*The Arbitration Division of the Commercial Court**

The Hon. Justice Clyde Croft
Supreme Court of Victoria

* Notes for a buzz group at the AMINZ/IAMA Conference 5 - 7 August 2010.

1. The Role of the Supreme Court of Victoria in Arbitration

The Court is vested with supervisory jurisdiction over both domestic and international commercial arbitration. The Federal Court also has the same jurisdiction with respect to international arbitration, as defined in the Commonwealth *International Arbitration Act 1974*, as amended in 2010.

On the 1 January 2010, the new Arbitration List G of the Commercial Court in the Victorian Supreme Court began operation. I am pleased to be the judge in charge of this list at a time when both international and domestic commercial arbitration law is in a process of significant reform.

The Supreme Court of Victoria is well equipped to facilitate and provide support to commercial arbitrations. As participants in the arbitral process I encourage practitioners to familiarise themselves with the support that the Court can provide to arbitration by examining the Green Book of the Commercial Court[1] and also the new Arbitration Business Practice Note[2].

Despite a common perception that domestic commercial arbitration is in serious decline in Australia, List G has attracted a very promising amount of substantial work in a very short time. Since the beginning of the operation of List G, on 1 January 2010, I have handed down decisions in three arbitration matters.[3] Each decision has raised a different issue regarding court intervention in arbitration. These decisions were made under the *Commercial Arbitration Act 1984* and not the new *Commercial Arbitration Act* that should come into force in the near future. However, the principles are still very relevant in examining the relationship between the Court and arbitration.

Arnwell Pty Ltd v Teilaboot Pty Ltd & Ors[4] raised issues regarding court intervention in procedural decisions made by an arbitral tribunal. *Oakton Services Pty Ltd v Tenix Solutions*[5] was a successful application to stay court proceedings in favour of arbitration as there was an arbitration agreement in place. *Thoroughvision Pty Ltd v*

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[1] *Practice Note 1 of 2010 of the Supreme Court of Victoria*.
[2] *Practice Note 2 of 2010 of the Supreme Court of Victoria* – Appendix I to this paper.
[3] *Arnwell Pty Ltd v Teilaboot Pty Ltd & Ors* [2010] VSC 123; *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor* [2010] VSC 139; *Oakton Services Pty Ltd v Tenix Solutions IMES Pty Ltd* [2010] VSC 176.
[4] [2010] VSC 123.
[5] [2010] VSC 176.

Sky Channel Pty Limited & Anor[6] involved an application for leave to appeal an arbitral award under s 38 of the *Commercial Arbitration Act 1984* (Vic) ("CAA") and an application to set aside an award for misconduct under s 42 on the basis of insufficient reasons provided in the award. I found that there was no manifest error of law on the face of the award for the purposes of s 38(5)(b)(i) and that there was no misconduct on the part of the arbitrator for the purposes of s 42 on the basis asserted. This required examination of the quality of reasons required by an arbitrator under s 29(1)(c) CAA in the context of a decision of the Victorian Court of Appeal[7] and a recent decision of the New South Wales Court of Appeal[8] in that area.

The *Thoroughvision* decision was referred to (though not named) in an article in the legal section of the *Australian Financial Review*[9] on 30 April 2010 which said that I suggested the New South Wales Court of Appeal approach in relation to the quality of reasons that an arbitrator must give was preferable. This is something of an oversimplification because clearly the Victorian decision is binding in Victoria within the ambit of the issues decided. Consequently, it may be helpful to set out what I did say in *Thoroughvision*:[10]

> "54 In my opinion, it is clear from the authorities that a principle of proportionality applies with respect to the nature and extent of reasons which an arbitrator is obliged to provide in an arbitration award. An example of a case in which very extensive and comprehensive reasons were required is *Oil Basins Ltd v BHP Billiton Ltd*.[11] This was, however, an arbitration that involved 15 hearing days, an arbitral tribunal of three, conflicting and substantive expert evidence and substantial submissions. The present arbitration is, on the other hand, an arbitration confined with respect to the proper construction of the MOU. Further, as indicated, the Deed of Arbitration requires that the arbitration be conducted in accordance with the overriding objective referred to in that Deed, adopting procedures suitable to the determination of the type of issues involved and at the same time avoiding unnecessary delay and expense so as to provide a fair, expeditious and cost effective process for the determination of these issues.
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> 55 It is well established that the reasons need show only that the arbitrator grasped the main contentions advanced by the parties, and communicated to

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[6] [2010] VSC 139 ("*Thoroughvision*").
[7] *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346.
[8] *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.
[9] James Eyers, 'Battle for arbitration continues' *Australian Financial Review* (30 April 2010) 42.
[10] *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor* [2010] VSC 139 at [58] –[58].
[11] (2007) 18 VR 346 at 367, [57] (Buchanan, Nettle and Dodds-Streeton JJA).

> the parties, in broad terms, the reasons for the conclusions reached.[12] The reasoning process must be exposed so that the reader of the award can understand how and why the conclusion was reached;[13] It is clear that reasons need not be elaborate or lengthy, provided that these requirements are met.[14] The decision of the Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd*[15] confirms that an arbitrator must address each issue raised for decision within the scope of the arbitration agreement.[16] However it does not follow that the position outlined on the basis of the authorities to which reference has been made is rendered any different, or that the nature and extent of reasons is not to be fashioned by reference to the nature of the matters in dispute and, proportionately, having regard to the complexity of the issues, the importance, monetary or otherwise, of the arbitration proceedings and the nature of the arbitral proceedings, expeditious or otherwise, as agreed between the parties."
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> …
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> "58 The present arbitration is, as indicated, to be distinguished from the very substantial, complex and lengthy arbitration proceeding the subject of the *Oil Basins* appeal. Additionally, this is not a case where, as in *Oil Basins*, the Arbitrator has omitted to deal with an entire and substantial issue, possibly, of critical significance to the arbitration. In this context I do not take the view that there is any relevant inconsistency for present purposes in the decisions of the Victorian and New South Wales Courts of Appeal in *Oil Basins* and *Gordian Runoff*, respectively.[17]"

One of the benefits of the Arbitration List is that a consistent body of arbitration related decisions will be developed by a single judge or group of judges. This should provide parties with greater certainty when judicial intervention or support is required.

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[12] See *UCATT v Brain* [1981] IRLR 224 at 228 (Donaldson LJ); and see *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 at 364-8 [50] to [59] (Buchanan, Nettle and Dodds-Streeton JJA); and *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.

[13] *Davidson v Fish* [2008] VSC 32 at [12] (Pagone J); and see *Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 at [18] (Heerey, Stone and Edwards JJ).

[14] See *Stefan v General Medical Council* [1999] 1 WLR 1293 at 1304.

[15] (2007) 18 VR 346.

[16] See (2007) 18 VR 346 at 364 (Buchanan, Nettle and Dodds-Streeton JJA).

[17] I am strengthened in this view by the conditional language adopted by Allsop P with respect to the extent of inconsistency between these decisions (see [2010] NSWCA 57 at [222] and [224]).

2. Key Provisions of the Commercial Arbitration Act 2010 and the International Arbitration Act 1974

Introduction

In Australia, international arbitration is governed by the IAA, which adopts (with amendments) the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law")[18] and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[19] Domestic commercial arbitration is governed by the Uniform Commercial Arbitration legislation[20] and was not, until recently, based upon the Model Law.

Both regimes have now been through a significant reform process. The *International Arbitration Act* has been updated to provide a framework that is in line with best international arbitration practice, including adopting, with amendments, the 2006 version of the Model Law.

The Uniform Commercial Arbitration legislation had changed little in 25 years in a time when other jurisdictions have made significant reforms and improvements. In May, the Standing Committee of Attorneys General released, after a significant consultative process, a model Commercial Arbitration Bill 2010 to be implemented in all states and territories. The New South Wales version of the bill was assented to on 28 June 2010. At this stage, the bill has not been introduced into the Victorian Parliament. Therefore, the *Commercial Arbitration Act 1984* continues to apply in Victoria, but will be replaced soon.

The Model Law

The 2006 version of the Model Law forms the basis of both the *International Arbitration Act* and the new *Commercial Arbitration Act 2010*. The use of the Model

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[18] United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration 1985 (as adopted by UNCITRAL on 21 June 1985). Adopted by the UN General Assembly 11 December 1985 (General Assembly Resolution 40/72), with revisions (as amended by UNCITRAL and adopted on 7 July 2006) adopted by the UN General Assembly on 4 December 2006 (General Assembly Resolution 61/33

[19] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ("New York Convention").

[20] *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1990* (QLD); Commercial Arbitration Act 1986 *(Tas); Commercial Arbitration and Industrial Referral Act 1986* (SA).

Law as the basis of both the IAA Amendment Act and the CAA Bill is consistent with the goal of creating a best practice framework for arbitration in Australia. The Model Law is an internationally drafted and accepted arbitration regime that is supportive of arbitration. It has been enacted in over 60 nation states. It allows parties the freedom to decide how they want their disputes resolved with minimal court intervention. The Model Law is the arbitration law against which all other arbitration laws are judged.

The choice of the Model Law for both the IAA and the CAA will assist with achieving a great deal of uniformity between the two regimes. This means that expertise developed under one regime will be easily applied to the other. While I will be focussing on the new *Commercial Arbitration Act*, most of what I will say is relevant to the *International Arbitration Act* as well.

The reform of the Uniform Commercial Arbitration legislation is a more fundamental shift than the amendments to the *International Arbitration Act* as for the first time the Model Law will apply to domestic commercial arbitration. Consequently, there is little to be gained from working through the current Uniform Commercial Arbitration legislation and comparing it to the CAA Bill. In fact, both practitioners and courts should avoid this, as the interpretations of provisions under the "old regime" will not necessarily apply.. I will discuss some of the key provisions in both regimes especially those that relate to court supervision and facilitation of arbitration.

Paramount Objects and Interpretive Provisions

Commercial Arbitration Act - Section 1AC – Paramount object of Act

The paramount object of the Act 'to facilitate the fair and final resolution of commercial disputes without unnecessary delay or expense' is an addition to the Model Law. It remains to be seen whether this section will have much impact on arbitrators and courts in interpreting and applying the Act. At the very least it is a reminder to those interpreting and applying the Act that one of the main advantages of commercial arbitration, in the domestic context, is the ability for parties and arbitrators to tailor arbitration procedures for the most efficient resolution of the dispute. Sometimes parties will want an arbitration that is just as formal as a court proceeding and sometimes they will want a "look and sniff" arbitration, and between these extremes lies the spectrum of possible arbitration procedures. The challenge is to find the appropriate point on this spectrum, hence to match the appropriate

arbitration procedure with the nature of the dispute. It is hoped that arbitrators will encourage parties to seek proportionality between the nature of the dispute and the arbitral procedure.

International Arbitration Act – Matters to which the court must have regard; objects of the Act

A court or authority in exercising the functions and powers listed in s 39(1) must:[21]

> "have regard to:
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> (a) the objects of the Act; and
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> (b) the fact that:
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> (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
>
> (ii) awards are intended to provide certainty and finality."

The extensive list in s 39(1) seems to cover most (if not all) situations where a court or authority would be applying or interpreting the IAA, the Model Law, the New York Convention or arbitration agreements and awards. A court or authority is directed to have regard to the objects of the IAA rather than obliged to apply the objects of the Act or the other considerations. This probably makes little practical difference.

The objects of the act are set out in s 2D of the *International Arbitration Act* as amended provides:

> "The objects of this Act are:
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> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
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> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
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> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
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> (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and

[21] IAA Amendment Act s 39(2).

(e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and

(f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975."

The Parliamentary intention and objective is made quite clear by the combination of both ss 39 and 2D – the efficient settlement of disputes by encouraging the use of arbitration in the context of international trade and commerce. Regard should also be had to Article 2A of the 2006 Model Law which provides:

> (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith
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> (2) Questions concerning matters governed by the Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

The relevant court

Commercial Arbitration Act - Section 6 – Court for certain functions of arbitration assistance and supervision

The Supreme Court of the relevant state is the court appointed to perform the various facilitative and supervisory functions under the *Commercial Arbitration Act.* Other courts can be given jurisdiction to perform these functions if the parties agree. In NSW both the District Court and the Local Court are available to the parties if they agree either before or after their dispute has arisen.

International Arbitration Act – Section 18 – Court for applying the Model Law

Courts are given certain functions under the Model Law. The functions includes the appointment of arbitrators (Arts 11(3) to (4)), the removal of arbitrators (Arts 13(3) and 14), decisions on arbitral jurisdiction (after the tribunal has already decided) (Art 16(3)) and the setting aside of arbitral awards (Art 34(2)). Under s 18 of the IAA Amendment Act these functions can be performed by the relevant state or territory

Supreme Court or by the Federal Court of Australia. This gives parties a choice of forum and will place pressure on the courts to provide efficient court procedures. As discussed above, List G of the Commercial Court in the Victorian Supreme Court is designed to provide an efficient and expeditious service in support of commercial arbitration; domestic and international. It has been argued that giving jurisdiction to multiple courts will create inconsistency in interpretation of national legislation. This should be able to be avoided by courts having regard to the interpretation provisions of the IAA in the context of the international character of the Model Law, and by the establishment of specialist arbitration lists.

There is provision in s 18 IAA Amendment Act for an authority to be prescribed for the purpose of appointing arbitrators. No authority has been prescribed, but it is a step towards the systems in place in the popular arbitration centres of Hong Kong[22] and Singapore.[23] The drafting in Section 18 of the IAA Amendment Act means that, without further clarification, the courts and the appointed authority will have concurrent jurisdiction to appoint arbitrators. It is uncertain how this would work in practice. If a body like Australian Centre for International Commercial Arbitration ("ACICA") is to be appointed there will need to be a transparent system of arbitrator selection so that parties can have confidence in the process. In my opinion, courts are not necessarily best placed for deciding which arbitrator will be best suited to a particular dispute. It is a decision best left to the parties themselves or, in the absence of agreement, a professional body like ACICA, which has a greater knowledge of arbitrators and their expertise.

Arbitration agreement and substantive claim before court

Commercial Arbitration Act - Section 8 - Arbitration agreement and substantive claim before court

If parties have agreed to arbitrate their disputes, they should be held to that agreement. If a party to an arbitration agreement files a claim in a court the other party has a right to apply for a stay of the court proceedings in favour arbitration. A court will grant a

[22] The Hong Kong International Arbitration Centre is appointed under section 34C(3) *Arbitration Ordinance* (Hong Kong).
[23] The Chairman of the Singapore International Arbitration Centre is appointed under Article 8(2) *International Arbitration Act* (Singapore).

stay unless the arbitration agreement is 'null and void, inoperative or incapable of being performed'. If there is a valid arbitration agreement the court must grant a stay.

The *International Arbitration Act* 1974 includes the same provision, which is taken from the Model Law.

Interim Measures

Commercial Arbitration Act 2010 - Section 9 - Arbitration agreement and interim measures by court

Although parties to an arbitration agreement are not to make substantive claims in court, they can still apply to a court for an interim measure of protection. The types of interim measures sought are usually injunctions to preserve the status quo, freezing orders etc. Arbitral tribunals, under section 17, also have the power to order interim measure and it is hoped that parties will generally seek such orders from the tribunal. Under sections 17H and 17I interim measures made by an arbitral tribunal are enforceable by the Court. Enforcement can only be refused on limited grounds. Therefore parties to an arbitration know are likely to comply with interim measures ordered by the arbitral tribunal or risk cost consequences in Court.

International Arbitration Act – Interim measure provisions

Prior to the 2010 amendments, the IAA currently adopted Article 17 of the 1985 Model Law, which states that the arbitral tribunal may 'order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.'

The fundamental problem with this provision was that there is no procedure within the Model Law for a party to have the arbitral tribunal's interim measure enforced by a court. Enforcement provisions under the 1985 Model Law only apply to 'awards', which, at the very least, must finally determine some of the issues in dispute.

In practice, interim measures ordered by an arbitral tribunal are often complied with as it is not wise to ignore the arbitral tribunal that is to decide the issues of substance, and also because the same interim measure can be applied for at a court under Article 9 of the Model Law. The latter option may raise res judicata issues as it puts the court

in the position of having to determine something already dealt with by the arbitral tribunal. Parties may be better off avoiding this complication and applying directly to the court, rather than applying to the arbitral tribunal.[24] Unfortunately, this means that parties will not be able to have the entire matter dealt with by an arbitral tribunal.

The 2006 Model Law avoids these complications by the creation of an enforceable interim measure regime. The amended IAA adopts all the amendments in relation to interim measures apart from Article 17B, which gives arbitral tribunals the power to give ex parte interim measures. Article 17H(1) allows interim measures to be enforced by a court subject to the limited grounds for refusing enforcement set out in Article 17I. Written agreement under s 23 (repealed under the amendments) will no longer be required in order to have enforceable interim measures available.

Section 18B of the amended IAA prevents arbitral tribunals from making ex parte interim measure orders, known as preliminary orders, under Article 17B of the Model Law. The major criticism of ex parte orders in arbitration is that they go against the consensual nature of arbitration. This criticism may be misguided as Art 17B of the Model Law is an opt-out provision, which can be excluded by party agreement. If parties do not wish to have ex parte preliminary orders then, consistently with the principle of party autonomy, they can exclude them.

Appointment and challenge of arbitrators

Commercial Arbitration Act - Sections 11 - 13 – Appointment and challenge of arbitrators

Parties should agree on the selection of arbitrators. However, a party wishing to avoid arbitration has an incentive to avoid proper appointment of arbitrations. To avoid this problem the Court is given a supervisory role when agreement is not reached or when arbitrators are challenged. This supervisory role is important to break the deadlocks and delays that are inevitable if arbitrators are not agreed to. A decision made by the Court, within its power, in this area is final.

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[24] Clyde Croft and Bronwyn Lincoln, 'The role of the courts; enforcement of arbitration awards and anti-arbitration injunctions' in K E Lindgren (ed) *International Commercial Litigation and Dispute Resolution* (2010) 76.

Similar provisions, which are taken from the Model Law, apply under the *International Arbitration Act*.

Practical court assistance

Commercial Arbitration Act

There are a number of ways in which the Court can assist the parties and the arbitral tribunal in reaching an efficient resolution of the dispute. Under section 27 the Court can assist the tribunal in taking evidence if requested by the arbitral tribunal or a party with approval from the arbitral tribunal. Under section 27A, the Court can also issue subpoenas requiring a person to attend to give evidence or to produce documents to the arbitral tribunal. If an arbitral tribunal has ordered a person to attend to give evidence or provide documents, and that person has failed to comply, the Court can order that person to comply with the arbitral tribunal's orders.

International Arbitration Act – Optional Provisions

The IAA Amendment Act adds to the list of optional provisions available in Division 3 Part III ('Optional Provisions') of the IAA. The new optional provisions are:

- s 23 Parties may obtain subpoenas
- s 23A Failure to assist arbitral tribunal
- s 23B Default by party to an arbitration agreement
- s 23C-23G Disclosure of confidential information
- s 23H Death of a party to an arbitration agreement
- s 23J Evidence
- s 23K Security for costs

The optional provisions remaining (some with amendment) in the IAA Amendment Act are:

- s 24 Consolidation of arbitral proceedings
- s 25 Interest up to making of award
- s 26 Interest on debt under award
- s 27 Costs

All of the optional provisions supplement the Model Law and are generally facilitative of arbitration. Most of them apply on an opt out basis. This is important because parties may not give specific thought to the optional provisions when drafting the arbitration agreement, and they may be unwilling to give more power to the arbitration tribunal once a dispute has arisen. Now the only IAA Amendment Act provisions that apply on an opt-in basis are consolidation of proceedings (s 24), death of a party (s 23H) and the confidentiality provisions (s 23C to 23G). If the parties do not wish the other optional provisions to apply they will need to agree to this effect in writing.

Confidentiality

Commercial Arbitration Act

Confidentiality is one of the key benefits for parties choosing domestic arbitration. For this reason, it is important that specific confidentiality provisions be added to the Model Law provisions which are adopted domestically. This is especially the case in Australia given the concerns about confidentiality caused by the decision in *Esso Australia Resources Ltd v Plowman*[25]. The confidentiality provisions in ss 27E to 27I of the CAA Bill apply, crucially, on an opt out basis. The Court can make orders allowing or disallowing disclosure of confidential arbitral information if the mandate of the arbitral tribunal is terminated or the arbitral tribunal has already ruled on the disclosure of the information.

International Arbitration Act

[25] (1985) 183 CLR 10.

The optional provisions added by the IAA Amendment Act in s 23C to s 23G are aimed at addressing a perceived deficiency in Australia in relation to the confidentiality of arbitral proceedings as a result of the decision in *Esso Australia Resources Ltd v Plowman*[26] - where the High Court decided that arbitrations were private but not confidential.

Section 23C prohibits parties and the arbitral tribunal from disclosing confidential information[27] except as provided for by the Act. Section 23D establishes the situations when confidential information can be disclosed such as by consent of all the parties, for the purpose of obtaining professional advice or when required to disclose by a court. Section 23E gives the arbitral tribunal the power, on application of a party, to allow disclosure of confidential information in circumstances outside s 23D. Sections 23F and 23G give the court the power to prohibit disclosure or allow disclosure, respectively, after an application under s 23E has already been made.[28] The court must apply a public interest test – does the public interest lie in preserving confidentiality or in disclosure?

These sections give some protection, but considering the international perception of the treatment of confidentiality in Australia it may have been desirable to adopt a more comprehensive approach such as that adopted in s 14A to I of the *Arbitration Act 1996* (New Zealand). The IAA Amendment Act confidentiality provisions are based on sections 14B to 14E of the New Zealand Act. However, the New Zealand provisions go further and make the distinction between privacy and confidentiality. Under s 14A arbitrations must be private. In ss 14F to 14I the New Zealand Act sets up a regime which allows for the possibility of court proceedings relating to an arbitration being conducted in private. A party must apply for the court proceedings to be conducted in private (s 14F(2)(a)) and state their reasons for doing so (s 14G). The court needs to balance the public interest and must consider the factors set out in 14H. These are:

(a) the open justice principle;

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[26] (1985) 183 CLR 10.

[27] Confidential information is defined in subsection 15(1) IAA Amendment Act. In summary, it includes information relating to the arbitral proceedings such as pleadings, evidence, transcripts, submissions, rulings and awards.

[28] If the arbitral tribunal's mandate has finished then a party can apply directly to the court - s 23G(3)(a) IAA Amendment Act.

(b) the privacy and confidentiality of arbitral proceedings;

(c) any other public interest considerations;

(d) the terms of any arbitration agreement between the parties to the proceedings; and

(e) the reasons stated by the applicant under section 14G(b).

As Australia has no private arbitral appeal mechanism[29] provisions that allow private court proceedings would be beneficial.

Considering that confidentiality has always been one of the most important claimed benefits of commercial arbitration there seems no good reason for applying confidentiality on an opt-in basis. The opt-in basis may be seen as a signal to international arbitration practitioners that Australia has not reached arbitration best practice in this area. Practitioners should be aware of these problems and make sure the parties opt in to the confidentiality provisions and also choose arbitration rules that provide for confidentiality and deal with confidentiality issues in a reasonable and practical way.

Reasonable opportunity to present case

Article 18 of the Model Law states '… each party shall be given a *full* opportunity of presenting his case.' [Emphasis added]. In situations where a party wants to delay arbitration proceedings it can rely on this provision to argue that it can present evidence and submissions no matter how costly, lengthy and unnecessary they are. Although this view conflicts with the objectives and approach of the Model Law and the IAA, it is at least arguable.

To remove doubt the amendments to the *International Arbitration Act* (s 18C) and the new *Commercial Arbitration Act 2010* (s 18) changes the "full opportunity" provision in the Model Law to be read as a "reasonable opportunity". This will encourage parties to consider the flexibility of arbitral procedure. There needs to be proportionality between the complexity of the dispute and the procedures adopted.

[29] Such as the private Arbitration Appeal Tribunal system established by the Arbitrators' and Mediators' Institute of New Zealand.

Determination of preliminary point of law by the Court

Commercial Arbitration Act 2010 - Section 27J

Section 27J, which is an addition to the Model Law, allows a party to apply to the court for a determination on a preliminary point of law. This can only occur with the consent of the arbitrator or all the other parties; so it is not a provision likely to be abused. Delays may arise, however, if the determinations made by the Court are appealed on a regular basis. It will be interesting to see how often this provision is utilised.

Setting aside and appealing awards

Commercial Arbitration Act 2010 - Sections 34 and 34A

Section 34, which is based on the Model Law, sets out the very limited grounds under which a party can apply to have an award set aside. The grounds do not cover errors of law or fact in the arbitral award, but rather deal with situations were there was no power to issue the award in the first place. Among other things an award can be set aside because the dispute is not covered by the arbitration agreement; there is not a properly constituted tribunal; the arbitration agreement is void; or the award is in conflict with the public policy of the state. The grounds are very narrow, and are unlikely to be successfully relied upon on a frequent basis. Similar grounds apply under the enforcement provisions in section 36.

In the domestic context the grounds in section 34 are thought to be too narrow. Therefore there is an appeal right given under s 34A. This section is an addition to the Model Law. Section 34A allows an appeal on a question of law if the parties agree that appeals are allowed and the Court grants leave. This section is the high point of the Court's supervisory role and goes further than the grounds set out in section 34. While it does go further than section 34, the appeal right is still restricted. Determinations of fact cannot be subject to appeal, but, of course, there is often difficulty in separating law from fact. The decision of the tribunal must be "obviously wrong" or the question must be one of "general public importance" and the arbitral

decision is open to “serious doubt”. These tests are somewhat similar to those under the previous *Commercial Arbitration Act*.

There is no additional appeal right under the *International Arbitration Act*.

Conclusion

Arbitration is a key part of our dispute resolution system. There are many benefits for parties who engage in an efficient arbitration process. The Court has a major role to play in making the new Commercial Arbitration legislation a success in this regard. It is important for the Court to have, in some circumstances, a role in reviewing arbitration awards. However, it is my view the Court will be most useful when using its powers under the facilitative provisions, and to break deadlocks in arbitral procedure when they occur. If parties know that unnecessary delays in arbitrations will not be tolerated by the Court, there is likely to be positive benefits in arbitral practice without the Court needing to get involved.

Appendix I

Practice Note No 2 of 2010

Arbitration Business

Court Support for arbitration

1. The Court is supportive of the wishes of disputants to resolve all or part of their dispute by arbitration and will assist parties in a variety of ways, including -

   (a) assistance and support for the arbitration process (e.g. subpoenas to witnesses or for production of documents, interim measures of protection (injunctive relief or otherwise) and orders with respect to the constitution of the arbitral tribunal);

   (b) determination of discrete questions of law which arbitrators or parties are able to refer to the Court (depending on the statutory or other basis of the arbitration process);

   (c) expeditious hearing and determination of appeals from the arbitration process (to the extent permitted under the statutory or other basis of the arbitration process);

   (d) enforcement of arbitration awards and orders of arbitral tribunals (to the extent permitted under the statutory or other basis of the arbitration process); and

(e) referring a proceeding or a question to arbitration under Chapter I Rule 50.08.

2. Court assistance is provided for all arbitration proceedings, international or domestic, and whether conducted under the *International Arbitration Act 1974* (Cth) or the *Commercial Arbitration Act 1984* (Vic). Enforcement or other proceedings with respect to arbitration conducted under these statutory provisions or under legislation in other jurisdictions (international and other Australian jurisdictions) are also available in the Court, subject to the provisions of the *International Arbitration Act 1974* or the *Commercial Arbitration Act 1984*, to the extent applicable.

International Arbitration

3. The *International Arbitration Act 1974* (s 18) confers jurisdiction on the Court to provide assistance with respect to the matters specified in Article 6 of the United Nations Commission on International Trade Law ("UNCITRAL") *Model Law on International Commercial Arbitration 1985* ("the *Model Law*") –

(a) appointment of a sole or presiding arbitrator failing agreement by the parties or co-arbitrators (Article 11(3));

(b) appointment of an arbitrator or arbitrators where the appointment procedure agreed by the parties fails (Article 11(4));

(c) deciding on challenges to an arbitrator or arbitrators (Article 13(3));

(d) termination of the mandate of an arbitrator as a result of a failure or impossibility to act (Article 14);

(e) determining whether the arbitral tribunal has jurisdiction (Article 16); and

(f) setting aside arbitral awards on the limited grounds specified in Article 34.

4. In addition to providing assistance under Article 6 of the *Model Law*, the *International Arbitration Act 1974* confers jurisdiction on the Court to –

(a) enforce foreign arbitral agreements by staying a proceeding or part of a proceeding that is before the Court which invites the determination of a matter capable of settlement by arbitration which is subject to such an agreement (section 7(2));

(b) make interim or supplementary orders for the preservation of the rights of the parties or in relation to any property for the purpose of providing effective enforcement of arbitration agreements (section 7(3)); and

(c) enforce foreign arbitral awards to which the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 ("the New York Convention") applies (section 8).

5. It is noted that the jurisdiction of the Court to provide interim measures of protection (e.g. interlocutory injunctive relief for the preservation of assets or evidence, *Mareva* injunctions, search orders and the like) in partnership with the arbitration process is recognised in Article 9 of the *Model Law*.

Domestic (Australian) Arbitration

6. Domestic (Australian) arbitration is currently subject to the operation of the uniform commercial arbitration acts. The Victorian legislation is contained in the *Commercial Arbitration Act 1984*.

7. The *Commercial Arbitration Act 1984* confers jurisdiction on the Court to provide assistance to the arbitration process in a variety of matters and circumstances, including –

(a) appointment or removal of arbitrators (sections 8, 10, 11, 13 and 44);

(b) ordering the attendance of witnesses or the production of documents (sections 17 and 18);

(c) consolidation of arbitration proceedings in some circumstances (section 26);

(d) correction of arbitration awards (section 30);

(e) enforcement of arbitration awards (section 33);

(f) taxation of any costs of an arbitration that are directed to be paid by an award and which are not taxed or settled by the arbitrator (section 34);

(g) assessment of the arbitrator's fees and expenses (section 35);

(h) orders in relation to the costs of an abortive arbitration (section 36);

(i) review of awards where there is a manifest error of law on the face of the award or there is strong evidence of an error of law where determination of the question dealt with by the award may add or be likely to add substantially to the certainty of commercial law (section 38);

(j) determination of a preliminary point of law with the consent of the arbitrator or of all the parties (section 39);

(k) setting aside an award where there has been misconduct by the arbitrator or setting aside the award in whole or in part where the arbitrator has misconducted the arbitration proceedings (section 42);

(l) remitting any matter for reconsideration by the arbitrator (section 43);

(m) termination of arbitration proceedings and, possibly, removing the dispute to the Court in the event of undue delay (section 46);

(n) the making of interlocutory orders for the purposes of and in relation to arbitration proceedings; to the same extent as may be done for the purposes of and in relation to proceedings in the Court (section 47);

(o) extension of time periods under the *Commercial Arbitration Act 1984* or the arbitration agreement (section 48); and

(p) staying Court proceedings to allow the arbitration to proceed (section 53).

Procedural Matters

8. Applications under the *International Arbitration Act* 1974 (Cth) must be commenced by originating motion. In determining whether an arbitration is international, reference should be made to the provisions of the *International Arbitration Act 1974* and also to the UNCITRAL *Model Law* (which the provisions of this Act apply) – particularly, Article 1 of the *Model Law*. Applications under the *Commercial Arbitration Act 1984* (Vic) must also be commenced by originating motion and must comply with Chapter II, Order 9.

9. Parties seeking to bring an application must first consult with the Associate to the Judge managing Commercial Court, List G – Arbitration proceedings, to establish a hearing date and to appoint a Judge or Associate Judge to hear the application. The Prothonotary will only accept a summons with a return date authorised by this Associate.

10. An application to enforce a foreign award pursuant to the *International Arbitration Act 1974* (section 8), should, as far as possible, comply with

the requirements of Chapter II, Rules 9.04 and 9.05. An application to enforce a domestic (Australian) award pursuant to the *Commercial Arbitration Act 1984* must comply with the requirements of Chapter II, Rules 9.04 and 9.05.

11. An application to set aside a foreign award pursuant to Article VI of the New York Convention or Article 34 of the *Model Law* (see Part II and sections 16 and 20 of the *International Arbitration Act 1984*) should, as far as possible, comply with the requirements of Chapter II, Rules 9.04 and 9.05.

12. An application for leave to appeal against an arbitrator's award under the *Commercial Arbitration Act 1984* must comply with the requirements of Chapter II, Rule 9.06 and Chapter I, Rules 4.06 and 4.07.

13. Subject to any direction of the Judge or Associate Judge hearing the application, practitioners must deliver to the Judge or Associate Judge, not less than two clear days before the time appointed for the hearing of the application, a copy of all affidavits including exhibits together with a brief outline of argument in support of the application.

14. From time to time urgent interlocutory applications arise in the course of arbitrations. The Court will be available on very short notice to hear and promptly determine these applications. The following provisions shall apply to applications which are accepted by the Judge managing Commercial Court, List G, as urgent.

    (a) The applicant should deliver to the Associate to this Judge at the time of seeking to bring the application a copy of the application and of all affidavits including exhibits and a brief outline of argument in support of the application.

    (b) The practitioner for the respondent should as soon as practicable and in any event on the day prior to the hearing of the application (if possible in all the circumstances) deliver to

the Associate to the Judge or Associate Judge appointed to hear the application, a copy of all affidavits including exhibits filed in opposition together with a brief outline of argument.

(c) If all parties to the application so request, the judicial officer appointed to hear the application may agree to determine the application within 24 hours of the completion of argument provided that in such a case no reasons for the decision will be provided at the time of determination. Any party requiring reasons must so advise the judicial officer at the time of the determination and the judicial officer will provide reasons, but they will be in short form. Reasons in short form will be simply statements, without elaboration, of the findings of fact and principles of law which lead to the determination.

(d) If the application is one that is properly made ex parte, this should be clearly stated in all communications with the Associate to the Judge. Such communications need not be copied to the respond until the interim determination of the application.

(e) Where an application for an interlocutory order offers, or the court accepts, or an order or other Court document records the giving of "the usual undertaking as to damages", this shall be taken to mean the following undertaking given to the Court:

> To abide by any order which this Court might make as to damages, in case this Court shall be of the opinion that any person shall have sustained any loss, by reason of this order, which the party giving the undertaking ought to pay.

15. These procedural arrangements will apply notwithstanding the Commercial Court Practice Note No. 1 of 2010. Otherwise, the Commercial Court Practice Note is applicable.

Commercial Court – Arbitration Proceedings

16. The Chief Justice has appointed the Hon. Justice Croft to manage Commercial Court, List G – Arbitration proceedings. All arbitration proceedings, any applications in arbitration proceedings, and any urgent applications with respect to arbitration matters, should be directed to His Honour's Associate (telephone: 03.9603 7731).

17. Arbitration matters arising in proceedings already allocated to the Technology, Engineering and Construction List (TEC List) will continue to be managed within that List by the Hon. Justice Vickery, though they may be transferred to List G in accordance with the usual practice applied in the Commercial Court with respect to the transfer of matters between lists in that Court. The same position applies with respect to the possibility of transfer of arbitration matters from List G to the TEC List.

18. Any changes in these arrangements will be notified from time to time on the Commercial Court website – www.commercialcourt.com.au

19. This Practice Note takes effect on and from 1 January 2010.

20. This Practice Note is in substitution for Practice Note No. 7 of 2006 which is hereby revoked.

Vivienne Macgillivray
Executive Associate to the Chief Justice
17 December 2009