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Update Summary

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INTERNATIONAL COMMERCIAL ARBITRATION IN AUSTRALIA LAW AND PRACTICE

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Commentary has been updated by Jonathon Redwood. Highlights include:

Australia's International Commercial Arbitration Role in the Asia-Pacific

In the last quarter of a century there been an explosion of economy growth and cross-border trade within the Asia-Pacific region. Growth in trade has naturally given rise to significance increase in cross-border disputes between trading partners. Since international arbitration remains the clearly preferred form of international commercial dispute resolution for cross-border disputes, there has been a concomitant increase in the international arbitration disputes across the region. Australia represents a secure neutral option for international arbitration in the Asia-Pacific region. See [1.10].

Arguments in favour of international commercial arbitration

According to the widely cited Queen Mary 2018 survey on international arbitration, arbitrations generally accepted advantages–neutrality, efficiency, expertise, finality, and enforceability, provide businesses with the needed certainty and predictability to engage in trade.

Enforcement

Probably the single most important advantage of international arbitration is relative ease, speed and effectiveness of enforcement. Unlike judgements from national courts, arbitral award benefit from the application of the *1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Award* (the New York Convention) which provides for simple, effective and robust method of enforcement across 165 jurisdictions that are signatory to this Treaty.

Freedom of selection of ground rules

A distinct advantage of international arbitration is that it gives parties the choice and flexibility to tailor procedural ground rules for the conduct of their arbitration that are suited to the particular features and size of their dispute. See [1.90].

Statistics on use of international commercial arbitrations

According to ACICA's *2020 Australian Arbitration Report* between 2016 to 2019 there were a total of 223 arbitrations with over $35 billion in dispute with a significant Australian connection. Construction and engineering disputes accounted for almost half of the arbitrations reported by respondents. Of that $35 billion approximately $10 billion were conducted under the ICC or

UNCITRAL arbitration rules and approximately $2 billion under the ACICA rules.

The statistics above demonstrate that the introduction of Australia's modern arbitral regime, including adoption of the UNCITRAL Model Law for international commercial arbitration fulfilled an obvious need, which continues to grow in its importance. The statistics also introduce the huge economic opportunity for Australia to enlarge its share of international arbitration within the Asia-Pacific region with the right level of coordination amongst stakeholders and the support of the Commonwealth, including through appropriate funding and support as in other rival arbitration jurisdictions. See [1.230].

Relevant Legislation and International Conventions

In *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533, a challenge was mounted against the constitutionality of the *International Arbitration Act 1974* (Cth) (“IAA”) on the basis that it offended Ch III of the *Constitution*. Had this challenge succeeded, it would have had very far reaching consequences, both regarding the IAA and the State and Territory Acts modelled on the *Commercial Arbitration Act 2010* (NSW), all of which have as their basis the UNCITRAL Model Law. In the judgement handed down by the High Court on 13 March 2013, the constitutional challenge, summarised and discussed below, was unanimously rejected in a joint judgment of French CJ and Gageler J and a separate joint judgment of Hayne, Crennan, Kiefel and Bell JJ.

In summary, the High Court held that the enforcement of an arbitral award is the enforcement of the binding result of the agreement of the parties to submit their dispute to arbitration, not the enforcement of the rights and liabilities which were the subject of the dispute submitted to arbitration. The making of an arbitral award in a private arbitration does not involve an exercise of judicial power. The existence and scope of the authority to make the arbitral award is founded on the agreement of parties to an arbitration agreement. To conclude that a particular arbitral award is final and conclusive does no more than reflect the consequences of the parties having agreed to submit a dispute of the relevant kind to arbitration.

The High Court’s decision in *TCL* strongly affirmed the essential justification for arbitration and the vital role of the Model Law within a coherent system for the settlement of international disputes. No other final court of appeal has so clearly explained the essential basis for arbitration and how its various strands intersect. The Court was careful to situate the modern conceptual foundation for arbitration within the wider international system of the Model Law and The New York Convention. See [3.05].

The *International Arbitration Act 1974* (Cth) - a short historical survey

The purpose of the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth) was primarily to ratify and give effect to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Wards made in New York on 10 June 1958 (commonly referred to as the New York Convention) in Australia.

The Commonwealth Parliament passed the *International Arbitration Amendment Act 1989* (Cth) (assented to on 15 May 1989) for the purpose of grafting the UNCITRAL Model Law approved of by a resolution of the General Assembly of the United Nations on 11 December 1985 and prepared by UNCITRAL onto the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth). At the same time the name of the principal Act was changed to the *International Arbitration Act 1974*. Together, the implementation of the New York Convention and the Model Law gave rise to a comprehensive national arbitration law for Australia. On 7 July 2006 UNCITRAL amended the 1985 Model Law, although those amendments did not become part of domestic law at that time. On 21 November 2008, the Commonwealth Attorney-General announced a review of the Act and released a detailed discussion paper which attracted widespread comment. This resulted in the enactment of the (a) *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth), which conferred jurisdiction under the Act on the Federal Court of Australia concurrently with that of the Supreme Courts of the States and Territories and (b) the *International Arbitration Act 2010* (Cth), which involved a major revision of the Act and the adoption of the 2006 amendments to the Model Law.

The *International Arbitration Act 2010* (Cth) implemented several amendments designed to adopt international best practice and remedy perceived deficiencies in the existing legislative regime. See [3.10].

Model Law covers the field

Under s 21(1) of the *International Arbitration Act 1974* (Cth), if the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration. See [3.200].