The Role of Court Assistance in Commercial Arbitration

Introduction

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1 The role of Australian courts in assisting commercial arbitration is determined by the legislative provisions with respect to international arbitration and domestic arbitration and by the approach of the courts in construing and applying those provisions.

2 The *International Arbitration Act 1974* of the Commonwealth and the Commercial Arbitration Acts of the States have adopted the UNCITRAL Model Law (as amended in 2006).

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3 Those statutes of the Commonwealth and the States comprise an integrated statutory framework for international and domestic arbitration. See ***Rinehart v Hancock Prospecting Pty Ltd***.[1]

4 When parties to a contract agree to submit any disputes to arbitration they choose to submit their disputes to the arbitral process in preference to the

[1] ***Rinehart v Hancock Prospecting Pty Ltd*** (2019) 267 CLR 514 [13] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

judicial process. The parties must accept the arbitral process which they have chosen for the purpose of resolving their disputes.

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5 In this lecture I will address various provisions of the Model Law that confer power on the courts to assist and, in some circumstances, to intervene in commercial arbitration, including before the arbitral tribunal is established. I will examine how Australian courts have construed these provisions (and their relevant counterparts in the Commonwealth and State Acts) in a manner that demonstrates respect for the arbitral process.

6 Some commentators have referred to judicial support of the arbitral process, on the one hand, as distinct from judicial interference with the arbitral process, on the other. The label 'judicial interference' appears to denote the adoption by the courts of an unduly broad or expansive construction of the powers conferred on the courts by the Model Law to intervene in the arbitral process. As will be seen, that approach has not been adopted by Australian courts. The case law indicates proper restraint in the construction of the powers and their application in practice.

7 Although the Model Law strictly limits the circumstances in which court intervention in the arbitral process is permissible, there is a proper and

necessary role for the courts in providing support to ensure the efficacy of the arbitral process.

Overview of the Model Law

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8 In ***TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia***,[2] French CJ and Gageler J noted that Article 2A(1) of the Model Law requires that, in the interpretation of the Model Law, regard be had 'to its international origin and to the need to promote uniformity in its application and the observance of good faith' [7]. Their Honours also noted that Articles 35 and 36, and other important provisions of the Model Law, originated from provisions of the New York Convention [7]. Their Honours also noted that the Model Law applies without regard to the system of law that governs an arbitration agreement [7].

9 An explanatory note by the UNCITRAL Secretariat on the Model Law (as amended in 2006) (Explanatory Note) includes a commentary on court assistance and supervision. The Explanatory Note states that amendments to arbitration law reveal 'a trend in favour of limiting and clearly defining court involvement in international commercial

[2] ***TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*** (2013) 251 CLR 533.

arbitration'. The justification is the conscious decision of the parties to an arbitration agreement to exclude court jurisdiction and to prefer the finality and expediency of the arbitral process. The Explanatory Note elaborates that consequently the Model Law envisages court involvement in two groups of circumstances.

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10 The first group comprises issues relating to:

(a) appointment, challenge and termination of the mandate of an arbitrator (Articles 11, 13 and 14);

(b) jurisdiction of the arbitral tribunal (Article 16); and

(c) setting aside of the arbitral award (Article 34).

11 The second group comprises issues relating to:

(a) court assistance in taking evidence (Article 27);

(b) recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (Articles 8 and 9);

(c) court-ordered interim measures (Article 17J); and

(d) recognition and enforcement of interim measures (Articles 17H and 17I) and of arbitral awards (Articles 35 and 36).

12 In this lecture I will focus on Article 5 and the articles I have just mentioned; in particular, on the approach of Australian courts in

construing and applying the provisions of domestic legislation that have enacted those articles.

The objects specified in the Commonwealth Act and the State Acts

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13 The articles in the Model Law must be construed having regard to the objects specified in the International Arbitration Act of the Commonwealth and the Commercial Arbitration Acts of the States. For example, s 2D of the Commonwealth Act states that the objects of the Act include:

(a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes (s 2D(a));

(b) to facilitate the use of arbitration agreements made in relation to international trade and commerce (s 2D(b)); and

(c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce (s 2D(c)).

Article 5

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14 I will begin with Article 5 of the Model Law. Article 5 provides that in matters governed by the Model Law, no court shall intervene except where so provided in the Model Law.

15 The prohibition against judicial intervention applies in relation to matters governed by the Model Law. It necessarily follows that the prohibition does not apply in relation to matters not governed by the Model Law.

16 It appears that matters not governed by the Model Law include matters relating to the capacity of the parties to enter into the arbitration agreement; the operation of State immunity; and the contractual relations between the parties and the arbitral tribunal. [See, generally, the observations of Randerson J in ***Carter Holt Harvey Ltd v Genesis Power Ltd***.[3]]

17 In ***Carter Holt Harvey Ltd v Genesis Power Ltd***, Randerson J said that the intention of Article 5 is [46]:

(a) first, to require that those who draft domestic laws specify the circumstances in which court control or involvement is envisaged for the purpose of increasing certainty; and

(b) secondly, where a particular topic or set of circumstances is governed by the domestic law, to exclude any general or residual powers of the domestic courts which are not specified in the domestic law.

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[3] ***Carter Holt Harvey Ltd v Genesis Power Ltd*** [2006] 3 NZLR 794 [41].

18 In ***Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd***,[4] Quinlan CJ construed s 5 of the Western Australian Commercial Arbitration Act, which is identical in substance to Article 5. It is convenient to refer to the provision as Article 5 of the Model Law rather than s 5 of the Act.

19 Quinlan CJ suggested that Article 5 reflects and gives effect to the precept that, in relation to the involvement of courts in the conduct of arbitrations under the Model Law, the Model Law is intended to be a code in relation to matters governed by the Model Law [299].

20 His Honour said that the word 'intervene' in Article 5 is significant. The word is not defined in the Model Law. It is apparent that in Article 5 'intervene' refers to the court intervening in, or 'coming into', the arbitral process otherwise than in accordance with the Model Law [300].

21 Where the Model Law authorises the court to intervene in matters relating to the arbitral process, the court must not intervene otherwise than in the manner provided for in the Model Law.

22 The word 'matter' in Article 5 is not defined in the Model Law. The word bears different meanings in different provisions of the Model Law. Quinlan CJ was of the view that in Article 5 'matters' is used in the sense of 'circumstances or things regulated by' the Model Law [306].

[4] ***Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd*** [2020] WASCA 77.

His Honour's construction of Article 5 focussed upon the arbitral process itself and court 'involvement' in that process, having regard to the conscious decision of the parties to an arbitration agreement to exclude court jurisdiction in favour of the finality and expediency of the arbitral process [309].

23 His Honour concluded that the purpose of Article 5 is to confirm that where a particular matter, involving the courts, is dealt with in the Model Law, the court's powers are to be determined by, and only by, the provisions of the Model Law [322]. His Honour's conclusion reflects the opinion of Randerson J in ***Carter Holt*** that the intention of Article 5 is 'where a particular topic or set of circumstances is governed by [the Model Law], to exclude any general or residual powers given to the domestic Court which are not specified in the [Model Law]' [46].

Article 8

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24 I turn now to Article 8 of the Model Law. Article 8(1) provides that a court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer

the parties to arbitration unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

25 In ***Subway Systems Australia Pty Ltd v Ireland***,[5] Maxwell P said the purpose of Article 8 is 'to impose an obligation on the 'court' in effect to enforce the agreement to arbitrate, by requiring that it decline to exercise jurisdiction over the dispute and instead refer the parties to arbitration'.

26 In ***Rinehart v Rinehart (No 3)***,[6] Gleeson J construed s 8(1) of the Western Australian Commercial Arbitration Act, which is identical in substance to Article 8(1) of the Model Law. It is convenient to refer to the provision as Article 8(1) of the Model Law rather than s 8(1) of the Act. Gleeson J said that the correct application of Article 8(1) is complicated where there are disputes as to whether the arbitration agreement is enforceable and as to the scope of the agreement [28]. Her Honour noted that Article 16 embodies the doctrine of kompetenz-kompetenz by which arbitrators are empowered to decide for themselves whether they have jurisdiction under an arbitration clause [28]. Her Honour added that the decision of the arbitrators in relation to their jurisdiction is provisional in that either party to the agreement may

[5] ***Subway Systems Australia Pty Ltd v Ireland*** (2014) 46 VR 49 [16].
[6] ***Rinehart v Rinehart (No 3)*** (2016) 337 ALR 174.

apply to the court to have the jurisdictional question reopened and reconsidered [28].

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27 In ***Carter Holt***, Randerson J said that where Article 8 is engaged, a court is bound to grant a stay of the proceedings before the court, except in the limited circumstances specified in Article 8(1) [49]. His Honour accepted that where Article 8 is engaged, the effect of Article 5 is to restrict the jurisdiction of the court to the mandatory grant of a stay of the proceedings before the court (where a party so requests) and to refer the parties to arbitration, except in the limited circumstances specified in Article 8(1) [54]. His Honour arrived at that conclusion because he was satisfied that the existence of parallel court and arbitral proceedings is a matter governed by the Model Law. In those circumstances, Article 5 prohibits the intervention of the court, except where so provided in the Model Law. Although Article 5 does not expressly say so, his Honour was satisfied that Article 5 was intended to convey that, where the court is permitted to intervene, the court may only do so in the manner provided in the Model Law [54].

28 Randerson J was of the opinion that Article 8(1) will not be engaged merely because there may be some connection between a court proceeding and the matter which is the subject of an arbitration

agreement. His Honour said there must be a direct relationship between the matter before the court and the matter which is the subject of the arbitration agreement. His Honour explained that, ordinarily, this is likely to arise where the relationship between the matter before the court and the matter which is the subject of the arbitration agreement is sufficiently close as to give rise to a material risk of conflicting decisions on fact or law [58].

29 Randerson J was of the opinion that where Article 8 is not engaged, Article 5 does not apply. Accordingly, where Article 8 is not engaged, there is no prohibition on the court ordering a stay of the arbitral proceedings [59].

30 Randerson J acknowledged that there may be circumstances in which there will be an overlap between the factual or legal issues in a court proceeding and the factual or legal issues in an arbitral proceeding, without Article 8 being engaged [61].

31 In ***Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd***,[7] Martin CJ said that Article 8 is silent on whether a reference to arbitration can or should be accompanied by a stay of the pending proceedings before the court [94]. His Honour said that although Article 5, if read literally, might suggest that the court lacks power to

[7] ***Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd*** [2014] WASC 10.

grant a stay, a literal reading would be inconsistent with the paramount object of the legislation of the Commonwealth and the States, 'which is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals' [94]. His Honour concluded that the paramount object would be enhanced by an order for reference to arbitration being accompanied by an order for a stay of the proceedings brought in the court, and in the case before him his Honour made orders to that effect [94].

Article 9

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32 I turn now to Article 9 of the Model Law. Article 9 read with Article 17J is concerned with court-ordered interim measures. By Article 9, it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant such measure. By Article 17J, a court has the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts. The court must exercise such power in accordance with its own procedures having regard to the specific features of international arbitration.

33 Article 17(1) empowers the arbitral tribunal to grant interim measures. Article 17(2) defines an interim measure.

34 In ***Ku-ring-gai Council v Ichor Constructions Pty Ltd***,[8] Bathurst CJ (Beazley P & Ward CJ in Eq agreeing) construed s 9 and s 17J of the New South Wales Commercial Arbitration Act. Section 9 and s 17J of the Act are identical, in substance, to Article 9 and Article 17J of the Model Law. It is convenient to refer to the provisions as Article 9 and Article 17J of the Model Law rather than s 9 and s 17J of the Act. Bathurst CJ said that the relationship between Article 9 and Article 17J 'is not entirely clear' [61]. His Honour explained:

(a) Article 9, unlike Article 17J, does not refer to the defined term 'Court'.

(b) Article 9 does not expressly confer any right to make an application to the Court for an 'interim measure of protection' or confer power on the Court to grant such a measure.

(c) Rather, Article 9 states that such an application and a grant of such relief is 'not incompatible with an arbitration agreement'.

(d) Further, Article 9 is confined to an 'interim measure of protection', which, at least on its face, may be narrower than the 'interim measures' contemplated by Article 17(2), particularly having regard to Article 17(3).

[8] ***Ku-ring-gai Council v Ichor Constructions Pty Ltd*** (2019) 99 NSWLR 260.

35 Bathurst CJ referred to and approved the conclusion of the Court of Appeal of Singapore in ***Swift-Fortune Ltd v Magnifica Marine SA***[9] that Article 9 does not confer any jurisdiction on a court [62].

36 The Court of Appeal of Singapore referred to extrinsic materials, including the working papers of the UNCITRAL Model Law Working Group and related academic commentaries. The Court of Appeal of Singapore said that those materials demonstrated that Article 9 was not intended to confer jurisdiction, but to declare the compatibility between resolving a dispute through arbitration and at the same time seeking assistance from the Court for interim protection orders. In particular:

(a) Article 9 does not itself regulate which interim measures of protection are available to a party. Article 9 merely expresses the principle that a request for any court measure *available* under a given legal system and the granting of such measure by a court of 'this State' is compatible with the fact that the parties have agreed to settle their dispute by arbitration.

(b) Article 9 does not regulate *whether and to what extent* court measures are available under a given legal system, but only expresses the principle that any request for, and the granting of, such interim measure, *if available in a legal system*, is not incompatible with the fact that the parties have agreed to settle their dispute outside the courts by arbitration.

[9] ***Swift-Fortune Ltd v Magnifica Marine SA*** [2006] SGCA 42.

(c) A request by a party for any such court measures is neither prohibited nor to be regarded as a waiver of the arbitration agreement.

(d) Article 9 has no bearing on the meaning and effect of a domestic law providing for interim measures. The domestic law has to be determined by reference to its own language and structure, as well as any other relevant extrinsic material.

37 In ***Swift-Fortune***, the Court of Appeal of Singapore held that a statutory provision of Singapore's domestic law did not confer power on a Court to grant a Mareva injunction restraining a foreign company from dealing with its assets in Singapore pending arbitration proceedings in London. The Court of Appeal also held that the existence of the Court's personal jurisdiction over the defendant did not, of itself, give power to the Court to grant a Mareva injunction in aid of a foreign arbitration.

38 Bathurst CJ noted that Article 17J was included in the Model Law in 2006 to make it clear that the court had that power, but Article 17J did not extend in any way to the type of relief which could be granted by the court.

Article 17J

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39 I will now consider Article 17J in further detail. In ***Sino Dragon Trading Ltd v Nobel Resources International Pte Ltd***,[10] the parties made a contract containing a dispute resolution clause stating that arbitration was to be conducted in accordance with the prevailing UNCITRAL rules. A dispute arose and arbitrators were appointed. The applicant applied to the arbitral tribunal for production of various documents. The tribunal refused the application in relation to some documents on the ground that the documents were irrelevant or that the documents had already been produced. The arbitral tribunal allowed the application in relation to other documents, but on the basis that the documents were in part redacted. The applicant then applied to the Federal Court for, in effect, the Federal Court to revisit the arbitral tribunal's procedural decision in relation to the production of the documents.

40 Edelman J noted that the power of the Federal Court to require a party to produce documents is contained in s 23 and s 23A(3) of the Commonwealth Act. His Honour held that none of the conditions in s 23A(1) or s 23A(2) was satisfied. His Honour observed that those provisions reveal that s 23A(3) is premised upon assistance to the arbitral tribunal [98].

[10] ***Sino Dragon Trading Ltd v Nobel Resources International Pte Ltd*** (2015) 246 FCR 479.

41 Edelman J rejected the submission of counsel for the applicant that, despite s 23(2) and despite s 23A, permission for the issue of subpoenas was not required because the court could require the production of documents under Article 17J. His Honour rejected that submission for four reasons.

42 First, the submission was contrary to the intention manifested by s 23 and s 23A.

43 Secondly, Article 17J provides for the power of the court to issue an interim measure in relation to arbitration proceedings. An interim measure might include matters such as an interim injunction, but does not include making a procedural order that the arbitral tribunal has consciously refused to make.

44 Thirdly, the applicant's approach to Article 17J was inconsistent with the narrow purpose of that provision. Article 17J is a provision which clarifies the existence of a power rather than expands power. His Honour approved an observation, based on an Explanatory Note by the UNCITRAL Secretariat, that Article 17J was included in the 2006 amendments to the Model Law 'to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to

order interim measures'. His Honour added that merely removing a potential obstacle to the court's power to issue interim measures does not mean that the power should be exercised or that any power would be expanded.

45 Fourthly, independently of the scope of Article 17J, the power under Article 17J 'should be exercised very sparingly and in circumstances in which such orders were effectively the only means by which the position of a party could be protected until an arbitral tribunal was convened': ***Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd***[11] quoting from ***Cetelem SA v Roust Holdings Ltd***.[12]

46 In ***Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)***,[13] Murphy JA, Mitchell JA and I noted that Article 17J requires the court to exercise the power conferred by that article 'in accordance with its own procedures'. That reference picks up relevant provisions of the Rules of Court and applies those rules to an exercise of power under Article 17J. The relevant Rules of Court, in their application to the exercise of the power conferred by Article 17J, may require implicit

[11] ***Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*** (2013) 298 ALR 666 [96] (Martin CJ; Buss JA agreeing).
[12] ***Cetelem SA v Roust Holdings Ltd*** [2005] 1 CLC 821.
[13] ***Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)*** (2018) 53 WAR 201.

modification so that, for example, references to a 'judgment' include an 'arbitral award' [25].

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47 Section 7(2) of the Commonwealth Act provides, in broad summary, for a court to stay curial proceedings involving the determination of a matter capable of settlement by arbitration under an arbitration agreement, and to refer the parties to arbitration. By s 7(3):

> Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

48 In ***Cape Lambert***:

(a) Martin CJ (with whom I agreed) held that the power in s 7(3) should be utilised for the purpose of promoting and enforcing the agreement of the parties to resolve their disputes by arbitration, rather than by making orders which would be inconsistent with, or subversive of, that agreement [84].

(b) Martin CJ inferred that the orders contemplated by s 7(3) [87]:

> are orders which are interim, in the sense that they are necessary to preserve the rights of the parties[,] in relation to any property that is the subject of the matter to which the stay orders relate[,] until such time as the arbitral tribunal can …determine whether interim measures in relation to that property should be ordered, or [are] supplementary in … that they…facilitate the reference of the dispute to arbitration, by preserving those rights until the arbitral tribunal is properly seized of the dispute.

(c) Martin CJ also observed that [93]:

> This approach to the ambit of the powers conferred upon the court by s 7 … is consistent with the limited role which national courts play when parties have agreed to resolve their disputes by international commercial arbitration…International comity requires national courts to faithfully respect these limitations upon their role - in this case by appropriately construing the ambit of the powers conferred upon the court by s 7 … having regard to such limitations.

(d) Martin CJ found it unnecessary to deal with the power conferred by Article 17J [49].

49 However, in ***Cape Lambert*** McLure P made these observations about Article 17J [128]:

> With concurrent jurisdiction of that nature, it seems unlikely that the default position is that a court should formulate its orders to facilitate a review or reconsideration thereof by the arbitral tribunal. At first blush, it appears that Articles 9 and 17J of the [Model Law] are in tension with the evident policy and purpose of s 7 of the Act. That tension can be reconciled by the court exercising its Article 17J power sparingly and only if there are compelling reasons to do so.

50 In ***Duro Felguera***, the court expressed the view that there is a difference between the exercise of the court's power under s 7(3) of the Commonwealth Act and Article 17J [148].

51 In particular:

(a) The power under s 7(3) is incidental to the power in s 7(2) to stay proceedings inappropriately commenced in the court and refer the parties to arbitration [148].

(b) The power in s 7(3) is exercised in a setting where curial proceedings have been commenced contrary to the terms of an arbitration agreement and the policy of the Commonwealth Act [148].

(c) In that context, it is natural to read the power conferred by s 7(3) as limited to what is required to facilitate the reference of the parties to arbitration [148].

52 The court in ***Duro Felguera*** elaborated that, by contrast, the power in Article 17J is expressly conferred on a court for the evident purpose of protecting the integrity of the arbitration process. Further, the court is also exercising its concurrent power to protect the integrity of the court's own process and prevent the frustration of a prospective judgment based on a prospective arbitral award. The enforcement of an arbitral tribunal's interim measure in the form of a freezing order would depend on a court making an order under Article 17H [149].

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53 The court in ***Duro Felguera*** accepted that, in exercising its power to make a freezing order in a case of the kind before the court, the court must have regard to the objects of the Commonwealth Act and should not make an order that is inconsistent with an arbitration agreement or that usurps the role of the arbitral tribunal. It is necessary, however, in assessing that matter to take account of Article 9. Article 9 is one of the 'specific features of international arbitration' to which Article 17J refers. Article 9 expressly provides that it is not incompatible with an arbitration agreement for a court to grant an interim measure (which includes a freezing order under Article 17J) during arbitral proceedings. Article 9

is inconsistent with the proposition that the court should only make a freezing order which operates until an arbitral tribunal has been established and has had a reasonable opportunity to make such an order itself [150].

54 The court in ***Duro Felguera*** noted that there were few reported cases in other jurisdictions which addressed the question of the appropriate period of operation for court-ordered interim measures. However, the Court observed that the approach of the primary judge in that case, who made a freezing order operative 'until further order' (rather than until an arbitral tribunal had been convened and given an opportunity to consider whether it should make a freezing order), was consistent with the approach of the Supreme Court of British Columbia in ***Trade Fortune Inc v Amalgamated Mill Supplies Ltd***,[14] a case decided before the addition of Article 17J to the Model Law [152].

55 The court in ***Duro Felguera*** accepted that the power to make a freezing order, either under the court's implied or inherent power or under Article 17J, should be exercised sparingly, and only if there are compelling reasons to do so. However, where an applicant satisfies the onerous requirements for obtaining a freezing order, there is no reason

[14] ***Trade Fortune Inc v Amalgamated Mill Supplies Ltd*** (1994) 113 DLR (4th) 116, 119 - 121 (approved by the Court of Appeal for British Columbia in ***Silver Standard Resources Inc v Joint Stock Company Geolog, Cominco Ltd*** (1998) 59 BCLR (3d) 196 [26] - [30]).

for a court to adopt a default position that the order should only be made until the arbitral tribunal can consider the question. That is particularly the case when the enforceability of any interim measure granted by an arbitral tribunal will depend on a judgment of the court giving effect to the interim measure [153].

56 The court in ***Duro Felguera*** added that a court may properly be reluctant to make a freezing order, except for a limited time, in circumstances where there is a serious contest as to whether the applicant for a freezing order has established a good arguable case for final relief. In those circumstances, the court may be seen to trespass on the role of the arbitral tribunal if it resolves a contest between the parties as to the merits of a claim which the arbitral tribunal will ultimately be required to determine. See, by analogy, ***Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd***.[15]

Articles 11 - 16

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57 I will now address briefly Articles 11 to 16. Article 11 is concerned with the appointment of arbitrators; Article 12 with grounds of challenge; Article 13 with the challenge procedure; Article 14 with the termination

[15] ***Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*** [1993] AC 334, 367 - 368.

of an arbitrator's mandate; Article 15 with the appointment of a substitute arbitrator; and Article 16 with the competence of an arbitral tribunal to rule on its jurisdiction.

58 Article 13 provides, in summary, that:

(1) The parties are free to agree on a procedure for challenging an arbitrator (Article 13(1)).

(2) Failing such agreement, a party who intends to challenge an arbitrator can, within a specified time, send a statement of reasons for the challenge to the arbitral tribunal and the tribunal must decide on the challenge (Article 13(2)).

(3) If a challenge under Article 13(1) or Article 13(2) is not successful, the challenging party may request, within a specified time, a court to decide on the challenge (Article 13(3)).

59 In ***Sino Dragon***, Edelman J made these observations about Article 13:

(a) Article 13(2) is a default rule that applies 'failing such agreement' as described in Article 13(1) [75].

(b) If Article 13(2) does not apply, the power of the court under Article 13(3) is enlivened only 'if a challenge under any procedure agreed upon by the parties … is not successful' [76].

(c) There may be a question whether an unsuccessful 'challenge under any procedure agreed upon by the parties' entitles the unsuccessful party to ask the court to decide the challenge on

only the grounds which were advanced in the agreed procedure, or whether new grounds can be raised [78].

(d) No common law power exists for the court to decide a challenge to an arbitrator outside the circumstances in Article 13(3) [86].

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60 In ***Ku-ring-gai Council***, a dispute between the parties was referred to an arbitrator pursuant to an arbitration agreement. During the arbitration, the parties consented to the arbitrator acting as a mediator. The mediation was unsuccessful and the arbitrator, without the parties' consent, continued to conduct the arbitration. Later, the respondent informed the appellant that the arbitrator's mandate had been terminated when he acted as a mediator. The respondent did not consent to the arbitrator continuing to conduct the arbitration. The appellant brought proceedings in the Supreme Court of New South Wales for a declaration that the arbitrator's mandate had not been terminated and for an injunction restraining the respondent from purporting to terminate the mandate. The appellant's proceedings were dismissed.

61 Section 14 of the New South Wales Commercial Arbitration Act provides [this section will be on the slide]:

> (1) If an arbitrator becomes in law or in fact unable to perform the arbitrator's functions or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if the arbitrator withdraws from office or if the parties agree on the termination.

(2) Otherwise, if a controversy remains concerning any of these grounds, any party may request the Court to decide on the termination of the mandate.

(3) A decision of the Court under subsection (2) that is within the limits of the authority of the Court is final.

(4) If, under this section or section 13(3), an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or section 12(3).

62 Section 14 (apart from subsection (3)) is substantially the same as Article 14 of the Model Law. By s 14(3), although a decision of the court is generally final, review of a decision of the court that is not made within the limits of its powers and functions is not precluded.

63 In ***Ku-ring-gai Council***, the Court of Appeal of New South Wales dismissed the appellant's application for leave to appeal as incompetent. Bathurst CJ (Beazley P & Ward CJ in Eq agreeing) held that a decision on whether the mandate of an arbitrator had been terminated was not an 'interim measure' within Article 17J. Rather, it was a decision on whether an arbitrator was 'unable to perform' the arbitration within s 14(1) of the New South Wales Commercial Arbitration Act. The power of the Supreme Court to hear and determine the appellant's originating process therefore arose under s 14(2) of the Act [65] - [66]. The proceedings involved an application for final relief under s 14(2) rather than for 'interim measures' within Article 17J. Section 14(3) of the Act operated to render the primary judge's decision 'final' in the sense of 'not subject to an appeal' [69] - [75].

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64 Article 16 concerns the competence of the arbitral tribunal to rule on its own jurisdiction.

65 In ***teleMates Pty Ltd v Standard SoftTel Solutions Pvt Ltd***,[16] Hammerschlag J held that Article 16(3) read with Article 5 makes it clear that, absent a request within the period specified in Article 16(3), no court may intervene to determine the matter of an arbitral tribunal's jurisdiction where the tribunal has itself determined that matter in favour of jurisdiction as a preliminary question. The making of a request within the stipulated period is an essential condition of the plaintiff's right to have the court decide the matter [53]. See ***David Grant & Co Pty Ltd v Westpac Banking Corporation***.[17] Hammerschlag J said that this position reflects two underlying policies of the Commonwealth Act. First, disputes which the parties have submitted to arbitration should be resolved speedily. Secondly, intervention by the court should be minimised [54].

66 Hammerschlag J further held that the proposition that Article 16 does not apply because the arbitrator was not validly appointed is unsustainable. His Honour pointed out that in every case where there is a total challenge

[16] ***teleMates Pty Ltd v Standard SoftTel Solutions Pvt Ltd*** (2011) 257 FLR 75.
[17] ***David Grant & Co Pty Ltd v Westpac Banking Corporation*** (1995) 184 CLR 265, 277.

to jurisdiction on the basis that the arbitrator has not been validly appointed, if the tribunal is to decide its own jurisdiction it must first, and is entitled to, assume it. This principle, known as the doctrine of separability, allows it to do so [56]. Article 16 is the statutory embodiment of this principle. It confirms an arbitral tribunal's jurisdiction to determine its own jurisdiction, amongst others, by determining the validity of its appointment [57].

67 In ***Sino Dragon***, Edelman J held that the court cannot intervene and make a ruling about the jurisdiction of the arbitral tribunal prior to the tribunal having made that determination [114]. His Honour referred with approval to the decision in ***teleMates*** [115]. Edelman J noted that Hammerschlag J held that Article 16(3), read with Article 5, did not permit the possibility of extending time for a request for a court to decide the matter following a preliminary ruling by the arbitral tribunal [115]. Edelman J held that the principles underlying Hammerschlag J's reasoning, and underlying Article 16 read with Article 5, apply with even stronger force to a request for a court to decide the matter *without* a preliminary ruling from the arbitral tribunal [115].

Article 27

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68 I turn to Article 27. Article 27 provides for the arbitral tribunal or a party, with the approval of the arbitral tribunal, to request assistance from a court in taking evidence.

69 Section 23A of the Commonwealth Act gives effect to Article 27. It provides, relevantly, that a party to arbitral proceedings commenced in reliance on an arbitration agreement may apply to a court for an order under s 23A(3) if at least one of the conditions specified in pars (a) to (f) is satisfied. However, by s 23A(2), in specified circumstances an application may only be made with the permission of the arbitral tribunal.

70 Section 23A(3) provides [this section will be on the slide]:

> The court may, for the purposes of the arbitral proceedings, order:
>
> (a) the person to attend before the court for examination or to produce to the court the relevant document or to do the relevant thing; and
>
> (b) the person, or any other person, to transmit to the arbitral tribunal one or more of the following:
>
> (i) a record of any evidence given in compliance with the order;
>
> (ii) any document produced in compliance with the order, or a copy of the document;
>
> (iii) particulars of any other thing done in compliance with the order.

71 Section 23A(6) provides that nothing in s 23A limits Article 27 of the Model Law.

72 In ***Sino Dragon***, the applicant sought to rely upon Article 27 as providing a power for the court to make an order for production when the arbitral

tribunal had refused to do so. As I have mentioned, Article 27 provides for 'the Tribunal, or a party with the approval of the Tribunal, to request court assistance in taking evidence'. In ***Sino Dragon***, Edelman J proceeded on the assumed basis that Article 27 includes a power to grant subpoenas. His Honour said that it was unnecessary to decide that issue because even if it is accepted that the issue of a subpoena is 'assistance in taking evidence', Article 27 requires that the tribunal seek that assistance from the court or that a party proceed with the approval of the tribunal. In the case at hand the tribunal had not sought assistance and the applicant did not have the approval of the arbitral tribunal in seeking assistance.

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73 More recently, in ***Mountain View Productions LLC v Keri Lee Charters Pty Ltd***,[18] an arbitrator granted the applicant permission, as contemplated by s 23(2) of the Commonwealth Act, to apply to the Federal Court for the issue of a subpoena to specified corporations for the production of documents.

74 Stewart J summarised the principles applicable to the grant of a subpoena under s 23 of the Commonwealth Act as follows [12]:

[18] ***Mountain View Productions LLC v Keri Lee Charters Pty Ltd*** [2022] FCA 161.

(1) It is inappropriate for the court to embark on a process which would second guess an arbitral tribunal that has granted an application to issue a subpoena. The role of the court is to assist arbitral processes and is not one of heavy-handed intervention.

(2) The court should not rubber stamp the arbitral tribunal's permission for a party to apply for the issue of a subpoena. The court must determine for itself whether issuing the subpoena is reasonable in all the circumstances.

(3) The court should only issue a subpoena to produce documents if it is satisfied that it is being issued for a legitimate forensic purpose, being that the documents are apparently relevant to the issues before the tribunal.

(4) Apparent relevance is a low threshold.

(5) The difficulty of assessing relevance prior to a hearing must be taken into account.

(6) The assistance that the party requesting the subpoena, may derive from the production of documents sought, must be taken into account.

75 Stewart J made further observations in relation to the question of relevance and in relation to the considerations that are relevant for the arbitrator's decision whether or not to grant permission [14] - [15]. In particular:

(1) Under s 23(2) of the Commonwealth Act, one of the requirements for the issue of a subpoena is that the arbitrator has granted permission which is consistent with Article 27.

(2) As between the arbitrator and the court, it is the arbitrator who is best placed to assess relevance. The arbitrator has the closest familiarity with the dispute.

(3) The relevant considerations for the arbitrator's decision include not only the effect that the issue of the subpoena may have on the arbitration proceeding, such as disruption or delay, but crucially whether the documents sought are relevant in the requisite sense.

(4) The court would not contradict the arbitrator, with regard to relevance, save in a clear case.

Article 31

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76 Article 31 is concerned with the form and contents of an arbitral award.

77 In ***Feldman v Tayar***,[19] the applicants sought to appeal from the primary judge's judgment enforcing, in part, a domestic arbitral award made in favour of the respondent. The applicants argued, amongst other things, that the arbitrators had failed to give adequate reasons as required by s 31(3) of the Victorian Commercial Arbitration Act (which is relevantly identical to Article 31(2)).

[19] ***Feldman v Tayar*** (2021) 64 VR 429.

78 Article 31(2) provides:

> The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30.

79 The Court of Appeal of Victoria (McLeish, Sifris and Kennedy JJA) noted (at [76]) that in ***Westport Insurance Corporation v Gordian Runoff Ltd***[20] the High Court made it clear that there was nothing in the legislation to suggest that arbitral awards should display reasons of a judicial standard. The High Court endorsed the test formulated by Donaldson LJ in ***Bremer Handelsgesellschaft mbH v Westzucker GmbH [No 2]***,[21] namely:

> All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. That is all that is meant by a 'reasoned award'.

80 McLeish, Sifris and Kennedy JJA were of the opinion that the adequacy or sufficiency of reasons will depend on the evidence, the complexity and nature of the issue, and the relevant finding. The reasons must address why the arbitrators have reached a particular decision [77].

Articles 34, 35 and 36

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[20] ***Westport Insurance Corporation v Gordian Runoff Ltd*** (2011) 244 CLR 239.
[21] ***Bremer Handelsgesellschaft mbH v Westzucker GmbH [No 2]*** [1981] 2 Lloyd's Rep 130 [25].

81 The final articles that I will address are Articles 34, 35 and 36.

82 Article 34 provides for an application to a court to set aside an arbitral award.

83 Article 35 read with Article 36 is concerned with the recognition and enforcement by a court of an arbitral award or the refusal by a court to recognise and enforce an arbitral award.

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84 In ***TCL Air Conditioner*** (High Court), a successful party to an arbitration applied to the Federal Court for the enforcement of the arbitral award. In proceedings in the High Court's original jurisdiction, the unsuccessful party argued that, to the extent that s 16(1) of the Commonwealth Act gave the force of law to the Model Law, and designated the Federal Court as having jurisdiction to recognise and enforce arbitral awards governed by the Model Law, it was invalid because it provided for the exercise of the judicial power of the Commonwealth in a manner contrary to ch III of the Constitution. The High Court rejected the unsuccessful party's contention.

85 A number of propositions were stated in ***TCL Air Conditioner*** in relation to claims that are submitted to arbitration, the status of an arbitral award

and the former rights of the parties consequent upon the making of an award:

(a) By submitting their claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. See ***Dobbs v National Bank of Australasia Ltd***;[22] ***TCL Air Conditioner*** [77] (Hayne, Crennan, Kiefel and Bell JJ).

(b) The arbitral award precludes recourse to the original rights, the determination of which had been referred to arbitration. Any issue might be submitted to arbitration, and upon that issue, the award would be as conclusive upon the parties as an award upon the whole cause of action if that had been submitted. See ***Dobbs*** (653, 654).

(c) In short, the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators, pursuant to the authority given to them by the parties. See ***TCL Air Conditioner*** [9], [31] (French CJ and Gageler J).

(d) The general rule is that an award made by an arbitrator pursuant to such authority is final and conclusive. The former rights of the parties are discharged by an accord and satisfaction. The accord is the agreement to submit disputes to arbitration; the satisfaction is the making of an award and fulfilment of the agreement to arbitrate. See ***TCL Air Conditioner*** [78] (Hayne, Crennan, Kiefel and Bell JJ).

[22] ***Dobbs v National Bank of Australasia Ltd*** (1935) 53 CLR 643, 653 (Rich, Dixon, Evatt & McTiernan JJ).

(e) The purposes for which an arbitral award is recognised as binding include the giving rise to a res judicata or issue estoppel. See ***TCL Air Conditioner*** [23] (French CJ and Gageler J).

See also ***CBI Constructors Pty Ltd v Chevron Australia Pty Ltd***.[23]

86 In ***TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd*** (***TCL***),[24] the appellant applied to the Federal Court for recognition or enforcement of the arbitral award to be refused under Article 36 and for the award to be set aside under Article 34. Article 34 provides that an arbitral award can be set aside by a court if, relevantly, the award is in conflict with the public policy of the State. Article 36 provides that recognition or enforcement of an arbitral award can be refused by a court if, relevantly, the award is contrary to the public policy of the State. The appellant alleged that the award was in conflict with, or contrary to, the public policy of Australia, because there had been a breach of the rules of procedural fairness in connection with the making of the award. The appellant's application was dismissed by the primary judge. A Full Court of the Federal Court dismissed the appeal.

87 The Full Court (Allsop CJ, Middleton and Foster JJ) held that the rules of procedural fairness are within the concept of 'public policy' in Article 34(2)(b)(ii) and Article 36(1)(b)(ii) [74]. However, the Full

[23] ***CBI Constructors Pty Ltd v Chevron Australia Pty Ltd*** [2023] WASCA 1 [72] - [74].
[24] ***TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd*** (2014) 232 FCR 361.

Court emphasised that 'the weight of authority is clearly to give a narrow meaning to public policy' in that context [77].

88 The Full Court said in ***TCL*** that an award should not be set aside under Article 34 unless there was 'demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness' [55].

89 The approach of the Full Court in ***TCL*** has been followed by the Court of Appeal of Victoria in ***Sauber Motorsport AG v Giedo van der Garde BV***[25] and the Court of Appeal of Queensland in ***Mango Boulevard Pty Ltd v Mio Art Pty Ltd***.[26]

90 In ***Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd***,[27] Pagone J said that the parties to an arbitration governed by the Commonwealth Act and the Model Law can, and are entitled to, expect that the relevant provisions of the Model Law and of the domestic legislation will be construed and applied with some uniformity in convention countries. His Honour added that relevant decisions in other countries have shown a reluctance to find an award to be in conflict with

[25] ***Sauber Motorsport AG v Giedo van der Garde BV*** (2015) 317 ALR 786.
[26] ***Mango Boulevard Pty Ltd v Mio Art Pty Ltd*** [2018] QCA 39.
[27] ***Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd*** (2014) 314 ALR 299.

or contrary to public policy, unless the complaint offends fundamental notions of justice and fairness [13].

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91 In ***Hui v Esposito Holdings Pty Ltd***,[28] Beach J in the Federal Court observed that Article 34 significantly limits the circumstances under which an arbitral award may be set aside. Significant judicial restraint must be exercised in considering and determining a challenge under Article 34. If a challenge based on procedural fairness grounds is made, the context and practical circumstances and consequences are important. In particular, any consequences short of 'real unfairness' or 'real practical injustice' should be put aside [114] - [118]. His Honour also observed that Article 18 and the review powers under Article 34 are not intended to apply to unfairness caused by a party's own conduct, including forensic or strategic decisions [122].

92 In ***Guoao Holding Group Co Ltd v Xue (No 2)***,[29] the applicant applied in the Federal Court for the enforcement of a foreign arbitral award under s 8(3) of the Commonwealth Act. The critical question was whether the enforcement of the award would be contrary to public policy within s 8(7)(b), so that the court should exercise its discretion to not enforce

[28] ***Hui v Esposito Holdings Pty Ltd*** (2017) 345 ALR 287.
[29] ***Guoao Holding Group Co Ltd v Xue (No 2)*** [2022] FCA 1584.

the award. The respondents argued that enforcement of the award would lead to such manifest unfairness and imbalance of remedy to the parties' dispute, the subject of the arbitration, that an Australian court would not enforce it [1]. Stewart J did not accept the respondents' argument and decided that the award must be enforced.

93 Stewart J held that the first respondent's complaints about the award did not rise to 'the level of the award being contrary to fundamental norms of justice and fairness in Australia, within the context of international commercial arbitration, such as to enliven the public policy ground for resisting enforcement' [35]. His Honour made these comments:

(a) It will, in general, be inappropriate for the enforcement court of a New York Convention country to reach a different conclusion on the same question of asserted defects in the award as that reached by the court at the seat of the arbitration [36]. His Honour referred to ***Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd***[30] and ***Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company***.[31] His Honour said that in the case before him the award debtors had applied exhaustively to domestic courts and authorities for the cancellation of the award, and they had been unsuccessful [36].

[30] ***Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd*** (2013) 304 ALR 468 [65] (Allsop CJ, Besanko and Middleton JJ).
[31] ***Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company*** (2021) 290 FCR 298 [77] (Stewart J; Allsop CJ & Middleton J agreeing).

(b) The Full Court of the Federal Court in ***Gujarat*** had approved the comments of Coleman J in ***Minmetals Germany GmbH v Ferco Steel Ltd***[32] that 'outside an exceptional case such as where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so, any suggestion that procedural defects in the conduct of the arbitration, which have already been considered by the supervisory court, should be reinvestigated by the enforcing court, is to be most strongly deprecated' [37].

94 In my opinion, it is clear that Australian courts have recognised that 'significant judicial restraint' must be exercised in relation to a challenge under Article 34, and the court will set aside an arbitral award only in very limited circumstances.

Conclusion

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95 That concludes my analysis of the Model Law provisions. It is readily apparent, from the decisions I have discussed this evening, that Australian courts understand and respect the freedom of parties to agree upon the resolution of their disputes by arbitration and that Australian courts understand and respect the distinction between judicial support of

[32] ***Minmetals Germany GmbH v Ferco Steel Ltd*** [1999] 1 All ER (Comm) 315, 331.

the arbitration process and judicial interference with that process. Australian courts recognise the objects that underpin the adoption of the Model Law in domestic legislation.

96 There are, of course, fundamental differences between resolution of disputes by arbitration and by judicial proceedings. For example, with the arbitration process:

(a) The arbitrators are remunerated in respect of the particular arbitration.

(b) The parties to the arbitration are directly or indirectly responsible for the payment of the arbitrators' fees.

(c) The parties will usually be involved in the selection of the arbitrators.

(d) The selection process may, or may not, be conducive to the appointment of arbitrators who do, or do not, have a close relationship with the lawyers who advise their clients on the selection of the arbitrators.

(e) The arbitration is conducted in private.

(f) The reasons of the arbitrators for making awards are not available for public scrutiny.

(g) The standard of the reasons may, or may not, be of the standard expected in judicial proceedings.

(h) There is no system for appellate review of arbitral decisions.

97 Parties who have elected to resolve their disputes by arbitration must be held to their election, despite any shortcomings in the particular arbitral process, including shortcomings in the hearing and the reasons, unless the process has miscarried in a manner and to an extent that enlivens the jurisdiction of the courts to intervene. Generally speaking, the parties have made their bed and must lie in it.