

# The Top Twenty Things to Change In or Around Australia's International Arbitration Act \*

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## Final Submission to the AGD's Review of the International Arbitration Act © 23 March 2009

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## INTRODUCTION: TOWARDS GLOBAL AND INFORMAL SOLUTIONS

- a. This is our **Final Submission** based on a manuscript for an article (with more detailed references and arguments, available on request) that we began collaborating on from mid-2008, well before the Attorney-General's Department (AGD) announced its **Review of Australia's International Arbitration Act (IAA)**.<sup>1</sup> Our collaboration was inspired by many years of teaching International Commercial Arbitration (ICA) to literally hundreds of postgraduate and undergraduate law students from dozens of countries, often already experienced practitioners, in Australia and world-wide. We had

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<sup>1</sup> Available, now with other Submissions, at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_ReviewofInternationalArbitrationAct1974](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_ReviewofInternationalArbitrationAct1974).

become increasingly concerned about the lack of progress in updating Australia's legislative framework, dating back almost two decades. We were also increasingly conscious that this undermines efforts to improve the ICA regime in this country through private initiatives such as those recently from the Australian Centre for International Arbitration (ACICA).<sup>2</sup>

- b. We therefore welcome the AGD's Review and this opportunity to contribute to a wholesale reform of the IAA system. We have already contributed an **Interim Submission** focusing on two specific questions raised in the AGD's Discussion Paper (DP), and we reproduce those points below (Parts 12 and 13, slightly edited and updated). We also contributed to AFIA's Submission, which addressed other specific questions raised in that DP.<sup>3</sup> Although the AGD's (ambitious) deadline for Submissions has now passed, we – like other stakeholders (eg ACICA) – wish now to raise further questions that should be addressed in this Review. Especially in light of the time taken to get a Review formally underway, and the low chances of another round of legislative reforms over the next few years if the IAA is amended soon, it is important that we reassess the Act more comprehensively.
  
- c. A more systematic review also allows us to identify more clearly what should be the guiding principles in such a reform exercise, which should be stated up front anyway.<sup>4</sup> First, we acknowledge that a contemporary ICA regime requires some minimum standards of fairness, as does any system receiving the support and imprimatur of a democratically elected legislature.<sup>5</sup> Especially today, however, the legitimacy of ICA is increasingly accepted world-wide. A more pervasive problem is a renewed sense that ICA is getting bogged down again in processes too much like or intertwined with regular court litigation. A similar problem became evident in the early 1990s, threatening to undermine the very rationale for ICA. In the late 1990s, the arbitration world tried to address such concerns through changes in legislation, arbitral institutions' rules and practices, and other initiatives.<sup>6</sup> Yet recent anecdotal and survey evidence suggests the re-emergence of delays, and particularly costs. It is not just the

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<sup>2</sup> With Garnett as a Director and Nottage as a Special Member, we served on the ACICA Committee that drafted new generic Arbitration Rules (2005) and then Expedited Arbitration Rules (2008). We were also founding members of the Australasian Forum for International Arbitration (AFIA), and have been teaching and researching ICA intently for the last twelve years. Nottage has also been involved in lecturing, organising seminars and writing for the Chartered Institute of Arbitrators – Australian Branch (CIArb), and is a member of the new Arbitrator Forum. Garnett's experience in ICA also includes six years as a consultant and counsel in a major national commercial law firm, where he regularly advises on applications to stay court proceedings or enforce arbitral awards and on the conduct of arbitral proceedings more generally.

<sup>3</sup> These Submissions, and 23 others, are now available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_ReviewofInternationalArbitrationAct1974](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_ReviewofInternationalArbitrationAct1974). To further assist the AGD and other stakeholders in this process, our Appendix summarises the main views expressed on the (more limited) issues highlighted in the AGD's DP.

<sup>44</sup> See further {Nottage 2006}.

<sup>5</sup> The same is true as Australia slowly fleshes out a legislative framework for other Alternative Dispute Resolution (ADR) of commercial disputes, such as mediation. On the overlaps between mediation and ICA in particular, see also generally {Nottage 2002}.

<sup>6</sup> {Nottage 2000}.

“grand old men”, responsible for developing the ICA world from the 1950s, who seek again to restore greater “informalisation”.<sup>7</sup>

- d. Secondly and relatedly, because problems of delays and costs tend to be associated with dispute resolution and law firm practice originating from common law jurisdictions, reforms to Australia’s ICA regime should favour more broadly-based “global” solutions.<sup>8</sup> ICA is inherently global anyway, since it involves cross-border transactions as well as arbitrators, lawyers and legal norms from diverse traditions. Global solutions includes widely-shared understandings of treaties such the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (NYC, 1958), the Model Law on International Commercial Arbitration (ML, 1985 as revised in 2006), legislative history for both, persuasive precedents from courts and arbitral tribunals world-wide, and other authoritative commentaries (including leading treatises published abroad). Focusing on such a common core promotes legitimacy in ICA, because a key premise of the rule of law is its accessibility and comprehensibility. It also promotes efficiency, because uniform or more loosely harmonised law reduces transaction costs by minimizing scope for disagreements, especially preliminary disputes involving conflict of laws and jurisdictional issues in ICA.<sup>9</sup>
- e. Given its legal history, it is particularly important for Australia now to go beyond a tradition of court intervention and “supervision” inherited from England, and arguably still evident there in the first decade following enactment of its Arbitration Act 2006.<sup>10</sup> Some judicial unwillingness to respect the autonomy of arbitrators and parties was also evident particularly in the first decade after enactment of the IAA, and still in its second decade of operation.<sup>11</sup> If Australia wants to be taken more seriously as a venue for arbitrations, amidst strong and growing competition especially in the Asia-Pacific, then it needs a legislative framework favouring more globally accepted approaches that respect arbitral autonomy as much as possible – whether for (still only occasional) arbitrations with Australia as the seat, or when it comes to enforcing foreign arbitral awards.
- f. The rest of this paper comprehensively applies these two principles – favouring more global and informal or expeditious solutions – to major issues relating to:
- stays of Australian court proceedings when faced with foreign arbitration agreements (Part A below – corresponding originally to NYC Art II);

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<sup>7</sup> See eg UCL/PWC empirical study (2006)

<http://www.pwc.com/Extweb/pwcpublishations.nsf/docid/B6C01BC8008DD57680257171003177F0> and {Mistelis 2004}. Leaders among the first generation of arbitration experts (see generally {Dezalay and Garth 1996}) have been urging more innovative responses for some time: eg {Nariman 2000; 2004}; {Mustill 2002}, summarised in {Spencer et al 2004}.

<sup>8</sup> See also generally {Garnett 2002}.

<sup>9</sup> {Spigelman 2006}.

<sup>10</sup> {Marriott 2006}; {Paulsson 2007}. See also now “12th ANNUAL REVIEW OF THE ARBITRATION ACT 1996: Over 1,000 Decisions since Entry into Force of the Arbitration Act” (!), at [http://www.biicl.org/admin/mailcasts/go.php?url=http%3A%2F%2Fwww.biicl.org%2Ffiles%2F4108\\_final\\_programme\\_26.03.pdf&mmid=238&u=25830](http://www.biicl.org/admin/mailcasts/go.php?url=http%3A%2F%2Fwww.biicl.org%2Ffiles%2F4108_final_programme_26.03.pdf&mmid=238&u=25830).

<sup>11</sup> {Garnett 1999}; {Garnett and Pryles 2008}.

- enforcement of foreign awards (Part B – NYC Art V);
- Australia’s version of the ML (Part C).

The paper concludes (Part D) by discussing some overarching issues. These focus on confidentiality and privacy, as well as how general themes can be highlighted and worded in the revised IAA. We group all these issues as the “Top Twenty”, taking seriously the AGD DP’s aim for the Review to generate a “comprehensive and clear” new framework for ICA in Australia, although some in fact raise various sub-issues.

- g. The paper does not go into how Australia might update its approach to investor-state arbitration (ISA), an overlapping area of cross-border dispute resolution. ISA raises some distinct considerations due to various additional public interests compared to ICA. Revised rules in that field are best incorporated via treaties – either directly, or indirectly by giving foreign investors the option of claiming under tailored ISA Rules developed by ACICA and other arbitral institutions.<sup>12</sup>

## A. STAYS IF ‘FOREIGN’ ARBITRATION AGREEMENT

### 1. Arbitrability – scope and applicable law: IAA ss 2C and 7

1.1 The revised IAA should list expressly what disputes are not “capable of settlement by arbitration”, and other legislation should be clarified accordingly where necessary. For convenience, the list could define – with consistent language – the precise extent to which particular types of disputes cannot be arbitrated. At present, for example:

- (a) Pre-dispute arbitration agreements (but not post-dispute agreements) concerning certain insurance contracts are completely “void” under s43 of the *Insurance Contracts Act 1984*;<sup>13</sup>
- (b) Arbitration agreements (both pre- and post-dispute) concerning certain carriage of goods transactions have “no effect”, under s11 of the *Carriage of Goods by Sea Act 1991*, but only if they provide for arbitration outside Australia.

By clearly listing such carve-outs in Australia to arbitrability of disputes, we can also more easily begin to reconsider whether these accord with current and foreseeable global trends. The tendency world-wide has been to expand arbitrability, as ICA has become more widely used and accepted.<sup>14</sup>

1.2 The most contentious question for Australia is which parts of the *Trade Practices Act 1974* (and state/Territory counterparts), if any, cannot be referred to arbitration. The Australian Governments have recently proposed a new *Australian Consumer Law* to harmonise and improve such legislation

<sup>12</sup> {Nottage and Miles 2009}, also at <http://ssrn.com/abstract=1151167>.

<sup>13</sup> Compare eg s 19 of the *Insurance Act (NSW) 1902*: an arbitration agreement “does not bind the insured” unless reached post-dispute. This was considered in *HIH Casualty & General Insurance Ltd (in liquidation) v R J Wallace* (2006) 204 FLR 297. One commentary suggests the provision “does not render an arbitration agreement ‘void’, nor does it render it ‘incapable of being performed’. Rather, it gives one party an option whether or not to be bound by the agreement; and, if a party decides, in respect of a particular dispute, not to be bound, then the agreement may be said to be ‘inoperative’ [under the NYC, or IAA s7]”: {Bonnell 2008}.

<sup>14</sup> See eg {Lew et al 2003} textbook; {Bantekas 2008}.

nation-wide, with an updated TPA as the core of the new system.<sup>15</sup> Many protections will probably remain – or even be expanded – to the benefit of certain firms, not just individual consumers. However, the public interests involved in various types of situations do differ, especially when it comes to determining the extent to which such disputes should be arbitrable:

- (a) Part V Div 2 of the current TPA includes certain statutory warranties in “consumer” contracts, which cannot be excluded or modified (s68). Such contracts are defined in s4B to include most transactions (each) worth up to \$40,000, as well as those exceeding that amount but ordinarily for personal or household use.<sup>16</sup> A choice of law agreement specifying another law is ineffective if the proper law would otherwise anyway be the TPA (s68). But this Division contains no express restrictions on forum selection clauses, including arbitration agreements. Nor does Div 2A, which extends these statutory warranties against manufacturers and importers of “goods”, limited in s74A(2)(a) to those ordinarily for personal use; or Part VA, imposing strict liability for defective goods causing personal injury or consequential property loss to such goods.
- (b) Part IVA of the TPA provides relief against unconscionable bargains or conduct, not limited to goods and services ordinarily for personal use (on which, see s51AB(5)). Extensive relief under the Act is triggered by unconscionability as defined by Australia’s evolving law of equity (s51AA), or by listed factors involving “business consumers” for transactions now up to \$10 million (s51AC<sup>17</sup>). This Part contains no express rules on forum selection or arbitration clauses. It may add further provisions directly targeting unfair contract terms more generally, or these will be inserted in another portion of the proposed *Australian Consumer Law*, although that may limit those additional protections (as in the EU and the *Fair Trading Act*, Vic) to contracts concluded for non-commercial purposes.
- (c) The prohibition on misleading or deceptive conduct in trade (s52 in Part V Div 1) benefits firms, who file almost all the litigation (against competitor firms), although it is hoped that this indirectly benefits consumers. As with Part IV on “Restrictive Trade Practices” (ie anti-trust law per se), there are no express rules on forum selection or arbitration clauses.

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<sup>15</sup> See <http://www.treasury.gov.au/contentitem.asp?ContentID=1482> (including Submissions by Nottage separately, and jointly with the Consumer Law Roundtable).

<sup>16</sup> This has sometimes been broadly defined: eg *Bunnings v Laminex* [2006] FCA 682.

<sup>17</sup> The Federal Senate is further reviewing this provision: see [http://www.aph.gov.au/Senate/committee/economics\\_ctte/tpa\\_unconscionable\\_08/report/index.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/report/index.htm).

1.3 Australian courts have begun to address some of these issues.<sup>18</sup> However, this Review should stand back to distinguish various situations, and survey the policy implications and options. One consideration identified by the US Supreme Court over two decades ago, in *Mitsubishi v Soler Chrysler-Plymouth*,<sup>19</sup> is the extent to which third parties may be adversely affected if certain disputes are allowed to proceed to, especially abroad. Even then, it gave the arbitrators (in Japan) the benefit of the doubt, trusting them to at least consider allegations of behaviour contrary to US anti-trust law. However, *obiter dicta* indicated that the Court might not countenance “prospective waivers”, whereby the parties expressly instruct arbitrators to address competition law issues *only* under a foreign (eg Japanese) law and *never* under US law. This might point the way to a compromise solution for new Australian legislation (for another, see Part 11 below). Alternatively or in addition, our legislation could require arbitration agreements that allow or require foreign arbitrators to consider Australian anti-competition law issues to meet stricter writing requirements, like New Zealand’s Arbitration Act 1996 (as amended, see Part 5 below) regarding purely consumer disputes.

1.4 Stricter writing requirements seem sufficient anyway when dealing with situations covered instead by categories (a) and (b) above, where third-party or public interests are less prominent. Australia’s revised IAA need not be dictated by expansive definitions of “consumer” transactions in the current TPA or proposed *Australian Consumer Law*. Instead, we could specify that arbitration agreements associated with transactions between firms, or parties pursuing commercial purposes, are valid even if they specify arbitration abroad, at least if covering disputes in these categories and subject perhaps to some stricter writing requirements.

1.5 Implicit in the discussion so far is the assumption that the applicable law for determining arbitrability is Australian law (ie the law of local courts, where a stay is sought regarding foreign arbitral proceedings). In fact, NYC Art II does not specify an express rule (in contrast to Art V on enforcement of a resultant award, where the law for determining arbitrability is that of the enforcing state’s courts).<sup>20</sup> It is true gap in the NYC, which it would be useful to fill in the revised NYC.

1.6 Another point of potential confusion is whether issues of arbitrability should be dealt with as matters “not capable of settlement under arbitration” (NYC Art II(1)) or instead as matters that are “null and void” or “inoperative” (NYC II(3)). Confusion can arise partly because some laws, but not others, refer to certain arbitration agreements being “void” (see eg para 1.1 above<sup>21</sup>). Problems could be reduced by the revised IAA and corresponding legislation using common terminology. A simple solution would be to state that specified arbitration agreements deal with matters “not capable of settlement under arbitration” or are

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<sup>18</sup> See recently eg *Ansett Australia Limited v Malaysian Airline System Berhad* [2008] VSC 109. Controversially, see eg *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* [2008] FCAFC 136.

<sup>19</sup> 473 US 614 (1985).

<sup>20</sup> {Arfazadeh 2001}.

<sup>21</sup> Cf Bonnell, *op cit*.

“not arbitrable” under separate (listed) legislation. Matters that background common law does – or perhaps will, one day – find not to be arbitrable could instead be covered as “null and void” or “inoperative” under NYC Art II(3). Alternatively, those provisions could be reserved for matters other than arbitrability that result in contracts being “null and void” or otherwise “inoperative”, such as fraudulent misrepresentation tainting the arbitration agreement. However, more discussion is needed about the practical implications of pursuing stay applications under NYC Art II(3) as opposed to Art II(1).

## **2. Arbitration agreement – substantive validity and applicable law: s7**

2.1 More importantly regarding NYC Art II(3) or its IAA s7 analogue, a gap should be filled by specifying that the applicable law for the arbitration agreement is that expressly<sup>22</sup> chosen by the parties to govern this agreement (separate from any underlying contract), otherwise the law at the seat of the arbitration.<sup>23</sup> This approach is similarly spelled out in NYC Art V, when it comes to enforcing foreign awards: the test is whether the “agreement is not *valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*” (emphasis added).<sup>24</sup>

2.2 This rule should be extended to the substantive validity question of whether “third parties” are bound by or can enforce the arbitration agreement.<sup>25</sup>

2.3 Another sub-issue is highlighted by the wording of NYC Art V. As quoted above (para 2.1), it always requires a “law” to govern the arbitration agreement. This would probably be understood as a national “law”, rather than transnational “rules of law” like the UNIDROIT Principles of International Commercial Contracts. Parties are clearly allowed to expressly choose “rules of law” to govern their underlying contract under ML 28(1). At least when it comes to clarifying NYC Art II (and IAA s7) regarding stays, there is an argument for clearly allowing parties similarly to be able to expressly choose “rules of law” (like the UNIDROIT Principles) to govern their arbitration agreement.<sup>26</sup>

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<sup>22</sup> Better *not* “or impliedly”, because different courts may give different weight especially to the law expressly (or even impliedly) chosen to govern the underlying contract (*lex causae*). So eg a choice of “New York sales law” may lead an Australian court to infer that New York contract law was also intended to govern the validity of the arbitration agreement, and hence not issue a stay concerning arbitration in England because the Restatement (2d) of Contracts and the UCC adopt more flexible interpretation principles. But an English court may decide that the parties intended English law (or the law of the seat) to apply, and hence apply stricter contract law interpretation principles to set aside the award, or an Australian court may refuse enforcement applying English law (as the law of the seat).

<sup>23</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 implies it is Australian law, perhaps as the law of the forum.

<sup>24</sup> See further {Berger 2007}. The default rule of applying the (foreign) seat is also important since the High Court of Australia (cf eg the Full Federal Court’s judgment in *Comandate*) has still not clarified whether, under Australian principles of contract interpretation (traditionally strict) and precedents, phrases like “arising from” the underlying contract encompass non-contractual (common law or statutory torts, restitution) claims.

<sup>25</sup> Berger, op cit, p 322 (citing Lalive et al). In recent two-party and multi-party cases, respectively *Comandate* and *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402, the applicable law question was not clearly argued or decided.

<sup>26</sup> Berger (op cit, pp 308-12), although generally a fan of such *lex mercatoria*, nonetheless concludes that allowing such an express choice of “rules of law” remains inadvisable in this context. (Incidentally, this Review should reconsider ML Art 28(2) which, absent a choice by the parties, only

### 3. Conditions on stays

The revised IAA should clarify the basis and limits on conditions that Courts can impose when allowing a stay, but on conditions. Several Australian judgments have violated the spirit (if not the text) of NYC Art II(1).<sup>27</sup> In *Hi-Fert*,<sup>28</sup> for example, the Full Federal Court not only refused to stay part of the proceeding on questionable grounds; it further required the parties to proceed to litigation *before* arbitration in respect of the matters in dispute. Such an order is clearly inconsistent with the court's obligation to refer parties to arbitration under Art II(1) of the Convention.

### 4. Stays under s7 vs ML Art 8 – alternatives, time limits?

The revised IAA should clarify whether or not these are independent grounds.<sup>29</sup> This is important particularly because ML Art 8 imposes stricter time limits for stay applications. In any event, we need to add a clearer and more explicit time restriction for stay applications under s7. At the moment the only real limitations are based on general doctrines such as laches and delay, whereby it has been argued in a number of recent cases that defendant has *waived* its right to arbitration because of dilatoriness.<sup>30</sup> Whatever view is taken on the relationship between section 7 and ML Art 8, some express time limit is required in section 7.

### 5. Arbitration agreement – formal validity / writing requirements: s7

5.1 This is the first issue raised by the AGD's DP (q.A) and the only one it sets out regarding Part II of the IAA. Courts in Australia, and in other jurisdictions like Hong Kong,<sup>31</sup> have struggled with the NYC's restrictive wording (and drafting history). Australia now has an opportunity to respect arbitration abroad more, and make arbitration less rule-bound (and more informal), by liberalising the writing requirements under the NYC (and the ML, especially if stays and enforcement can *also* be sought under that regime – in Part III of the IAA – as suggested in Part 4 above and Part 6 below).

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allows the arbitrator to apply a [national contract] "law" to govern disputes about any underlying contract. There is a much stronger argument for changing this provision to allow parties to select "rules of law", now that the UNIDROIT Principles are much more widely used for planning and resolving sales and other underlying contracts. See presentations from the 25 July 2008 CLE Seminar at Sydney Law School: at <http://www.law.usyd.edu.au/scil/pdf/SCILWP7Finalised.pdf>.

<sup>27</sup> See eg *Ansett* (op cit), noted at <http://www.mallesons.com/publications/update-combine.cfm?id=1352167>.

<sup>28</sup> *Hi-Fert Ltd and Another v Kiukiang Maritime Carriers Inc and Another* (2000) 173 ALR 263. See further Garnett (1999), op cit.

<sup>29</sup> Not decided in *Comandate*. The trial court in *Eisenwerk* (see *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Qd R 461) said that s7 was "impliedly amended" by the later ML. That view is criticised by Garnett (1999, op cit), who (with Pryles, 2008, op cit) has argued that they should be independent bases for stays.

<sup>30</sup> See eg *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896.

<sup>31</sup> See eg *APC Logistics Pty Ltd v CJ Nutracon Pty Ltd* [2007] FCA 136; *HIH Casualty & General Insurance Ltd (in liquidation) v Wallace* (2006) 68 NSWLR 603. In Hong Kong, compare eg {Kaplan, 1996} with the recent District Court judgment in *Winbond Electronics (HK) Ltd v Achieva Components China Ltd* [2007] HKCU 1514.

5.2 Theoretically, Australia could liberalise writing requirements to varying degrees at different stages, for example regarding stays (s7, to allow foreign arbitral proceedings to get underway more often) but not enforcement of foreign awards (s8). But public interests involved do not seem sufficiently different to justify such distinctions, and anyway they would add significantly to complexity. We therefore propose a single liberalised regime, applicable to both stays and enforcement from abroad (and also to arbitration agreements establishing arbitration with the seat in Australia, governed by the ML regime in Part III).

5.3 Fortunately, UNCITRAL has exhaustively reviewed the pros and cons of liberalizing writing requirements, so we can choose from two new potential “global standards”:

- (a) “Option 1” for a revised ML Art 7 involves extensive liberalisation – similar to that undertaken in some other major arbitration venues such as Singapore (1995 Act) and the UK (1996 Act) – but excluding especially purely oral agreements that were not “recorded in any form”.
- (b) “Option 2” involves complete liberalisation – as has long been true in Sweden and France, and in NZ since its 1996 Act – hence requiring no writing or form requirements for arbitration agreements and allowing the last-mentioned scenario.

5.4 Concurrently in 2006, UNCITRAL issued a Recommendation urging courts to (re-)interpret the NYC’s own provisions in light of the revised ML.<sup>32</sup> For countries operating within the strict English law tradition like Australia, and struggling to implement even “hard law” norms of international law,<sup>33</sup> it seems best not to rely on such “soft law” norms but instead incorporate liberalised rules into Part II of the Act (adopting the NYC) that mirror those in Part III (adopting the ML).

5.5 As summarised in our Appendix, all Submissions to the AGD on this point agree on Option 1.<sup>34</sup> But this may be partly due to what psychologists call “framing”, because this option was specifically mentioned in the AGD’s Q.A, or due to the innate conservatism of lawyers. An even more important factor may be the legacy of Anglo-American-Australian contract law more generally. Since the English Statute of Frauds (1677), this has required evidence in writing for many types of contracts, and subsequently developed a parol evidence rule highlighting the importance of written contract terms. This tradition casts a long shadow,<sup>35</sup> as the New Zealand Law Commission

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<sup>32</sup> See [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf), promoting an expansive reading of NYC Art VII (“more favourable rights”) and the interpretation of NYC Art II(2) (as “non-exhaustive” writing requirements).

<sup>33</sup> See eg {Crawford 2009}.

<sup>34</sup> This partial liberalisation has also been selected by Ireland [tbc], Mauritius, Peru and Slovenia, when those countries adopted the revised ML regime in 2008. For the status of ML adoption, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html).

<sup>35</sup> See {Nottage 2002} PhD chapter 2: Different countries even within the common law tradition differ in determining what parties intend by agreements expressed to be “subject to contract” or the like. Some adopt a presumption, at least for some types of contracts (NZ, England, perhaps Australia) that the parties do not intend to be immediately bound, until the subsequent memorialisation in formal contract documentation. Others (like important jurisdictions within the US – and eg a civil law country

(NZLC) found when in 1997 it suggested a liberalisation of that country's version of the Statute of Frauds.<sup>36</sup> Civil Law countries, which never had juries deciding factual aspects of contract disputes and instead tend to have highly trained and cohesive career judiciaries, have often been quite liberal regarding writing requirements.<sup>37</sup>

5.6 In fact, our Appendix shows that a few Submissions to the AGD's Review already are not necessarily adverse to Option 2. We too are quite agnostic, and recommend more serious consideration about total liberalisation. That pays more respect to "global" solutions, since this option also has the imprimatur of UNCITRAL, and it presents an opportunity to lead rather than follow. Australia should also remember its commitment to business law harmonisation with NZ, further strengthened by a new cross-border judgments treaty.<sup>38</sup>

5.7 It is also helpful to draw on the NZ experience in several respects. Drawing on a large and longstanding body of academic and other literature, the NZLC has highlighted three general functions for writing requirements in contracts. However, each function or rationale seems questionable in the context of contemporary ICA:

- (a) The *evidentiary* function: it remains true that written or otherwise recorded documentation is often the most useful evidence. However, increasingly experienced arbitrators (many from or familiar with civil law traditions) are capable of assessing evidence about oral agreements, and this task – eg when ruling initially on their jurisdiction (see Part 14 below) – can be assisted by reforms on interim measures (eg clearer powers to get subpoenas of witnesses: see Part 11 below). All the more so, with courts nowadays. Apparently the sky has not fallen in, with parties alleging all sorts of purely oral arbitration agreements, in NZ since 1996 – let alone in France and Sweden.
- (b) The *channeling* function: some writing requirements may help to promote more and better use of arbitration agreements, for example by encouraging parties (or their legal advisors) to record further details into their agreements to tailor them to their transactions and likely disputes. However, option 1

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like Japan) simply weigh up all factors to determine what the parties intended in the particular case. Such different starting points could manifest themselves, irrespective of any legislative writing requirements, if eg an arbitration agreement is reached "subject to contract" – how do we determine if the parties nonetheless intend to be immediately bound? It provides another reason for a clear legislative provision on what the applicable law is regarding the validity and interpretation of the arbitration agreement (see Part 2 above).

<sup>36</sup> See [http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_94\\_236\\_PP30.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_94_236_PP30.pdf). However, this may have been more due to lack of parliamentary time on what was seen then as quite a narrow issue. After all, even NZ's Arbitration Act 1996 – adopting the ML but abandoning all writing requirements for non-consumer arbitration agreements – was only enacted as a private member's Bill.

<sup>37</sup> For example, "freedom from form requirements" is seen as an additional principle undermining Japan's Civil Code of 1896, which drew primarily on German and French law at the time: see Nottage (2002) op cit. However, when Japan adopted the ML to revamp its Arbitration Act in 2003 (prior to UNCITRAL's 2006 amendments), it added writing requirements (largely based on the original ML): see {Nottage 2004}.

<sup>38</sup> See respectively <http://www.mfat.govt.nz/Foreign-Relations/Australia/1-CER/0--Reference/0-business-law-memo.php> and <http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2008/12.html>; and more generally [http://www.trademinister.gov.au/releases/2008/sc\\_cer\\_joint\\_communique.html](http://www.trademinister.gov.au/releases/2008/sc_cer_joint_communique.html) and {Nottage 2008}.

already has little “channeling” function, as it only requires some sort of “record”. Nowadays, moreover, arbitration institutions (like ACICA) have updated Arbitration Rules (and practices) drawing on extensive experience world-wide, so there is less need to encourage such extra drafting into arbitration clauses compared to two decades ago (for the original ML, or five decades ago for the NYC).

- (c) The *cautionary* function: writing requirements certainly can help warn parties not to lightly limit their rights by contract, which is why NZ has even strengthened requirements in its 2007 Arbitration Amendment Act regarding agreements involving consumers.<sup>39</sup> But do commercial parties need to be cautioned in such a blunt fashion nowadays, now that they use ICA so frequently and in-house counsel or outside lawyers have so many other opportunities to learn about ICA? Commercial litigation has become so expensive and slow in some courts, including Australia,<sup>40</sup> that on that ground alone – let alone problems relating to cross-border enforceability of judgments – we could almost argue for the caution to be reversed: “beware of *not* having an arbitration agreement”! Imposing a writing requirement, as a caution to others, also infringes on the autonomy of some parties who genuinely wish to conclude a simple agreement orally – say, because of a lengthy or intimate business relationship, or because it remains frequent in their trade.

5.8 If option 2 (complete liberalisation) is selected, we should nonetheless consider what specific areas to caution parties, lawyers and arbitrators about – at least for now, and more indirectly (such as through this law reform discussion, and continuing legal education). The main problem at present would lie in allowing a purely oral arbitration agreement to form the basis of proceedings with Australia as the seat (if the IAA adopts option 2 of Art 7 of the revised ML), because of potential problems in enforcing the award via the NYC (with its stricter Art II wording about writing).

5.9 However, that should not present difficulties if one party was Australian, for example, while the other is from NZ, France, Sweden or other countries that might also now begin to adopt option 2 in updating their arbitration legislation (via the ML and/or their version of the NYC). In other situations, arbitrators might encourage the parties to embellish their original arbitration agreement in various ways (as in the process generating Terms of Reference under the ICC Rules,<sup>41</sup> or through a preliminary conference), and that could – and perhaps then should – be done in writing. All parties should be (made) agreeable to that, especially if there are any counter-claims or set-offs, or evidence possibly other than purely oral evidence about the original arbitration that could constitute sufficient “writing” anyway.

5.10 Whichever liberalisation option is chosen, it could be useful to add a provision specifically addressing a situation that has given rise to different interpretations by arbitrators, courts and commentators – sometimes under the rubric of writing requirements, sometimes under substantive validity of the arbitration agreement (which then depends instead on its applicable law of

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<sup>39</sup> Nottage (2008) op cit, and more generally {Kawharu 2008}.

<sup>40</sup> See Marriott 2006 (op cit); and eg {Castle 2008}.

<sup>41</sup> Cf *Commonwealth Development Corp (UK) Ltd v Montague* [2000] QCA 252.

contract). The question is whether it suffices for the parties to incorporate by reference a standard-form contract which has buried within it an arbitration clause, especially when the standard-form contract is not appended or already known to the recipient who later contests the clause.<sup>42</sup>

## C. ENFORCING AWARDS

### 6. Two issues when Australia implemented NYC Art V via IAA s8

6.1 Omission of the word “only” in s8 of the IAA has been highlighted to assert that the grounds for refusing enforcement are non-exhaustive, ie Australian courts retain a residual discretion.<sup>43</sup> This is completely contrary to legislative history, text and worldwide understanding of NYC Art V.<sup>44</sup> Such an argument opens up a wide and possibly unlimited source of challenges to an award. **In response to Q.B** of the AGD Review’s DP, therefore, this requires urgent rectification to ensure that Australia complies with its treaty obligations.<sup>45</sup>

6.2 In addition, s8 seems to reinstate a partial reciprocity requirement (ie that the award comes from another NYC state), even though Australia never made that reservation when acceding to the Convention.<sup>46</sup> Admittedly, an alternative ground for enforcement under s8 is that the plaintiff was domiciled or ordinarily resident in a NYC state. However, that arguably goes at least against the spirit of the Convention and its specified set of reservations. Simply for clarity, Australia should either now make the reciprocity reservation, or (as we prefer, if only because over 140 states are now party to the NYC anyway) not even require domicile in a NYC state.

### 7. Enforcement possible only under IAA s8, not ML Arts 35-6?

This is the effect of the present IAA s20, but the rationale is unclear. Restricting enforcement to s8 does not seem necessary or even advisable, particularly in light of the points below, and liberalisation of writing requirements.<sup>47</sup>

### 8. Enforcing awards set aside at seat

8.1 In addition to those two sets of problems just in bringing in the NYC’s enforcement regime into the IAA, new issues have been arising around the world in applying the NYC itself. For example, expanding on the NYC’s pro-enforcement attitude, France, Switzerland and some US courts have allowed enforcement of

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<sup>42</sup> {Houtte 2001}.

<sup>43</sup> *Resort Condominiums v Bolwell* (1993) 118 ALR 655. Lee J’s reasoning was applied in *International Movie Group Inc v Palace Entertainment Corp Pty Ltd* (1995) 128 FLR 458 (Supreme Court of Victoria) aff’d sub nom *ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc* [1997] 2 VR 31, to refuse enforcement of a foreign award in Australia on the ground that it was too uncertain. See further Garnett and Pryles (2008) op cit.

<sup>44</sup> Eg {van den Berg 2005}.

<sup>45</sup> Garnett and Pryles (2008), op cit.

<sup>46</sup> Noted also in Damian Sturzaker et al’s report on NYC Enforcement in Australia for the ICC: see <http://www.iccwbo.org/uploadedFiles/Court/Arbitration/News/2009,February,%20Task%20force%20New%20York%20Convention.pdf>

<sup>47</sup> Part 5 above; and Berger (op cit).

awards set aside by foreign courts at the seat of the arbitration.<sup>48</sup> We suggest a provision clearly authorizing our courts to follow this approach, thus encourage some element of “delocalisation” or autonomy of the arbitration from courts at the seat, rather than the contrary approach of some other US courts or countries.<sup>49</sup>

8.2 These situations are perhaps increasingly unlikely to arise, as countries around the globe continue update their arbitration legislation often on the basis of ML principles (supporting the autonomy of the parties and the arbitration). But our suggestion would send a consistent message about what Australia is trying to achieve in this Review of the IAA.

## 9. Suspending enforcement if setting aside sought at seat

9.1 Two Australian judgments seem to take rather different approaches, although they are arguably reconcilable on their facts and hence both justifiable.<sup>50</sup> One possible IAA reform is to adopt an approach more reluctant to suspend enforcement. This seems consistent with the pro-enforcement approach of the NYC, mentioned above (para 8.1) to allow enforcement of locally-annulled awards.

9.2 However, the latter issue is an unanticipated gap in the Convention, whereas NYC Art VI expressly reserves to courts the right to suspend enforcement while the setting aside proceedings are underway. It may therefore be enough to leave this to evolving court decisions, but to assist in that development this Review at least should provide some record of discussion of this issue.

## 10. Public policy

10.1 An appropriate starting point for the revised IAA, increasingly accepted world-wide, is the International Law Associations’ Resolution 2/2002 adopting Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitration Awards”. It is accompanied by a detailed Report of the ILA conference in New Delhi that approved these Recommendations.<sup>51</sup> They emphasise that an award should be enforced under the NYC (or through other avenues) except in exceptional circumstances, such as a violation of “international public policy”, defined as:

- (a) fundamental principles, either substantive (eg abuse of rights, or drug trafficking) or procedural (eg lack of impartiality or natural justice);
- (b) “public policy rules” designed to serve the essential political, social or economic interests of the state (*lois de police*, eg anti-trust or consumer protection laws), which would be manifestly disrupted by enforcement; and
- (c) duties of the state to respect its obligations to other states or international organisations (eg UN resolutions on sanctions).

Recommendations 2(a) and 2(b) acknowledge that what constitutes “fundamental” principles remains for the enforcing courts to decide; but bearing in mind “the international nature of the case and its connection with the legal system of the forum”,

<sup>48</sup> See eg {Read 1999} (discussing *Chromalloy* etc).

<sup>49</sup> See eg {Freyer 2001}.

<sup>50</sup> *Toyo* (op cit), *Hallen v Angledal* [1999] NSWSC 552; cf Garnett and Pryles (2008) op cit.

<sup>51</sup> Both available via <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

as well as whether any consensus exists within the international community (perhaps evidenced by international treaties – such consensus may also indicate “transnational public policy”). Recommendation 1(f) explains that similar tests should be applied whether the seat of the arbitration was within the state (ie, in the context of a setting aside application) or from abroad.

10.2 With legislative history showing that these Recommendations were a major source of inspiration (and see s17 and Part 20 below), the revised IAA should amend s19 – and s 8 – to refer to “international” public policy. Paragraphs (a) and (b) of s19, if they were ever necessary, can also be removed.<sup>52</sup> Rather than procedural international public policy violations, which are nowadays relatively clear-cut,<sup>53</sup> the revised Act could list what Australia considers to amount to violations of substantive fundamental principles – if indeed the legislature wants to attempt this at all, rather than leaving it to courts to elaborate as debates and applications continue to accumulate world-wide.

10.3 For example, especially if we limit non-arbitrability of certain TPA claims for stay purposes (see Part 1) to allow foreign arbitrators to address them more safely and efficiently, the revised IAA might note that it would consider this an “international public policy” ground to consider refusing enforcement of an award if the arbitrators in fact did not deal with TPA claims. This is the US Supreme Court’s “second look” *obiter* in *Mitsubishi*, although it appears hardly ever to have been applied in subsequent reported American case law.<sup>54</sup> However, the Australian legislature (or courts, if this matter is left open in the revised Act), should consider whether this is consistent with the approach and examples given in the ILA Recommendations.

10.4 A second question that should be clarified arises instead from decisions of the English courts, especially the Court of Appeal in *Westacre* regarding enforcement of awards based on underlying contracts that are illegal, to varying degrees.<sup>55</sup> The approach was, on the one hand, to refuse enforcement if such contracts are (almost?) universally deemed illegal worldwide (eg for slavery, drugs, possibly now “bribery”). On the other, English courts have enforced the foreign award (which might itself be subjected to challenge at the seat for breach of international public policy) if the underlying contract was legal both in the place of performance (Pakistan, at the time) and under the applicable contract law (eg the expressly chosen Swiss law – allowing contracts for “purchasing influence”). Yet ILA Recommendation 2(a) tries to de-emphasise both those connecting factors.

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<sup>52</sup> See also Submissions by the Victorian Bar, and CIArb. The latter also suggest that leaving the extra reference to “natural justice” in para (b) might allow a review of an award for lack of “reasons” (cf Part 17 below). A similar risk remains regarding Arb-Med (Part 16), if we leave in para (b). Instead, we might define – or indicate in legislative history – what violations of “international public policy” do *not* encompass, such as certain types of reasoned awards or Arb-Med processes.

<sup>53</sup> {Mantilla-Serrano 2004}.

<sup>54</sup> {Donovan and Greenawalt 2006}.

<sup>55</sup> . *Westacre Investments Inc v Jugoimport-SDRP Holding Co Ltd* [1999] 3 WLR 811. See also *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 QB 448, and generally {Enonchong 2000}. This whole issue was left open in *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700. Cf also eg *Independent State of Papua New Guinea v Sandline International Inc* [1998] QCS 298, noted eg at <http://www.mondaq.com/article.asp?articleid=12836> (with the arbitral award now published in <http://www.cambridge.org/catalogue/catalogue.asp?ISBN=9780521661201>, and the original contract at <http://coombs.anu.edu.au/SpecialProj/PNG/htmls/Sandline.html>).

10.5 Paragraph 10.3 indicates that the strictness of Australia’s position on such issues can be related to its stance about arbitrability, in the context of stays (Part 1). More generally, the ILA’s Recommendations and background Report should also help in identifying shared conceptions of public interests, which could be adapted when deciding on the scope of arbitrability within the revised IAA.

10.6 Australia’s position on the contours of “international public policy” as a basis for refusing enforcement, and indeed on arbitrability when considering stays, depends also on an evolving debate on whether arbitrators are bound anyway at least by (narrower, consensus-based) “transnational public policy”. At a more abstract level, Pyles is opposed to this very notion; but it has strong support among other experienced arbitrators, such as Kessedjian.<sup>56</sup>

(a) One problem lies in defining “transnational public policy” (TPP). However, there are similar problems in defining broader “international public policy”; and international commercial lawyers are now familiar with restating “common core” principles in other contexts, such as the UNIDROIT Principles and various initiatives to restate European contract law.<sup>57</sup> Still, unlike ongoing attempts to elaborate the substantive *lex mercatoria*,<sup>58</sup> much work remains to be done to distill the evolving elements of TPP.

(b) There may also be practical problems in national legislation, like the IAA, trying to bind foreign arbitrators to abide by TPP – unless for example they were Australian residents. It might be better for Australian and especially international professional associations – of lawyers or arbitrators – to bind their members to such norms, forming working groups to elaborate and monitor the scope of TPP.

(c) Meanwhile, arbitrators may only have a moral duty to abide by TPP,<sup>59</sup> where not legally bound to consider it under the *lex arbitrii* (which may not have followed the consensus in its strictures about public policy) or perhaps under arbitral rules (requiring at least best efforts by arbitrators to render an enforceable award).

## 11. Interim measures

11.1 Interim measures are another matter raising issues related not only to enforcement of awards or orders from abroad (s 8 and Part II of the IAA), but also those issued where the seat is in Australia (Part III, typically under the ML – discussed further in Part C below). Regarding enforcement under the NYC or s8, courts and commentators generally agree that most interim measures are not “final” enough to be enforceable under the NYC or s8.<sup>60</sup> We

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<sup>56</sup> Compare {Pyles 2007} with {Kessedjian 2007}. Cf also generally {Diwan 2003}.

<sup>57</sup> Nottage (2004b) re EU.

<sup>58</sup> Eg Professor Berger’s [www.tldb.net/](http://www.tldb.net/), already prefigured in {Berger 2001}.

<sup>59</sup> {Mayer 2006}.

<sup>60</sup> Eg *Bolwell* (1993) op cit. But cf eg *Publicis* etc in the US: {Webster 2001}.

first suggest making them enforceable under certain conditions, at least via ML Arts 35-6 (and see Part 7 above).<sup>61</sup>

11.2 This makes it important, for example, to define more clearly what is encompassed within “interim measures”. The original ML, drawing on the 1976 UNCITRAL Arbitration Rules, did not elaborate. Nor did many other arbitration laws, leading to arbitral institutions developing more detailed provisions. Art 17(2) of the ML, as amended in 2006, also provides a more specific definition. Art 17A specifies certain prerequisites for issuing interim measures; and Arts 17D-G add further provisions (eg about providing security).<sup>62</sup> Art 17H provides for enforceability, and Art 17J for refusing enforcement (primarily, the usual grounds in ML Art 34 or NYC V). **In response to the AGD Review’s Q.F**, Australia’s IAA should at least adopt these provisions of the revised ML, following already Ireland, Mauritius, Peru and Slovenia (in 2008) as well as New Zealand (*Arbitration Amendment Act 2007*<sup>63</sup>).

11.3 The contentious issue, in UNCITRAL Working Group deliberations and now apparently in Australia, is whether to include the revised ML Arts 17B and 17C. They allow, subject to certain safeguards, for ex parte applications to arbitrators for “preliminary orders” directing the parties not to frustrate the purpose of requested interim measures. Such orders are not awards, and are “binding on the parties but shall not be subject to enforcement by a court”. These provisions represent a compromise. Some were opposed to allowing any form of ex parte proceeding, highlighting concerns about natural justice and little evidence of such proceedings being used or requested. But others favoured even more robust provisions to clarify or establish new contours for natural justice, and thereby promote the possibility of ex parte orders in exceptional and necessary cases – as is common nowadays in many courts worldwide.<sup>64</sup>

11.4 Our Appendix shows that almost all Submissions to the AGD are opposed to including these provisions in the revised IAA. However, the AFIA Submission suggests a further compromise that we also favour, at a minimum: highlight in the legislation that they are available on an “opt-in” basis. ACICA Submission (p 15) suggests that issues of *res judicata* could be raised by the wording of s17C(5), but that that could then be reworded to address that point.

11.5 As with responses about the extent to which Australia should liberalise writing requirements (Part 5 above), we are first concerned again about Submissions responding to “framing”. The AGD’s DP simply stated, after noting some controversy about ex parte preliminary orders: “At this stage, the Government does not intend to implement [those] provisions”. More discussion is needed, especially about the advantages of this regime that led UNCITRAL (including Australia) to agree on the wording in Arts 17B and

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<sup>61</sup> The optional provision in IAA s23 can then be deleted.

<sup>62</sup> These provisions are similar to Art 28 of the ACICA Arbitration Rules (2005), because we drafted that drawing on the UNCITRAL Working Group drafts that later became the revised ML Art 17.

<sup>63</sup> This was suggested back in 2003, in response to a draft report by the NZLC: {Nottage 2003}.

<sup>64</sup> Compare eg {Houtte 2004} and {Hober 2005}.

17C. We should also find out why our partner in trade and legal affairs, New Zealand, adopted these provisions – as did Ireland, Mauritius, Peru and Slovenia in 2008. The basic rationale appears to have been to acknowledge that international arbitrators nowadays deserve similar powers and trust as judges.<sup>65</sup> Rejecting these provisions, without a clear rationale, could also signal more than just that Australia is foregoing another opportunity to “lead rather than follow”. The message could be that Australia is rather choosing to “lag” behind the new global standard. After all, Arts 17B and 17C are not phrased as an “option”, as in the revised Art 7, which suggests less consensus within UNCITRAL and its member states.

11.6 What about *courts* issuing interim measures, in *support* of arbitrations?<sup>66</sup> ML Art 9 arguably provides a jurisdictional basis for this, but some Singaporean authority instead states that there must also be a clear and explicit basis in domestic law for courts to have the power to award interim measures in respect of arbitrations.<sup>67</sup> Revised ML Art 17J does more clearly extend jurisdiction, by expressly giving courts the same powers regarding such interim measures as it has for regular court procedures (eg including any possibilities for ex parte applications to the courts). This is similar to s12(6) of Singapore’s Act.<sup>68</sup> However, the revised IAA should add a provision like s2(1-5) of Singapore’s Act, giving the court the same powers and remedies as an arbitrator. Then ML Art 9 should be cross-referenced to revised ML Art 17(2), defining what is meant by interim measures.

## C. MODEL LAW

### 12. Opt-out and opt-in

12.1 **In response also to Q.D** of the AGD Review’s DP, we strongly agree with the need to reverse the decision in *Eisenwerk*. The Queensland Court of Appeal held that the parties impliedly intended to opt out of the ML (otherwise given force of law through IAA s21, and applying generally where Australia is the seat: see ML Art 1(2)) simply by specifying the ICC Arbitration Rules as also governing their arbitration.<sup>69</sup> That judgment fundamentally misunderstands the relationship between (opt-in) Arbitration Rules, incorporated by reference into the parties’ arbitration agreement, and arbitration legislation (mostly now opt-out default rules, plus some mandatory rules). It has been another obstacle

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<sup>65</sup> See eg {Kennedy-Grant 2008} (by a former Master of the High Court of New Zealand).

<sup>66</sup> As opposed to undermining them. Cf eg *Electra Air Conditioning BV v Seeley International Pty Ltd* [2008] FCAFC, upholding the first-instance decision by Mansfield J (criticised at <http://www.mallesons.com/publications/update-combine.cfm?id=1168291>).

<sup>67</sup> Compare, respectively *The Lady Muriel* 2 HKC 320 and *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629.

<sup>68</sup> **12. Powers of arbitral tribunal.**

(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for --

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(6) The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court.

<sup>69</sup> *Eisenwerk* (op cit).

to having Australia being taken seriously as an arbitration venue, exacerbated by the delay in correcting this misunderstanding by legislation.

- 12.2 The Singaporean legislature responded to some similar misunderstandings by promptly amending – twice! – s15 of its ML-based International Arbitration Act.<sup>70</sup> At a minimum, we support the DP’s suggestion to add a provision like s15(2) to s21 of our own Act.<sup>71</sup> This is preferable to requiring parties or their legal advisors to remember to add a similar provision into an arbitration agreement when the seat is Australia, or to adopt the ACICA Arbitration Rules (which contain a similar provision in Rule 2.3).
- 12.3 However, Australia should take this opportunity to also clarify what happens when the parties have chosen (a) a State’s Commercial Arbitration Act (CAA), or (b) foreign arbitration legislation, to govern their arbitration. Regarding a bare choice of (a), *Aerospatiale* held that this displaced the ML pursuant to IAA s21.<sup>72</sup> The outcome seems similar to that provided by s15(1)(b) of the Singaporean Act. Australia’s revised IAA could also add a similar provision addressing situation (b), although such a choice is less likely to arise in practice.<sup>73</sup>
- 12.4 In all these situations, namely express exclusion of the ML or a bare selection of (a) a CAA or (b) a foreign arbitration law, we should require parties to have done this “in writing” in their arbitration agreement (including, by necessary

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<sup>70</sup> In response to first to a case involving an Australian company: *John Holland Pty Ltd v Toyo Engineering Corporation* [2001] 2 SLR 262.

Law of arbitration other than Model Law

15. —(1) If the parties to an arbitration agreement (whether made before or after 1st November 2001\*) have expressly agreed either —

\*Date of commencement of the International Arbitration (Amendment) Act 2001 (Act 38/2001).

(a) that the Model Law or this Part 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.

[38/2001]

(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.

[38/2001; 28/2002]

(From <http://statutes.agc.gov.sg/>, emphasis added.)

<sup>71</sup> IAA s21 reads: ‘If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.’

<sup>72</sup> *Aerospatiale Holdings Australia Ltd v Elspan International Ltd* (1992) 28 NSWLR 321.

<sup>73</sup> Especially now that arbitration legislation around the world is generally more modern and supportive of responsible arbitration practice, we do not support allowing even the option of a completely delocalised procedure – completely avoiding any *lex arbitrii*. There are too many risks of leaving the parties marooned without any access to a court for redress or support, for example when faced by a corrupt or biased arbitrator, or when wishing to obtain easily enforceable interim measures against a third party.

inference, any Arbitration Rules incorporated by reference therein<sup>74</sup>). Parties generally should be taken to want to retain the ML (designed specifically for *international* arbitrations, unlike the CAAs and some arbitration laws overseas). That is especially likely for its updated version envisaged by the AGD Review and our further suggestions in this Submission, unless there is clear evidence of a contrary intention (in their written arbitration agreement).

- 12.5 There is also an argument for making a further amendment along the lines of s 15A of the Singaporean Act.<sup>75</sup> It is verbose, and we would hope that Australian courts would get this point even without such an amendment. But one Singaporean Court did not.<sup>76</sup> So an Australian court might be persuaded that reasoning along the lines of that Singaporean Court has been deliberately left open, were our legislature only to make an amendment similar to s 15(2) of the Singaporean Act – but not one like s 15A.
- 12.6 Conversely, the revised IAA should add a provision highlighting that parties can choose to opt-in to the ML/IAA regime.<sup>77</sup> Arguably, one such provision already exists in ML Art 1(3)(c), which allows parties expressly to agree that an arbitration is “international”. But very few appear to be aware of it, or at least to take advantage of it.<sup>78</sup> The option could be given more prominence within the IAA, and the inclusion of a parallel provision in the CAAs would be a valuable reinforcement.

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<sup>74</sup> The words ‘or in any other document in writing’ in our current Act’s s21 is presumably aimed at such Rules. The words seem too broad, or unnecessary (s15 of the Singaporean Act refers only to “arbitration agreement”, in turn defined in s2 to be “in writing”).

<sup>75</sup> Application of rules of arbitration

15A. —(1) It is hereby declared for the avoidance of doubt that a provision of rules of arbitration agreed to or adopted by the parties, whether before or after the commencement of the arbitration, shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the Model Law or this Part from which the parties cannot derogate.

(2) Without prejudice to subsection (1), subsections (3) to (6) shall apply for the purposes of determining whether a provision of rules of arbitration is inconsistent with the Model Law or this Part.

(3) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter on which the Model Law and this Part is silent.

(4) Rules of arbitration are not inconsistent with the Model Law or this Part merely because the rules are silent on a matter covered by any provision of the Model Law or this Part.

(5) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter which is covered by a provision of the Model Law or this Part which allows the parties to make their own arrangements by agreement but which applies in the absence of such agreement.

(6) The parties may make the arrangements referred to in subsection (5) by agreeing to the application or adoption of rules of arbitration or by providing any other means by which a matter may be decided.

(7) In this section and section 15, “rules of arbitration” means the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation. [28/2002]

<sup>76</sup> *Dermajaya Properties v Primum Properties* [2002] 2 SLR 164

<sup>77</sup> See eg the NZ Arbitration Act.

<sup>78</sup> See eg *Oil Basins*, op cit and discussed further below (Part 17). It was really was an international arbitration and could have been run under the ML regime if the parties had invoked Art 1(3)(c). That would have avoiding the dispute about whether extensive “reasons” needed to be given by the arbitrators, but it was run instead under the CAA.

- 12.7 Further, **in response to Q.C** of the AGD Review's DP, we agree that a provision should be added to the revised IAA reiterating that it alone – not the CAA regime – governs an international arbitration to which Part III and the ML apply. It would do no harm to also elaborate that the revised IAA regime does include powers to issue subpoenas and orders about uncooperative witnesses or parties. These are two powers with the CAAs (ss 17 and 18) that the AFIA Submission (p4) gives as examples where powers under the CAAs are arguably wider at present.
- 12.8 More generally and longer-term, as in several other Submissions as well as more and more countries world-wide,<sup>79</sup> we propose using the ML as the core for revamped CAA legislation designed for domestic arbitrations. Thankfully, new CAA provisions drafted by NSW and Victorian officials some years ago – based on the English Arbitration Act 1996 – were put on hold, so Australia now has a chance to adopt instead a new regime CAA closer to the emerging global standard.

### **13. Jurisdiction of courts and devolving powers to arbitral institutions**

- 13.1 **In response to Q.H** of the AGD Review's DP, on balance we do not agree with the idea of giving the Federal Court exclusive jurisdiction for all matters arising under the IAA. This will entail practical problems in re-educating parties and their legal advisors. However, the major objection we identify is constitutional.
- 13.2 State courts have always enjoyed full subject matter jurisdiction over state and federal matters (with a few small exceptions like antitrust matters under Part IV of the TPA, which are exclusively reserved to the Federal Court). Federal Courts, by contrast had full jurisdiction over federal matters (most importantly matters arising under Commonwealth statutes) but only limited jurisdiction over state matters. In particular, the Federal Court could only hear a matter when it falls within the court's accrued jurisdiction i.e. it was pendent to a federal claim, which effectively means that it arose out of the same factual basis.
- 13.3 In 1987 the cross-vesting scheme was enacted, which purported to vest the Federal Court with full state jurisdiction and to put it on the same footing as a state court, with unlimited jurisdiction. However in *Wakim*<sup>80</sup> the High Court held that the conferral of power on federal courts to resolve matters beyond the accrued jurisdiction was unconstitutional. In effect, the pre-1987 position, where the Federal Court had limited jurisdiction over state matters, was restored.
- 13.4 What is the relevance of this to the proposed vesting of exclusive jurisdiction over matters under the IAA in the Federal Court? It is this: suppose a party

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<sup>79</sup> Eg NZ (Kawharu, op cit), Japan (Nottage, op cit), Hong Kong {Secomb 2000}, etc: see generally eg {Sanders 2007}.

<sup>80</sup> (1999) 198 CLR 511.

commences proceedings in an Australian court, say, for breach of contract in breach of an agreement to arbitrate in New York. Such a claim cannot be brought in the Federal Court because it is a purely state law claim (unless it is "attached" to a federal claim, say for breach of s 52 TPA – cf Part 1 above). So the party sues in a state court. The defendant however is unable to apply for a stay under s 7 of the IAA because such power is now exclusively reserved to the Federal Court. The state court cannot use its cross vesting power to transfer the matter to the Federal Court because the Federal Court has no jurisdiction over the plaintiff's cause of action. So you have jurisdictional gridlock.

- 13.5 What other alternatives are there? We could require parties to proceed only in Federal Court if there is accrued jurisdiction. But it may be expecting too much even of Australian legal advisors, or significantly increase transaction costs to them (and therefore their clients), to ensure they always correctly anticipate when accrued jurisdiction is present.
- 13.6 Alternatively, we could vest exclusive jurisdictions in state courts. However, although the record of the Federal Court is not spotless in applying the IAA, the state courts face additional challenges given their more widely dispersed and diverse nature.
- 13.7 On balance, therefore, we favour maintaining the status quo for the revised Act. But we would suggest a range of more indirect and non-legislative measures to address the underlying goal of promoting greater expertise among our judges in contemporary international arbitration law and practice. Specialist Lists could be developed. More extensive continuing education could be offered, for example through the Australian Institute of Judicial Administration, involving experienced ICA professors and practitioners outside the judiciary.

#### *Appointment Powers for an Arbitral Institution*

- 13.8 **In response to Q.G(i)** of the AGD Review's DP, we recommend devolving default powers to appoint arbitrators under s11 of the Act, from the courts to a designated arbitral institution. This would advance the related goal of promoting expertise in ICA more generally in this country. Such an arbitral institution, by definition, is more specialised in ICA than the courts, even if they develop more specialist Lists.
- 13.9 Devolution of this power to an institution devoted to ICA would also expand its profile and the other activities by such an institution. Further, it could encourage innovations by competing institutions interested in becoming the institution nominated through the legislation.
- 13.10 However, since this will involve devolving a hitherto public function on an institution that is or may be partly or fully private, familiar issues of regulatory design and good governance need to be addressed. The institution will have to offer expertise in identifying suitable arbitrators, but also maintain core elements of transparency and other values that we expect of public bodies as

well as private bodies partnered with the public. The government may need to provide ongoing funding or other support, and certainly monitor the governance and practices within the nominated institution.

- 13.11 For example, in TPA Part V Div 1A regarding Product Safety, s 65E allows the Minister to adopt a safety standard developed by “Standards Australia International Limited” (which now has a listed associate company, SAI Global) instead of developing its own mandatory standard pursuant to s 65D. The Minister provides significant annual funding to ensure that Standards Australia retains the expertise to provide good standards, and to ensure that its standard-setting process includes broad stakeholder involvement and is not “captured” by better-organised and self-funded interest groups. The other public values that the government expects Standards Australia to promote are also entrenched in a Memorandum of Understanding.<sup>81</sup>
- 13.12 As another example, even after the federal government largely decentralised the outsourcing of legal services from 1999, it required private suppliers to abide by certain standards (such as its “Model Litigant Policy”).<sup>82</sup>
- 13.13 What does this imply when devolving arbitrator appointment powers from the courts to an arbitral institution nominated in the IAA? As a starting point, the preferred institution should be one not only with expertise specifically in ICA, but also with a history of a sound relationship with the government and the courts. The most obvious candidate is ACICA, since it was established in 1985 precisely to focus on ICA (not domestic arbitration or other ADR). In addition, over the years it has persuaded the government to provide significant in-kind and financial support (such as a grant from the AGD in 2003), on the ground that ACICA serves more than the private interests of its members.
- 13.14 However, a final decision on whether ACICA should be nominated in the revised IAA should depend on whether it can demonstrate that it is and will remain committed to the public values expected by the government, especially those hitherto advanced by the courts when making default arbitrator appointments.
- 13.15 Regarding transparency, for example, does ACICA explain clearly and publically how it selects arbitrators when so requested by the parties (by express agreement, or by adopting Arbitration Rules that provide that ACICA makes the appointment)?
- 13.16 Substantively, does it only appoint such arbitrators only from a panel of its Fellows, and what conditions (other than payment of a \$440 annual fee) are involved in admission as a Fellow? If ACICA were nominated as the

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<sup>81</sup> See further Nottage’s Submission (18 April 2006) and the Productivity Commission’s Inquiry into “Standards and Accreditation”, at <http://www.pc.gov.au/study/standards/>.

<sup>82</sup> Attorney General’s *Legal Services Directions* (eg Appendix B). See further Stephen Green, Shinichi Nishikawa and Luke Nottage, ‘Who Defends Japan? Government Lawyers and Judicial System Reform in Australia and Japan’, paper in preparation (outline available on request) for Leon Wolff et al (ed) *Who Judges Japan?*.

appointing authority in lieu of the Courts even when parties had not selected ACICA's Arbitration Rules to govern the arbitration, would it still be appropriate to apply the same conditions, or should a separate panel be established solely for this purpose with different conditions? In order to diversify the pool and minimise some possible conflicts of interest for the institution, those listed on a separate panel might not have to pay an annual fee. But the costs of maintaining such a panel might then have to be at least partly funded by the government. Alternatively, ACICA might commit to appointing arbitrators who are not necessarily on its existing panel, especially when acting pursuant to the revised IAA.

13.17 As a condition of providing such funding, and/or ongoing designation of ACICA in the revised Act, the government might also require it to insist that any nominated arbitrators bind themselves at least to the standards of independence and disclosure set out in the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration.<sup>83</sup> This could be a condition of admission onto the new separate ACICA panel, or a condition to an arbitrator accepting an appointment via ACICA under the Act. However, this may involve significant further administrative costs for ACICA, in the cause of ensuring that arbitrators meet minimum standards of probity expected not just by the parties but also the legal system and society as a whole, as part of a dispute resolution system underpinned by public legislation. This might justify some further government funding, at least partially offsetting such costs.

13.18 Especially when designation also likely involves possible funding to the institution, however, it is important that the process of reaching and maintaining agreement on that institution be itself made transparent and open to review through the legislature. We therefore recommend that the revised IAA:

“(a) designates as the institution ACICA, unless another institution (or consortium of institutions, possibly including ACICA) is prescribed by Regulation; and (b) subject to such nominee concluding a Memorandum of Understanding with the Minister – with appointment powers reverting to the courts if such a Memorandum cannot be agreed upon”.

This would encourage both ACICA and existing or potential competitor institutions to design and offer to the government increasingly attractive processes on arbitrator appointment, appropriately balancing private and public interests.

13.19 More generally, we believe it is important to keep building up the capacity and legitimacy of Australia's arbitral institutions, especially if the CAAs (designed originally for domestic arbitrations) come to be more closely aligned with the revised IAA regime (designed for international arbitrations). That is also the tendency in New Zealand, for example, which has recently taken a further

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<sup>83</sup> See [www.ibanet.org/images/downloads/guidelines%20text.pdf](http://www.ibanet.org/images/downloads/guidelines%20text.pdf), and a critical comparison by {Bond 2005}.

innovative step regarding (more “domestic”) arbitrations. Although these retain rights to appeal from arbitrators for errors of law (unlike “international” arbitrations based on the ML under their Act), AMINZ has developed an “Arbitration Appeals Tribunal” that parties can select to deal with such appeals instead of the High Court of New Zealand.<sup>84</sup>

#### 14. Arbitrators ruling on own jurisdiction (*Kompetenz/Kompetenz*)

14.1 The Full Federal Court in *Comandate*, at least, has recently (and belatedly!) confirmed this principle even in stay applications, outside the context of the ML (where the seat is in Australia: Art 1). But what exactly does it mean?

14.2 In particular, can or should the courts be able to hear challenges to arbitrators’ jurisdiction concurrent with the latter’s hearings?

(a) Not so in France, for example, which is again very arbitration-friendly in this respect.

(b) Not so, after a certain stage in the arbitral proceedings, in some countries.

(c) Yes, in the US, where – as one might expect given their importance in socio-economic governance – courts can be enjoined at any stage; but not if the parties agree to exclude this option. Germany, with ML-based arbitration legislation, also allowed that exclusion; but recently closed that door.<sup>85</sup>

Given what social psychologists tell us about the strong pull of default rules,<sup>86</sup> we favour adopting at least (b) rather than the US approach in (c).

#### 15. Evidence

The selection of neutral and expert arbitrators (Part 13) is one of the most important elements of ICA. Along with enforceability of their award, which may be gradually eroded by the new 2005 Hague Convention on Choice of Court Agreements,<sup>87</sup> that facility open to the parties provides one of the major advantages over cross-border litigation. Another advantage is their ability to agree on more flexible and efficient procedures for the arbitration, especially relating to evidence. We therefore recommend that the revised IAA adds a requirement for arbitrators to consult with parties about using the 1999 IBA Rules on the Taking of Evidence in ICA. However, this would not then require them actually to use all those now widely-accepted norms balancing traditional common and civil law approaches.<sup>88</sup>

#### 16. Arb-Med

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<sup>84</sup> See

[http://www.lawsociety.org.nz/publications\\_and\\_submissions/lawtalk/2009\\_issues/lawtalk\\_issue\\_724/arbitration\\_appeals\\_tribunal\\_operative](http://www.lawsociety.org.nz/publications_and_submissions/lawtalk/2009_issues/lawtalk_issue_724/arbitration_appeals_tribunal_operative)

<sup>85</sup> {Park 2007}.

<sup>86</sup> Eg {Thaler and Sunstein 2008}.

<sup>87</sup> But only a few states have so far signed or acceded: see

[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98). On general satisfaction with the enforceability of international arbitration awards, see the UCL/PWC empirical study (2008) at [http://www.pwc.co.uk/eng/publications/international\\_arbitration\\_2008.html](http://www.pwc.co.uk/eng/publications/international_arbitration_2008.html)

<sup>88</sup> See

[www.ibanet.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf](http://www.ibanet.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf). Our proposal is inspired by ACICA Rule 27.2, although that doesn’t specifically *require* consultation.

16.1 The option of authorising the arbitrator also to attempt mediation (“Arb-Med”<sup>89</sup>) is another potentially important difference from regular court procedures. It has been more popular among jurists and firms familiar with the civil law tradition (especially German and Japanese law), the Scandinavian approach, and the socialist law tradition (especially Chinese law), where judges themselves are expected to adopt a more proactive approach to resolving disputes even during trial. Common lawyers have started to become used to such hybrid procedures now that their own courts tend to promote more vigorous case management, and sometimes ADR more generally. They are also more aware of the potential for “pure” forms of mediation and the like, as more and more firms include multi-tiered ADR clauses in their contracts – requiring the parties first to attempt mediation or the like before commencing more formal arbitration procedures.

16.2 Given this background, the revised IAA should encourage a more global and informal approach by including provisions specifically on Arb-Med. However, these should acknowledge considerable variance in the law and practice in various countries. In particular, the provisions should try to address some concerns (especially still from common lawyers) about natural justice – namely, the arbitrator having to proceed to an award after actively promoting mediation, which might have prejudiced his or her views on the legal merits. The revised IAA should then amend s19(b) accordingly.

16.3 One possibility is to adopt a simpler version of s27 of the CAA (NSW), clearly authorising the arbitrator to try to facilitate settlement. However, there has been little impact from s27 of that Act (admittedly, designed for and mostly applying to domestic arbitrations). There remain questions about what precisely is meant by “natural justice”, and particular concerns about the usual and arguably most effective “caucusing” technique employed by professional mediators – namely, *ex parte* meetings with each party.<sup>90</sup>

16.4 An alternative that addresses such concerns is offered by the (otherwise ML-based) legislation in Hong Kong, carried over into s17 of the Singaporean Act. This requires arbitrators to disclose material “confidential information” that they have received in a failed mediation. However, it seems these provisions are hardly ever used in practice – at least in Singapore. Although this may partly due to the types of international arbitrations run in Singapore (larger-scale, and/or M&A etc), it seems more is required to move the mindset of lawyers trained in the common law tradition towards that of those from other legal traditions.

16.5 The CIArb Submission (p18) proposes Arb-Med whereby the parties consent in writing for the arbitrators (i) to act as mediator (including by caucusing), and again (ii) to continue as mediators if their mediation fails. This is similar to the model preferred by experienced mediators and CIArb members Alan Limbury and (current

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<sup>89</sup> It is essential that the procedure begins as a arbitration, not a mediation (unlike “Med-Arb”, as outlined at p15 of the CIArb Submission). If it starts as a mediation, which succeeds, there is (logically) no more dispute or difference capable of triggering an arbitration and hence generating an enforceable consent award. See further {Nottage 2007} and generally also Marriott (op cit).

<sup>90</sup> See eg {Redfern 2001}. A classic and very comparison for international arbitrations remains: {Schneider 1998}.

CIArb chairman) Derek Minus.<sup>91</sup> They try to balance concerns about caucusing with the “dual agreement” safeguard. However, as emerged from a Sydney Law School CLE Seminar on Arb-Med involving Professor Kaufmann-Kohler and following on from her public lecture in 2008,<sup>92</sup> it seems unlikely that parties will be willing to provide a second agreement in writing following a failed mediation.

16.6 We therefore still prefer Kaufmann-Kohler’s alternative model, requiring only one agreement of writing that commits the parties to retain the arbitrators even if their mediation efforts fail, but which also prevents the arbitrators from caucusing. This approach is commonly used in international arbitrations, to good effect,<sup>93</sup> even though some mediation “purists” may find it hard to believe that it is possible to help the parties settle disputes without caucusing. Nonetheless, one compromise for our revised IAA could be to offer as options the CIArb model and ours, for parties and legal advisors to choose depending on their proclivities, experiences and the type of transaction or expected disputes.

## 17. Awards – copies and reasons

17.1 In response again to the AGD Review’s Q.F, to promote less rule-bound enforcement of awards, we agree to Revised ML Art 35(2) requiring only an original or a copy rather than a “duly authenticated” original award.

17.2 More importantly regarding awards, and again tying into the issue of “natural justice”, we need to address the extent to which reasons need to be similar to those common or expected in Court judgments. Unless the parties agree otherwise, reasons are required in awards governed by the CAA, the ML or (impliedly) the NYC, as well as many Rules of arbitral institutions (eg ACICA Rule 33.2) in ICA cases. But in the recent *Oil Basins* case under the CAA, the Victorian Court of Appeal set aside the award because inadequate reasons and failure to deal with important submissions and evidence amounted to an error of law as well as misconduct by the arbitrators.<sup>94</sup> Although the ML does not provide for these two grounds for appeal, the CIArb Submission (p20) suggests that a similar result might have been reached under Part III of the IAA because s19 specifically mentions “natural justice” with regard to “public policy”.

17.3 We disagree with the CIArb’s suggestion. First, “natural justice” is implicit anyway in the notion of “public policy” under the ML (and/or NYC), and it should be “international” public policy anyway (see Part 10 above). Secondly, it is widely

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<sup>91</sup> See eg {Limbury 2007}.

<sup>92</sup> See [www.ialecture.com](http://www.ialecture.com) (forthcoming in *Arbitration International*); and Nottage (2008) op cit, also at [www.acica.org.au](http://www.acica.org.au) and [www.law.usyd.edu.au/scil/](http://www.law.usyd.edu.au/scil/).

<sup>93</sup> See also the “town elder” proposed by {Rivkin 2008}, also at [http://www.google.com.au/url?sa=t&source=web&ct=res&cd=1&url=http%3A%2F%2Fwww.arbitrators.org.au%2Fasset%2Frivkin\\_article.pdf&ei=8Y7BSdv1Oca-kAWZ0c0o&usq=AFQjCNHq0xKiihPyn\\_CGkJYC-UObghCemw&sig2=GCjCoNHghpDaomg3YX6LIg](http://www.google.com.au/url?sa=t&source=web&ct=res&cd=1&url=http%3A%2F%2Fwww.arbitrators.org.au%2Fasset%2Frivkin_article.pdf&ei=8Y7BSdv1Oca-kAWZ0c0o&usq=AFQjCNHq0xKiihPyn_CGkJYC-UObghCemw&sig2=GCjCoNHghpDaomg3YX6LIg). This approach tends to overlap with our proposed approach, because it takes case management with all parties (not separately) to a new level. Note also Kaufmann-Kohler’s study (cited in Nottage, 2008, op cit) confirming no reported decisions worldwide where consent awards have been refused enforcement, even though many of them probably involved arbitrators facilitating settlements.

<sup>94</sup> Cf *Oil Basins* (op cit).

accepted that there is very little scope for challenges under ML Art 34 for violating public policy due to inadequate or incorrect reasoning. For example, a Canadian judgment has held recently that: “if the tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award – good, bad or indifferent – is final and binding on the parties”.<sup>95</sup>

17.4 However, it could be useful to clarify this question in the revised IAA, if only because *Oil Basins* was in effect an international arbitration (involving Australia’s largest company and the local subsidiary of a large US oil company, the application of New York contract law, and internationally renowned arbitrators). Further, ACICA’s new Expedited Arbitration Rules (Art 28.3) provide in principle for reasons to be given “in summary form”, and arbitrators under this new scheme deserve as much guidance as possible. Lastly, we propose above (Part 12) that the CAA legislation should eventually be aligned with the ML regime, and one of us has also co-authored a comparative analysis of the *Oil Basins* judgment pointing out that although “the international trend has been to curtail the power of courts to review the merits (including the reasoning) of arbitral awards”, this is not universal. In particular, various provisions promoting more extensive reasoning on the part of arbitrators are contained in the English Arbitration Act 1996.<sup>96</sup> However, that is admittedly designed for both domestic and international arbitrations, hence for example allowing appeals for errors of law unless excluded by the parties.

## **18. Other optional provisions – interest, costs and consolidation**

18.1 **In response to the AGD Review’s Q.E**, of course we recommend correction of the drafting inconsistencies in Part III Div 3 of the IAA. Sections 25-17 on interest and costs should be clearly stated to apply on an “opt out” basis, given what social psychologists tell us about the attraction of such default rules, as well as our overarching principle of trying to expand the boundaries for arbitrators and the parties as much as possible. That principle also leads us to support AFIA’s Submission that s25(2)(a) be deleted and s26 be amended to allow the arbitrators to award compound interest.

18.2 Equally importantly, if not more so, s24 should also become an “opt-out” default rule. It should be reworded to cover situations that have arisen even in our courts, given that more and more cases involve multiple parties.<sup>97</sup> Crucially, a provision should also be added providing for court-ordered consolidation. Section 24 effectively leaves it up to the arbitral tribunals themselves to agree to consolidate without any mechanism or forum for resolving an impasse. This is a type of court “intervention” in arbitration which would be beneficial, and consistent with the ML because it expands the realm of arbitration rather than restricting it.

## **D. OVERARCHING ISSUES**

### **19. Confidentiality and Privacy**

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<sup>95</sup> *Canada (Attorney-General) v SD Myers Inc* 2004 FC 34 at [42].

<sup>96</sup> {Garnett and Steele 2007}. See also eg {Gaitis 2004} and {Webster 2006}.

<sup>97</sup> See eg *Origin Energy Resources Limited v Benaris International NV & Anor; Woodside Energy Limited v Benaris International NV & Anor* [2002] TASSC 50 (noted at [http://www.claytonutz.com/Areas\\_Of\\_Law/controller.asp?aolstring=20&na=11&printarticle=yes](http://www.claytonutz.com/Areas_Of_Law/controller.asp?aolstring=20&na=11&printarticle=yes)).

19.1 In ICA, as opposed to ISA (to which different public interests apply), the trend worldwide has been to promote confidentiality relating to arbitration as yet another widely-recognised advantage for parties (and arbitrators) compared to cross-border litigation. This must also be linked to privacy of proceedings. One key remaining issue is whether privacy should extend to court challenges or enforcement proceedings (as in very pro-arbitration countries like France). Others include how confidentiality is brought in – implied terms developed by case law (as in most common law jurisdictions, but also in Sweden under the analogue of “good faith”) or by specific legislative provision (as in NZ) – and the scope and/or procedures regarding exceptions.

19.2 We believe, along with many other Submissions, that the revised IAA should reverse the High Court of Australia’s rejection of an implied term of confidentiality.<sup>98</sup> This still goes against the world-wide trend, even in common law countries, and we cannot expect this issue to be quickly and comprehensively revisited again by the High Court – if only because so few international arbitration cases reach that Court. Instead, bearing in mind again its commitment to business law harmonisation as well as a very detailed NZLC report, Australia should adopt the NZ Arbitration Amendment Act’s provisions on both confidentiality and privacy, including whether arbitration-related court proceedings can or should be held in public.<sup>99</sup>

## 20. Overarching Principles

20.1 In response to the AGD Review’s Q.F, we agree again to follow global standards by adopting Revised ML Art 2A:<sup>100</sup>

“(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.  
(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.”

20.2 Such a provision could also extend to the entire Act, not just Part III and the ML. At the least, just as s17 of the present IAA explicitly allows reference to the ML’s *travaux préparatoires* for interpretation purposes, such a provision should be added for Part II (the NYC) and Part IV (ICSID investment arbitrations). For those two Parts, the revised IAA could also include a reminder that they are giving effect to Australia’s international treaty obligations.<sup>101</sup>

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<sup>98</sup> *Esso Australia Resources Ltd & Ors v Plowman (Minister for Energy) & Ors* (1995) 128 ALR 321. Cf generally eg {Brown 2001}.

<sup>99</sup> See also already ACICA Arbitration Rules Article 18.

<sup>100</sup> Note that this is based on Art 2 of the 2002 UNCITRAL Model Law on International Commercial Conciliation, and originally CISG Art 7. That ML also deserves governmental inquiry, perhaps as part of this very Review, although it has not yet such much update internationally and views remained mixed: compare eg {van Ginkel 2004} and {Sanders 2007}.

<sup>101</sup> It is better to be consistent and explicit, although this should already guide interpretation anyway nowadays under Australian law: see *Comandate* (op cit).

20.3 Further, at least for Part III (or, specifically, elaborating on ML Art 18), but possibly the entire revised Act, Australia should an overarching principle similar to what is found in s1 of the English Arbitration Act: “The overriding objective of this Act is to facilitate arbitration that is fair, expeditious and inexpensive, considering especially the amounts in dispute and complexity of the issues or facts involved”.<sup>102</sup>

## CONCLUSION

- a. A complete overhaul of the IAA is long overdue and the AGD’s DP makes a helpful start, but much more work needs to be done. For many, this may be a once-in-a-lifetime opportunity to bring Australia’s ICA regime up again to world standards. Reform of the IAA should also feed into reform of the CAA regime, designed initially for domestic arbitration, which is struggling particularly in the face of mediation, adjudication and other newer forms of ADR.
- b. The DP states (para 2) that the Review aims to “consider whether to adopt ‘best-practice’ developments in national arbitral law from overseas”. However, our general approach and specific recommendations operate on more of a presumption that ICA law and practice should respect *globally* accepted solutions, especially the hard work put into the revised ML. Because we also favour restoring more *informality* to ICA, we agree more wholeheartedly with the Review’s aim that the revised IAA should “improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration”.
- c. We also emphasise that the Review is supposed to generate legislation that “provides a *comprehensive* and clear framework governing international arbitration in Australia”. This is where the DP is most disappointing, because asks specifically about only eight matters. There are many more points where Australia needs to clarify its law related to international arbitration, as this Submission has shown. At the least, the AGD should now analyse our additional points, and often overlapping points raised in many other Submissions (summarised in our Appendix), and then open them up for another round of public debate.
- d. This is the only realistic way to advance the DP’s suggested goal of “promoting Australia as a place for international arbitration”. The reality is (cf para 4) that Australia is not yet “an attractive venue for international arbitration” – at least in terms of numbers of ICA cases conducted in this country, as opposed to now very well-established arbitral venues such as Singapore, Hong Kong and China. To claw back some lost ground in that respect, we need to show the world that our revisions to the IAA are truly comprehensive, promoting more user-friendly and innovative ICA proceedings consistent with actual or emerging global standards. By doing that properly, we will also

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<sup>102</sup> See also the ACICA Expedited Arbitration Rules, Article 3.1.

improve the training of Australia's "new generation" of arbitration specialists, increasingly called upon to help Australian (and other) firms in their ICA proceedings abroad.

- e. In any event, the revised IAA should add provision committing the Government to at least one (or, preferably, rolling) reviews of the IAA every three or five years – even once revised after this Review process – to monitor progress and to ensure it remains more up to date compared to increasingly rapid developments world-wide. It may also be more appropriate for such regular reviews to be conducted by or with the Australian Law Reform Commission, perhaps in the context of other cross-border commercial law issues. Regrettably, such a wide-ranging review has not been attempted since 1996.<sup>103</sup>

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<sup>103</sup> "Legal Risk in International Transactions (ALRC 80), at <http://www.austlii.edu.au/au/other/alrc/publications/reports/80/>

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