect – regardless of the impact of section 30. The ‘all or nothing’ approach to Part III suggested by Murphy J – whereby all provisions, whether amended or not, apply to every arbitration agreement – is therefore itself contradicted by the express terms of the amending legislation. Consequently the difficulty or ‘strange result’³⁸ of having to determine whether a particular provision operates retrospectively or not will be present whatever view is taken of section 30.

The most recent decision on the temporal scope of the *IAA* is *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*.³⁹ This case concerned an agreement dated June 2007 between a Chinese company (Rizhao) and an Australian company (Mt Gibson) which provided for arbitration in Western Australia according to the *CAA 1985 (WA)*. Awards were rendered that were successfully enforced by Mt Gibson under section 33 of the 1985 *CAA* in the Supreme Court of Western Australia. Rizhao appealed this decision to the WA Court of Appeal, arguing that the first instance court erred by not applying the

37 Ibid 223–224 [74].

38 Ibid.

39 (2012) 287 ALR 315 (*‘Rizhao’*).

provisions of the *IAA* to the issue of enforcement. The Court dismissed the appeal on the narrow ground that Rizhao should not be permitted to raise issues on appeal which it did not present to the primary judge.⁴⁰

Nevertheless, the Court of Appeal⁴¹ took the view that, given the ‘significance [of the question] to the commercial community generally’,⁴² it should also consider the substantive ground of appeal – namely, whether the *IAA* as opposed to the 1985 *CAA* applied to the question of enforcement of the awards. Resolution of this question depended upon whether the old or new section 21 applied to the arbitration. If the 2010 version of section 21 applied, the parties’ arbitration would have been mandatorily subject to the Model Law, whereas, under the old section 21, the parties could exclude the Model Law in favour of the *CAA*.

In addressing this issue Martin CJ, similarly to Murphy J in *Castel*, referred to the distinction between procedural and substantive laws in the context of retrospectivity drawn by Dixon CJ in *Maxwell v Murphy*. However unlike Murphy J, Martin CJ saw a direct impact of section 21 ‘upon the vested rights of the parties to the proceedings’, especially where the parties had entered an arbitration agreement under the assumption that they could exclude the Model Law and had conducted an arbitration on that basis:

It is fairly arguable that the right of each party to have any dispute or difference arising under their contract resolved under the legal regime which they had chosen is a vested and substantive right, with the result that the [amended] s 21 should not be construed as adversely affecting those rights.⁴³

The argument for a prospective operation of section 21 is even stronger, Martin CJ said, where the dispute or difference between the parties had ‘crystallised’⁴⁴ prior to the commencement of the amending Act. In *Rizhao*, not only had disputes between the parties ‘crystallised’, but ‘the contractual rights recognised by s 21 prior to its amendment had been invoked’⁴⁵ in the sense that arbitration proceedings had been commenced.

Moreover, Martin CJ noted, the differences in the legal regime governing arbitration under the 1985 *CAA* and the Model Law are ‘significant’, entailing the risk of ‘profound’ consequences to the parties if a retrospective operation was given to section 21. Such consequences may include an arbitral tribunal validly appointed under the legal regime in force prior to 6 July 2010 no longer being validly appointed, or a member of the tribunal being vulnerable to challenge on grounds that would not have given rise to objection under the law existing prior to 6 July 2010.⁴⁶ Even more unjustly, the Court noted, ‘an award made prior to 6

40 Ibid 335 [93].

41 The leading judgment was delivered by Martin CJ (with whom Buss JA (at 348 [153]) agreed). Murphy JA agreed with Martin CJ in a separate judgment.

42 *Rizhao* (2012) 287 ALR 315, 338 [103].

43 Ibid 344 [133].

44 Ibid.

45 Ibid.

46 Ibid 344 [134].

July 2010 and that [was] binding and enforceable under [the prior legal regime in force], could be liable to be set aside, or not enforced under the [new regime].⁴⁷

Of course, it should be added that the reverse situation could also apply. That is, a decision of a court to remove an arbitrator or set aside an award made under the 1985 *CAA* could potentially be overturned or ‘validated’ by retrospective operation of the Model Law. Indeed such a situation is perhaps more likely than the examples given by Martin CJ, since the Model Law provides less scope for court intervention in the arbitral process than the 1985 *CAA* and so perhaps less scope for retrospective nullification.

The judgment of Martin CJ then proceeded to distinguish the *Castel* decision on the ground that the arbitration agreement in that case did not provide for an exclusion of the Model Law, as in *Rizhao*.⁴⁸ In the case of *Castel* there were therefore ‘no vested rights of the parties which could be adversely affected’ by the retrospective operation of the new section 21.

Finally, Martin CJ rejected the argument of *Rizhao* that the amended *IAA* could still apply in the case because the plaintiff’s application to enforce the awards was not commenced until after the 2010 amendments had entered into operation. Since the Court of Appeal considered that the 2010 amendments to Part III cannot apply to arbitration agreements entered into before 6 July 2010, at least where disputes between the parties had crystallised and possibly also where arbitral proceedings had been commenced before that date, the time at which the plaintiff applied to enforce the award was irrelevant.⁴⁹

In a separate judgment, Murphy JA agreed with Martin CJ and Buss JA,⁵⁰ noting that there is no express provision in the amending legislation that gives the new section 21 retrospective effect. Nor could such an intervention be inferred from the legislation.⁵¹ However, Murphy JA went further than Martin CJ and Buss JA by expressly reserving the position in the case where a dispute between the parties, although crystallised, had not been ‘referred to arbitration’ prior to 6 July 2010. In Murphy JA’s view, in that situation, the parties’ rights to arbitration ‘would arguably not have vested’.⁵²

In response to that further point made by Murphy JA, with respect, such a distinction seems potentially unjust to a party to an arbitration agreement who wishes to arbitrate. Such a party may be confronted with a defendant who has commenced court proceedings in breach of an arbitration agreement for which a stay will be required or a defendant who refuses to cooperate in appointment of an arbitrator, in which case a court-ordered or institution-ordered appointment will have to be made before arbitration can commence. Such court proceedings to

47 Ibid 345 [135].

48 Ibid 346 [140].

49 Ibid 347–348 [149].

50 Ibid 348–349 [154].

51 Ibid 357–358 [200].

52 Ibid 359 [207].

compel arbitration may take time,⁵³ and thus prevent a referral to arbitration occurring before the cut-off date (6 July 2010). Given that such obstacles to arbitration are beyond the control of the party wishing to arbitrate, it would seem harsh to say that – although a dispute had ‘crystallised’ before 6 July 2010 – the agreement may still be retrospectively subjected to a new arbitral regime because no technical ‘referral’ to arbitration has occurred.

More generally, however, the current authors welcome the approach of the WA Court of Appeal in its acknowledgement that rights under an arbitration agreement can be drastically affected by a change to the law governing the arbitration, and that such a change is as much ‘substantive’ as a change to the governing law of the contract. This fact is a compelling argument in favour of a prospective application of the new section 21 – that is, to arbitration agreements entered into on or after 6 July 2010.

While the current authors have rested their argument for prospectivity of section 21 on the presence of section 30 in Part III of the *IAA* as well as the general presumption against retrospective legislation, the WA Court of Appeal focuses more on the serious impact of a change of legal regime on the ‘vested rights’ of parties to the arbitration agreement. The result reached is the same on either view. The approaches, however, are not identical. While Martin CJ and Buss JA appear to suggest that retrospectivity could operate where no dispute between the parties had crystallised before 6 July 2010, and Murphy JA would allow retrospectivity where no referral to arbitration has occurred prior to that date, we would argue that the impact on rights is also profound even where neither of those events has occurred prior to 6 July 2010.

It is likely that parties to an arbitration agreement and their advisers, prior to 6 July 2010, would have proceeded under the assumption that the Model Law could be excluded under section 21 in favour of the *CAA*. Indeed, this right to opt out may have been a major factor in the parties agreeing to arbitration at all, especially given the lingering legacy in Australia of the more interventionist style of arbitration derived from the English law tradition. Australian case law, including cases like *Rizhao*, continues to reveal many instances where Australian parties have expressly opted out of the Model Law in their international arbitration agreements. The current authors are also aware of other cases in practice in which a party has made its acceptance of arbitration as a dispute resolution method conditional upon there being available a right of appeal for a serious error of law. While commentators may have differing views on the appropriateness of such a right in contemporary international arbitration, especially in light of concerns about considerable costs and delays experienced

53 For an example of very extensive delays in Australian courts, even recently, see *Lightsource* (2011) 250 FLR 63.

recently in this field,⁵⁴ the fact remains that the right did exist in international arbitrations in Australia before 6 July 2010 where parties excluded the Model Law. The principles of party expectations and finality of dispute resolution, which also underlie the WA Court of Appeal's reasoning in *Rizhao*, therefore provide further grounds militating in favour of a prospective application to section 21 of the *IAA*.

However, there is one further, negative consequence of giving section 21 a prospective effect which was adverted to in Part II above; the black hole problem. That is, in the context of an international arbitration agreement entered into prior to 6 July 2010 that selects the *CAA* as the governing law, such a choice cannot be honoured where the 2010, 2011 or 2012 version of the *CAA* has been enacted in the relevant jurisdiction. This is because the new *CAA* operates retrospectively, yet is confined to domestic arbitration agreements – meaning in effect that no legislation applies to the arbitration agreement at all.

Note that the *Rizhao* case came close to presenting this exact situation. Suppose, for example, that the *Rizhao* case had arisen for decision in Western Australia later in 2012, after the *new CAA* (only recently passed by the Western Australian Parliament)⁵⁵ had been enacted. What could the Court of Appeal have done then? It would not have been sufficient simply to find that the new section 21 of the *IAA* was prospective and that the parties' rights under the old *CAA* were preserved by virtue of the old section 21, because the old *CAA* would no longer have any operation, having been repealed following the enactment of the new *CAA*. Yet, since the new *CAA* cannot apply to an international arbitration agreement, the Court would have been left with no law to apply – the black hole dilemma. Perhaps all the Court could have done to extract itself from this predicament was to declare again that the rights vested under arbitration agreements governed by the old *CAA* remained operative even though such legislation was no longer in force.

A much more difficult situation would have been presented if parties, after a dispute had arisen but before arbitration proceedings had commenced, had sought a declaration from the court as to the applicable law for their arbitration where the agreement selected the *CAA* but was entered into prior to 6 July 2010. In that situation the Court, applying a version of the *Rizhao* test, may feel less comfort in applying the old *CAA* since no rights had yet 'vested' as no arbitral process had taken place; in such a case the black hole problem would squarely arise. Presumably what a court would have to do in such a case would be to find the parties' reference to the *CAA* to be void for uncertainty and impose the Model

54 Luke Nottage, 'Addressing International Arbitration's Ambivalence: Hard Lessons from Australia' in Vijay Bhatia, Christopher Candlin and Maurizio Gotti (eds), *Discourse and Practice in International Commercial Arbitration* (Ashgate, 2012) 11; as well as the recent Chartered Institute of Arbitrators' survey, Chartered Institute of Arbitrators, *The Survey – Costs of International Commercial Arbitration* <<http://www.ciarb.org/conferences/costs/012-the-survey/>>.

55 Sections 1A and 1B of the *Commercial Arbitration Act 2012* (WA) commenced on 29 August 2012, however a commencement date for the remainder of the Act has yet to be proclaimed <<http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=9B3DB66CED6B08BC482578B000181FC8>>.

Law instead, or alternatively invite the parties to enter into a new arbitration agreement (subsequent to 6 July 2010), under which the Model Law would mandatorily apply. Yet, in the absence of parties' willingness to enter such a fresh agreement, the earlier comments made about party expectations being defeated would again be apposite.

To resolve this issue in a more balanced way, an amendment should be made to the new *CAAs* to provide that they cannot apply retrospectively to agreements entered into before the date of commencement, where parties to international arbitration agreements had excluded the Model Law; instead the old *CAA* should apply. This would provide one way for the parties' rights that had vested under existing arbitration agreements, which had selected the old *CAA*, to be upheld and therefore for the black hole to be averted. An alternative solution is for legislative amendments providing that the new *CAA* should apply to such agreements. This would still respect the parties' decision to exclude the Model Law in favour of a more interventionist regime, as the new *CAAs* maintain provisions providing, for example, for judicial review of serious errors of law committed by arbitrators.

IV WHERE TO NOW?

On the one hand, several factors support a prospective interpretation of the provisions in part III of the *IAA*, especially section 21. First, there is the absence of an express provision in the amending legislation or the *IAA* that expressly confers retrospectivity on the amended provisions of part III, especially when compared with section 14 part II of the *IAA*. Secondly, there is the presence of a provision in part III (section 30), which arguably has the opposite effect. Thirdly, there is the principle against retrospective legislation based on respect for party expectations, as well as broader concerns about the 'rule of law'.⁵⁶ According to this view, it would be seriously unjust and inefficient if arbitration agreements entered into (and conducted) on the basis of a prior legal regime were subsequently put into question by new and substantially different rules. The imposition of such new rules would also compromise finality of any arbitral process. All of these factors are compelling reasons why the amended provisions in part III, especially section 21, should have only prospective effect. Given the persistent differences among Australian courts regarding the *Eisenwerk* doctrine (highlighted in parts I and III above), the *IAA* should be further amended to clarify that even where parties had previously entered into arbitration agreements that adopted arbitration rules, this fact should not be taken as intending an opt out of the Model Law.⁵⁷

56 See generally Gerangelos, above n 15; Sampford, above n 15; *Australian Education Union v General Manager of Fair Work Australia* (2012) 286 ALR 625.

57 Sections 15(2) and 15A of *International Arbitration Act* (Singapore, cap 143A, 1995 rev ed) provide a useful precedent in drafting such an amendment, see Garnett and Nottage, above n 6, 171–2, and further in the text below.

To avoid the black hole problem, a corresponding amendment to the new *CAA* regime should also be made. The old *CAA* (or perhaps the new *CAA*) legislation should apply to international arbitration agreements excluding the Model Law that were entered into before the date of commencement of the new *CAAs*. In this regard, it is pertinent to note the response to a letter written on 13 March 2012 by one of the present authors to the Chief Justice of WA after reading the *Rizhao* judgment. Martin CJ wrote on 21 March 2012 to the Attorney-General of WA highlighting the black hole issue and recommending an amendment to the *Commercial Arbitration Bill 2010* (WA).⁵⁸ The difficulty with such a suggestion, however, is that it was the intention of the federal, state and territory governments to make the new *CAAs* uniform, like the *CAAs* introduced in the mid-1980s.

On the other hand, a completely prospective approach to Australia's new arbitration legislation reforms seems inconsistent with the position taken in several other Asia-Pacific jurisdictions that have adopted the original Model Law regime, or which have also recently amended their arbitration legislation particularly in light of the 2006 revisions to the Model Law. The four jurisdictions analysed below have applied all their new legislation to all arbitration agreements – whenever entered into – albeit with some express and limited exceptions.

For example, section 26(1) of Singapore's *International Arbitration Act 1994* states that Part II of the Act, including the Model Law, 'shall not apply in relation to an international arbitration between parties to an arbitration agreement that was commenced before 27th January 1995 unless the parties have (whether in the agreement or in any other document in writing) otherwise agreed'. Section 26(3) adds that: 'In any ... agreement in writing ... a reference to arbitration under the Arbitration Act (Cap. 10) shall, so far as relevant and unless the contrary intention appears, be construed to include a reference to arbitration under this Act'.⁵⁹ Thus, prior arbitration agreements – even those expressly referring to the more interventionist old *Arbitration Act* – were subjected to the Model Law regime introduced by section 3 of the new Act, provided such agreements were 'international'. Hence, in international arbitrations commenced after that date in Singapore, now a very popular seat in Asia, the Model Law regime applied irrespective of when the agreement itself may have been entered into. Several later amendments to the Singaporean Act have also been extended to earlier arbitration agreements.⁶⁰

58 A copy of Martin CJ's letter to the Hon CC Porter MLA is on file with the authors.

59 Chapter 143A, available via Attorney-General's Chambers Singapore <<http://statutes.agc.gov.sg/aol/home.w3p>>. In addition, pt III of the Singapore legislation, dealing with enforcement of foreign awards under the New York Convention, is applied by s 28(1) to arbitration agreements made either before or after 27 January 1995.

60 See, eg, *International Arbitration (Amendment) Act 2009* (No 26 of 2009). These reforms include, for example, a further liberalisation of writing requirements for arbitration agreements as well as authorisation for local courts to issue interim measures in support of foreign arbitrations (as under the revised Model Law).

Very interestingly, however, a different approach has been taken in section 15(1):

If the parties to an arbitration agreement (whether made before or after 1st November 2001)⁶¹ have expressly agreed either –

- (a) that the Model Law or this Part [II] shall not apply to the arbitration; or
- (b) that the Arbitration Act (Cap. 10) or the repealed Arbitration Act (Cap. 10, 1985 Ed) shall apply to the arbitration,

then, both the Model Law and this Part shall not apply to that arbitration but the Arbitration Act or the repealed Arbitration Act (if applicable) shall apply to that arbitration.

This provision effectively ‘grandparents’ old arbitration agreements where parties had excluded the Model Law, by subjecting such agreements to the earlier (more interventionist) *Arbitration Act* regime. In other words, Singapore does *not* give retrospective effect to the new international arbitration law regime for that particular category of international arbitration agreements. This comparative reference point therefore supports our argument for not giving retrospective effect in Australia to the *IA Amendment Act*’s reform of section 21, for international arbitration agreements concluded before 6 July 2010 where parties had also excluded the Model Law under the original section 21 of the *IAA*. Otherwise, however, Singapore does essentially apply its *International Arbitration Act* and subsequent amendments to all international arbitration agreements.

In Hong Kong too, another very popular jurisdiction nowadays that had moved quickly to adopt the Model Law (in 1989) for international arbitrations, the starting point has been that new legislation applies retrospectively. The latest amendments enacted in 2010, aligning the regime for domestic arbitrations even closer to the Model Law provisions, essentially apply if the arbitration begins on or after commencement of the new *Arbitration Ordinance* from 1 June 2011.⁶² A notable exception does arise under section 100. The more interventionist regime

61 Commencement date of Singapore’s *International Arbitration (Amendment) Act 2001* (No 38 of 2001). This legislation repealed s 15 of the original 1994 Act and substituted not only s 15(1), but also s 15(2) as follows: ‘(2) For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned’. The new s 15(2) was added to overrule promptly a decision of the Singaporean High Court that had followed the *Eisenwerk* doctrine: *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262. Following another aberrant decision on opting out of the Model Law, s 15A was added by the *International Arbitration (Amendment) Act 2002* (No 28 of 2002).

62 Cap 609, available at Department of Justice Bilingual Laws Information System <<http://www.legislation.gov.hk/eng/home.htm>>. Section 1(2) stated that the Ordinance ‘comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette’, which was subsequently specified as 1 June 2011. Schedule 3 contains savings and transitional provisions that do not refer to when arbitration agreements were concluded. See also John Choong and J Romesh Weeramantry (eds), *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Thomson Reuters, 2011) 572.

(also derived from English law, including appeals for serious errors of law) applies to:

- (a) an arbitration agreement entered into before the commencement of this Ordinance which has provided that arbitration under the agreement is a domestic arbitration; or
- (b) an arbitration entered into at any time within a period of 6 years after the commencement of this Ordinance which provides that the arbitration under the agreement is a domestic arbitration.

Similarly to Singapore, therefore, certain old arbitration agreements are ‘grandparented’ under section 100(1)(a). There would have been no need to include such a provision if the reforms contained in Hong Kong’s new Ordinance were not intended otherwise to have retrospective effect.⁶³

A more straightforward approach is found in countries that still remain less active venues for international arbitration. In New Zealand, for example, the *Arbitration Amendment Act 2007* adopts the revised Model Law’s provisions on interim measures issued by the arbitral tribunals (including ex parte applications for certain preliminary orders), as well as amendments related to confidentiality and consumer arbitration agreements. It simply applies those reforms focusing on the statute’s commencement date (section 2), with a minor amendment (section 7) to the transitional provisions of the original Act.⁶⁴ New Zealand’s *Arbitration Act 1996* had introduced the Model Law for international arbitrations with transitional provisions that had applied ‘to every arbitration agreement, whether made before or after the commencement of this Act, and to every arbitration under such an agreement’ (section 19(1)), with some minor express exceptions.⁶⁵ In Japan, the *Arbitration Act 2003* (adopting the Model Law regime also for

63 However, following a presentation by a Judge of the Court of First Instance (High Court of Hong Kong) at a conference held 5–7 September 2011 in Sydney at the Federal Court of Australia (co-hosted by Sydney Law School and the Law Council of Australia), where his Honour compared aspects of the new Hong Kong Ordinance (Saunders, above n 9), the following exchange took place that was subsequently reproduced in the conference proceedings:

Unidentified audience member [Nottage]: This is a question for Justice Saunders in relation to the new Hong Kong legislation. Does the new Hong Kong *Arbitration Ordinance* apply with prospective or also retrospective effect? In other words, will the new regime also apply to pre-2011 arbitration agreements or not?

Justice Saunders: It is not retrospective.

Unidentified audience member [Nottage]: And would you like to elaborate on why that policy choice was taken?

Justice Saunders: I don’t know why but probably because it was because nobody likes retrospective legislation. If I had made my agreement under the old legislation why should the rules be changed?

Saunders, above n 9, 195.

64 Available at Parliamentary Counsel Office, *Arbitration Amendment Act 2007* (17 October 2007) New Zealand Legislation <http://www.legislation.govt.nz/act/public/2007/0094/latest/DLM970194.html?search=ts_act_arbitration_resel_25_h&p=1>.

65 Available at Parliamentary Counsel Office, *Arbitration Act 1996* (2 September 1996) New Zealand Legislation <<http://www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html>>.

domestic arbitrations) applies to all arbitration agreements, save for some exceptions specified in the Supplementary Provisions.⁶⁶

It is not known whether similar problems to that seen in the *Rizhao* case have been encountered in these four jurisdictions. Yet, purely from a comparative perspective, it could be argued that Australia is out of step internationally by not clearly making retrospective at least some of the 2010 amendments to Part III of the *IAA*. A retrospective approach arguably has particular merit in the context of amendments designed to expedite and otherwise encourage international arbitrations in Australia, which has largely not benefited from the boom in international arbitration in Asia.⁶⁷ Such amendments include section 18A, for example, which appears aimed at reducing the possibility of derailing an arbitration by challenging arbitrators, through redefining the Model Law's test ('justifiable doubts as to the impartiality or independence' of the arbitrator) by reference to 'a real danger of bias'.

However, as argued above in the context of the *Rizhao* decision and evident also especially from comparing the Singaporean legislation, the argument for a retrospective operation to the amendments is much less convincing in the case of the new section 21. The factors mentioned above, in particular the protection of party expectations and the need for finality in the arbitral process, weigh strongly in favour of a prospective interpretation of this provision introduced in 2010 by the *IA Amendment Act*.

What, then, should be done now in Australia? At a minimum, parties and their legal advisors should check carefully all their existing arbitration agreements to see whether any may potentially fall within the 'black hole', namely those:

- (a) concluded before 6 July 2010;
- (b) providing for 'international' (and 'commercial') arbitration as defined in article 1 of the Model Law, especially arbitration agreements between

66 Under art 2 of the Supplementary Provisions, prior arbitration legislation (which followed early German law in not requiring arbitration agreements to be in writing) applies regarding 'the form for arbitration agreements ... made prior to the enforcement' (that is, commencement, from 1 March 2004) of the *Arbitration Act 2003*: translation available at The Japan Shipping Exchange, Inc, *Arbitration Law (Law No. 138 of 2003)* <http://www.jseinc.org/en/laws/new_arbitration_act.html>. Supplementary Provisions arts 3 and 4 also add special protections regarding consumer and labour contract arbitration agreements, which apply only to agreements made after commencement of the 2003 Act. See further Tatsuya Nakamura and Luke Nottage, 'Japan' in Tom Ginsburg and Shahla Ali (eds), *Arbitration in Asia* (Juris, 3rd ed, 2012) forthcoming.

67 Note also that arbitration rules often nowadays incorporate a provision binding the parties that adopt them to any subsequent version of the rules in force when the arbitration is commenced, which the institution may have developed at that later date, unless the parties agree otherwise (see, eg, the 2012 ICC Rules art 6.1). If parties familiar with arbitration are prepared to trust an institution to improve provisions, they arguably would (or should) be prepared to trust a legislature aiming to improve arbitration law. However, the analogy is not complete because parties normally specifically agree to arbitrate under rules that allow expressly for 'subsequent versions' to bind them – that is, they are expressly on notice about this possibility. They can also, in their original arbitration agreement, reject the imposition of any such subsequent versions of the rules.

parties having their principal place of business in different states (such as Australia and China);

- (c) expressly or impliedly excluding the Model Law;
- (d) specifying the seat to be in any State that has adopted the new uniform *CAA* legislation, and repealed the old (such as NSW, Victoria, South Australia, Tasmania, Western Australia or the Northern Territory).

Such parties could then seek to renegotiate and substitute a new arbitration agreement. As such an agreement would be concluded after 6 July 2010, it will avoid the black hole. But they will now have, mandatorily, the less interventionist regime provided by the Model Law – even though the parties did not initially want it in their initial arbitration agreement. Also, a party more likely to become a respondent in the arbitration may be reluctant to renegotiate. It could be quite happy to use the black hole problem as a means of impeding or delaying dispute resolution by means of arbitration. Further, the transaction costs of renegotiating arbitration agreements will be significant. This approach will also not allow parties to benefit from retrospective application of other Part III amendments, such as the lower threshold for court determinations about alleged bias of arbitrators.

Another option would be to leave these questions to the courts to resolve. This suggestion is undesirable because Australian courts are already split regarding the retrospectivity or otherwise of Part III amendments, especially section 21. This article has also indicated several other problems regarding the temporal operation of the 2010 amendments. Transaction costs will multiply enormously if all these issues have to be litigated all the way to the High Court of Australia, which may then prompt legislative intervention anyway. The confused situation may lead to embarrassment for Australia as it seeks to reposition itself as a regional hub for cross-border dispute resolution.⁶⁸

The only sensible way forward is therefore to embark promptly on another round of statutory reform. The simplest solution is for the *IAA* to be amended to specify precisely whether and how the 2010 amendments apply to international arbitration agreements made before 6 July 2010. As argued above, lawmakers should not take the easy way out by stating expressly that the new section 21 has retrospective effect, as this would ride roughshod over party expectations. If an amendment to the *IAA* instead clarifies that section 21 has only prospective effect, then to avoid the ‘black hole’ the temporal scope of the new *CAAs* also then needs to be re-examined. In addition, these statutory amendments could be combined with reforms clarifying other aspects of the *IAA*. One question that has

68 Nottage and Garnett, *International Arbitration in Australia* (2010) above n 13, 13–14, with further references. See also the proposed review of Australian contract law at Australian Government Attorney-General’s Department, *Review of Australian Contract Law* (21 March 2012) <<http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Review-of-Australian-Contract-Law.aspx>>; and also reforms being investigated for Australian private international law: Luke Nottage, ‘The Government’s Proposed “Review of Australian Contract Law”: A Preliminary Positive Response’ (Legal Studies Research Paper No 12/49, *Sydney Law School*, 2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111826>.

not been clearly resolved, for example, is which Australian courts have jurisdiction to enforce international arbitration awards where the seat is in Australia.⁶⁹ Another issue concerns the wording of section 18A,⁷⁰ which was inserted at the last moment into the *IA Amendment Act*. The opportunity should also be grasped to examine other outstanding issues relating to international arbitration in Australia, which have been highlighted recently. These include:

- statutory provisions encouraging arbitrators to facilitate early settlement ('Arb-Med') and many other issues raised by commentators in the run-up to the 2010 amendments;⁷¹
- the burden and standard of proof for enforcing foreign arbitral awards under section 8 of the *IAA*, particularly where the defendant alleges it is not a party to the arbitration agreement;⁷²
- whether and why (as a policy matter) disputes over charter parties should only be heard by Australian courts or in arbitral proceedings 'conducted in Australia'.⁷³

69 *Castel* was only a first-instance decision of the Federal Court, and as of 20 August 2012 the case at first instance was not completed: see Commonwealth Courts, *Applications for File* (21 April 2011) <<https://www.comcourts.gov.au/file/Federal/P/VID317/2011/actions>> and above n 33. Justice Murphy's initial judgment expressly left open the question of whether the court of a State or Territory might also have enforcement jurisdiction.

70 The legislature seems to have intended to adopt the 'real danger' test developed by earlier English law, but the wording differs and there has been subsequent case law development in England as well as Singapore and Hong Kong. See Sam Luttrell, 'Australia Adopts the "Real Danger" Test for Arbitrator Bias' (2010) 26(4) *Arbitration International* 625.

71 Nottage and Garnett, above n 6, especially 179–84 (on Arb-Med). That chapter, based on the present authors' public submission, also highlights many other important issues that were not ultimately dealt with in the *IAA Amendment Act* or that could be revisited. For example, by enacting s 18B of the *IAA*, Australia declined to adopt the revised Model Law's compromise solution in art 17B, which allows arbitrators to issue ex parte a 'preliminary order directing a party not to frustrate the purpose of the interim measure requested' by a party, unless the parties had agreed otherwise. Yet almost all jurisdictions that have reformed their arbitration law in light of the revised Model Law have also adopted art 17B (and the related art 17C). At least the Australian legislation could have allowed parties to 'opt-in' to allow such preliminary orders, rather than (seemingly) making s 18B mandatory. Anyway, s 18B is curiously drafted. It only refers to preliminary orders and so does not expressly exclude the possibility of arbitrators issuing interim measures themselves on an ex parte basis, even though this was the concern that generated the revised Model Law's compromise solution in arts 17B–C.

72 *Altain Khuder* (2011) 282 ALR 717. See further Monichino, above n 14, especially 123; Jonathan Kay Hoyle, 'Enforcing a Foreign Award: Not as Straightforward as It Seems?' (2011–12) Summer 2011–12 *[NSW] Bar News* 38; and, somewhat less critically, Gregory Nell SC, 'Recent Developments in the Enforcement of Arbitral Awards in Australia' (2012) 26(1) *Australian and New Zealand Maritime Law Journal* 2 <<https://maritimejournal.murdoch.edu.au/index.php/maritimejournal/article/view/175/220>>. Cf also now *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 (29 June 2012) ('*DKN*'), discussed further in Monichino, Nottage and Hu, above n 8.

73 *DKN* [2012] FCA 696 (where a voyage charterparty was held to be a 'sea carriage document' and so fell within the scope of ss 11(1)(a) and 11(2) (b) of the *Carriage of Goods By Sea Act 1991* (Cth); cf *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (2012) 112 SASR 297 where the opposite view was taken). It is also unclear what is meant by this wording under s 11(3) of the *Carriage of Goods By Sea Act 1991* (Cth); does it require the seat to be Australia, or only the hearings?

- when Australian court proceedings involving non-parties to an arbitration agreement, yet raising issues identical or similar to those subject to foreign arbitral proceedings, should be discontinued as constituting an ‘abuse of process’.⁷⁴

Some commentators may respond that another round of statutory reform will harm Australia’s reputation as a sophisticated and supportive jurisdiction for international commercial arbitration. But the rolling reviews of arbitration law in Hong Kong, and prompt amendments following wayward court decisions in Singapore (including a variant of the *Eisenwerk* heresy),⁷⁵ suggest instead that ongoing legislative attention can be seen as demonstrating a serious commitment to arbitration.

Whatever legislative route is now taken, it is of utmost importance that Australia does not delay in addressing the black hole problem and other issues relating to the temporal application of its legislative regime for international arbitration. The black hole will only grow larger if more states and territories proceed to repeal their old *CAA* legislation, substituting new statutes modelled on the *CAAs* already enacted but which apply only to domestic arbitration agreements. For over a year, well before decisions such as *Rizhao* and *Castel*, the present authors have raised these issues with federal and NSW lawmakers. They are reportedly still under consideration.⁷⁶

Secondly, going forward, the international arbitration law reform process in Australia should be as open as possible. One possible reason why problems are

74 *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427.

75 *International Arbitration (Amendment) Act 2009*, and see further Nottage and Garnett, above n 6, 171–2; Charles Lim Aeng Cheng, ‘The Developmental Life Cycle of International Arbitration Legislation – Singapore IAA Case Study’ (2011) 7(1) *Asian International Arbitration Journal* 1.

76 After informal correspondence in May 2011 with an official in the federal Attorney-General’s Department, on 19 July we wrote formally to the then Attorney-General himself and, on 21 July, to the Attorney-General of NSW. We received a reply from the latter (Letter from Greg Smith to Luke Nottage, 13 September 2011), which stated relevantly:

It was the intention of both the Commonwealth and NSW Governments that the [IAA] would exclusively cover international arbitration and that the *CAA* would cover domestic arbitration. Given this, I do not think an amendment to the *CAA* [2010 (NSW)] is warranted. I understand the Commonwealth Attorney-General is aware of the issue you have raised and has the matter under consideration.

We received a reply dated 7 November 2011 from the former, Robert McClelland, stating that these issues raised regarding temporal application (and some others) were ‘currently under consideration’ by the Federal Attorney-General’s Department (and adding that it ‘is intended that the next tranche of amendments [to the *IAA*] will include a ‘med-arb’ provision’). On 2 April 2012 we wrote to the Director-General of the NSW Attorney-General’s Department, in his capacity as secretary of the Standing Council on Law and Justice <<http://www.scag.gov.au/>>. We appended (with permission) Chief Justice Martin’s letter to the WA Attorney-General, which recommended amendment to the Bill before the WA Parliament in order to address the black hole problem. That NSW official replied by letter dated 20 April stating that his Department and the Federal Attorney-General’s Department were aware of the issue, as well as the *Castel* and *Rizhao* decisions, and that their effect was now being considered by the Federal Attorney-General’s Department. As of 10 October 2012, the matter reportedly remains under review. The ‘black hole’ problem identified by the authors was also mentioned by the Chief Justice of the Federal Court: see Patrick A Keane, ‘The Prospects for International Arbitration in Australia’ (Speech delivered at the AMTAC 2012 Annual Address, Brisbane, 25 September 2012) at page 4, available at <<http://www.amtac.org.au/amtac-papers/>>.

now becoming apparent in the revised *IAA* is that the proposals in the *IA Amendment Act* were never referred to a select committee in the Federal Parliament, thus significantly reducing the opportunities for public scrutiny of the proposals. A select committee of parliamentarians can invite some of those responding to calls for public submissions, for example, to give evidence in formal committee hearings, which are subsequently recorded in Hansard and provide an additional resource for the committee's independent report on the Bill.⁷⁷ It is hoped that future reforms to the *IAA* will benefit from that sort of parliamentary process.

Better commercial arbitration legislation is also likely to emerge if the Australian Government forms a standing advisory body comprising experts from the judiciary, the legal profession, academia, the business sector and other stakeholder groups. This body could then consult widely and make public some of its work program.⁷⁸ Without such broader initiatives, Australia seems unlikely to secure the 'cultural change' promised by the 2010 arbitration law reforms.⁷⁹

77 The *IAA* Amendment process therefore differed from other major law reform proposals that the present authors have been involved in, such as the Australian Consumer Law reforms (also introduced in 2010). See, eg, Luke Nottage, 'Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism' (2009) 9(2) *Queensland University of Technology Law and Justice Journal* 111.

78 See, eg, Australian Government, *Corporations and Markets Advisory Committee* <<http://www.camac.gov.au/camac/camac.nsf>> and Commonwealth Consumer Affairs Advisory Council, *Consumer Policy*, Australian Consumer Law <http://www.consumerlaw.gov.au/content/Content.aspx?doc=consumer_policy/cp_development.htm>. At the least, there should be a specialist group within, or facilitated by, the Federal Attorney-General's Department International Legal Services Advisory Council <<http://www.ilsac.gov.au/Pages/default.aspx>>.

79 McClelland, above n 3.