International
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International Arbitration 2021

A practical cross-border insight into international arbitration work

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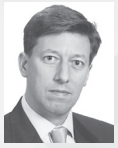
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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The Commonwealth of Australia is a federation, comprising six States and two Territories. Each State and Territory is a separate jurisdiction. In Australia, international arbitration is governed by a Federal statute, the *International Arbitration Act 1974* (Cth) ("**IAA**"), which was significantly amended in 2010 and in 2015. Domestic arbitration is governed by a *Commercial Arbitration Act* ("**CAA**") in each State or Territory. The CAAs in each State are very similar and are known as the "**Uniform Acts**".

The IAA and the CAA both adopt the *UNCITRAL Model Law* ("**Model Law**") with some amendments.

The formalities for an arbitration agreement follow the minimal requirements of Article 7 (Option 1) of the Model Law. The agreement may take any form but must be in writing. It can be a clause in a contract, in the form of a separate agreement, appear in an exchange of letters or in pleadings.

Subject to issues of arbitrability (see question 3.1 below), the types of dispute that are referable to arbitration are limited only by the agreement between the parties.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Neither the IAA nor the CAA prescribes the elements of an arbitration agreement. However, an arbitration agreement should provide the following:

a) which disputes may be referred to arbitration;
b) the seat of the arbitration;
c) the number and qualification (if any) of the arbitrators;
d) the governing law of the arbitration agreement;
e) the procedural rules that apply; and
f) the language of the proceedings.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Under the IAA and the CAA, courts are required to refer the parties to arbitration if a party so requests prior to submission of that party's first substantive statement. Courts are "pro-arbitration" and will stay court proceedings in favour of arbitration if the arbitration agreement is valid and broad enough to encompass the dispute and if the dispute is "arbitrable".

In *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, Australia's highest appeal court, the High Court of Australia held that an arbitration agreement dealing with any "disputes under this deed" covered the issue of whether the arbitration agreement itself was valid. In doing so, it confirmed that arbitration clauses are to be construed widely, taking into account the language used, the surrounding circumstances and the purposes of the contract (see also *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QSC 75).

In *Gemcan Constructions Pty Ltd v Westbourne Grammar School* [2020] VSC 429, the court was asked to consider whether there was a valid arbitration agreement. The contract contained a clear arbitration clause, but the contract drafters had entered "not applicable" in Annexure A to the contract against both the tribunal nominating authority and the arbitration rules. The court held that the nominating authority and the rules were only relevant to procedural aspects of the arbitration and did not negate the parties' agreement to arbitrate itself.

However, a narrowly drafted arbitration agreement may be interpreted only to refer specified disputes to arbitration, if that is the "natural and ordinary meaning" of the language used (*Inghams Enterprises Pty Limited v Hannigan* [2020] NSWCA 82).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The IAA governs the enforcement of international arbitration proceedings. The IAA incorporates and gives effect to the Model Law. Under the IAA, courts enforce arbitration proceedings by referring parties who have commenced court proceedings in breach of the agreement to arbitration (Section 7 of the IAA) and by enforcing the tribunal's award, subject to limited exceptions under Article 36 of the Model Law. The position is almost identical for domestic arbitrations under the Uniform Acts.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

No, there are separate laws governing domestic and international arbitration. International arbitration proceedings seated in Australia are governed by the IAA. Domestic arbitration is governed by each State's CAA or Uniform Laws, which are very similar across all States and Territories. Many of the provisions of the CAA are very similar or identical to the Model Law.

One difference is that, for domestic arbitrations, the parties may agree to a right of appeal against the arbitral award on a question of law (Section 34A). In the absence of an agreement, no such right of appeal exists against a domestic award and recourse is only possible on the narrow grounds under Article 34 of the Model Law.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes. International arbitration in Australia is substantially based on the Model Law.

Significant differences include:

a) the parties are taken to have had a full opportunity to present their case, if they have had a reasonable opportunity to present their case (Section 18C);
b) express powers given by the IAA to the courts to support international arbitration in relation to the production of evidence (Section 23A) and subpoenas (Section 23);
c) allowing tribunals to make orders for consolidation of arbitration proceedings (Section 24); and
d) express provisions dealing with interest (Sections 25 and 26) and costs (Section 27).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The parties are given considerable flexibility as regards the conduct of international arbitration proceedings. Certain fundamental rights underpinning the process are mandatory; for example, a party's right to equal treatment and to be given a reasonable opportunity to present its case and to be given sufficient notice of any hearing. Common law principles of due process and natural justice also apply to arbitral proceedings.

Other non-derogable rights under the Model Law include the enforcement provisions discussed in question 2.1 above (right to a stay of court proceedings in favour of arbitration and the limited right of recourse under Article 34 of the Model Law).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Australian courts start from the position that "any claim for relief of a kind proper for determination of a court" is arbitrable (*Elders CED v Dravco Corp* [1984] 59 ALR 206). This is more so in the sphere of international arbitration where a liberal approach is taken to arbitrability.

The IAA and CAA apply to "commercial arbitrations". A pre-existing commercial relationship between parties is not required and it is sufficient if the dispute is commercial in nature. For example, a family dispute involving transactions of a commercial nature will suffice (*Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13).

However, certain disputes involving, in particular, matters of legitimate public interest, are not considered appropriate for arbitration, including:

a) certain intellectual property disputes (e.g. patent or trade mark disputes);
b) taxation disputes, but, generally speaking, only those purporting to bind the tax authorities; and
c) insolvency-related proceedings where arbitration could have the effect of obviating the statutory regime.

There are also some statutes that bar arbitration proceedings for particular disputes. For instance, Sections 11(2) and 11(3) of the *Carriage of Goods by Sea Act 1991* (Cth) render void an arbitration clause incorporated in a sea carriage document or bill of lading relating to the carriage of goods from and to Australia, unless the arbitration is conducted in Australia.

Section 43 of the *Insurance Contracts Act 1984* (Cth) renders void provisions in a contract of insurance having the effect of referring disputes to arbitration, although parties may later agree to refer matters to arbitration after the dispute arises.

Where part of a claim is arbitrable, courts have a discretion to stay the non-arbitrable part pending the arbitration of the remainder (*Re Infinite Plus Pty Ltd* [2017] NSWSC 470).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. Arbitral tribunals may rule on their own jurisdiction. The IAA adopts Article 16 of the Model Law and Section 16 of the CAA is substantially the same as Article 16.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

A party commencing court proceedings in Australia in breach of an arbitration clause runs the risk of not only having those proceedings stayed, but also being liable for costs (see *Relative Networks Pty Ltd v Evoluzione Pty Ltd* [2021] WASC 121). A stay will generally be granted unless the arbitration agreement is inoperable, the dispute is not arbitrable or a party has waived the right to seek a stay (Section 8 of the CAA and Section 7 of the IAA, see also *Dialogue Consulting Pty Ltd v Instagram Inc* [2020] FCA 184 and *One Sector Pty Ltd v Panel Concepts Pty Ltd* [2021] QDC 054).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Generally, the court must not intervene in any arbitral proceedings other than where provided for by statute (Article 5 of the Model Law adopted by the IAA and Section 5 of the CAA).

In respect of issues of jurisdiction, a court may only intervene once the tribunal itself has ruled on the matter (Article 16(3) of the Model Law and Section 16(9) of the CAA).

A request for the court to intervene must be made within 30 days of receipt of the tribunal's ruling, and the court's decision is not appealable.

When reviewing the tribunal's decision on its own jurisdiction, courts determine the issue *de novo* while at the same time giving deference to cogent reasoning of the tribunal (*Lin Tiger Plastering Pty Ltd v Platinum Construction (VIC) Pty Ltd* [2018] VSC 221 at [40]).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Generally, tribunals have no jurisdiction over individuals or entities that are not parties to the arbitration agreement. The following exceptions apply:

a) third parties claiming "through or under a party to the arbitration agreement" (Section 7(4) of the IAA) may be treated as parties to the arbitration. This would, for example, include an insurer enforcing rights of subrogation (*Tensioned Concrete Pty Ltd v Munich Re* [2020] WASC 431);
b) upon application from a party to the arbitral proceedings, a tribunal may consolidate two or more arbitral proceedings: on the ground that they involve a common question of law or fact; the rights to relief arise out of the same transaction; or if otherwise desirable (Section 24 of the IAA and Section 27C of the CAA); and
c) a court may, upon request from a party that has approval from the arbitral tribunal, issue subpoenas against third parties ordering that the third parties attend for examination before the tribunal and/or produce documents to the tribunal (Section 23 of the IAA and Section 27A of the CAA).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Each State and Territory of Australia has its own statute dealing with limitation.

The limitation periods in those statutes are regarded as matters of substantive law.

The applicable law will be the law chosen by the parties, or alternatively, the law having the closest connection to the contract.

The limitation periods apply equally to court and arbitration proceedings.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

The liquidation of a company which is a party to an arbitration results in an automatic stay of the arbitration, and leave of the court is required to proceed with the arbitration or enforce an arbitration award (Sections 471B and 500(2) of the *Corporations Act 2001* (Cth) ("**the Act**").

An arbitration involving an Australian company in voluntary administration is not automatically stayed (*cf.* court proceedings under Section 440D(1)). However, leave of the court is required to begin or proceed with enforcement proceedings in relation to properties of a company in administration (Section 440F of the Act).

Under Section 447A of the Act, courts have a general power to make orders in relation to companies in administration. This includes, in appropriate circumstances, the power to stay arbitration proceedings for a limited period of time so as to avoid disrupting and distracting administrators (*In the matter of THO Services Limited* [2016] NSWSC 509).

Cross-border rules allow for arbitration proceedings in Australia to be stayed where one of the parties is subject to overseas insolvency proceedings (*Cross-Border Insolvency Act* adopting Article 20 of the Model Law on Cross-Border Insolvency).

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Generally, parties are free to decide which laws apply to the substance of a dispute.

In the absence of an express choice by the parties, the arbitral tribunal will determine the proper law of the contract, which will usually be the law most closely connected with the contract. In all cases, the tribunal shall decide the question in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

A tribunal may decide a dispute *ex aequo et bono* or as *amiable compositeur*, if the parties have expressly authorised it to do so.

In an application to stay court proceedings in favour of a foreign-seated arbitration, under Section 7(2) of the IAA, the question as to whether the applicant was a party to the foreign arbitration agreement was decided based on the choice of law rules of the forum hearing the stay application (which, in Australia, at common law, results in application of the *lex fori*) and not the law of the putative arbitration agreement (*Trina Solar (US), Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6).

In contrast, an application to enforce a foreign arbitration award in Australia where the validity of the arbitration agreement is in dispute is determined by the law of the putative arbitration agreement (Section 8(5)(b) of the IAA).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Mandatory laws that apply by virtue of an Australian nexus cannot be ousted by a choice-of-law clause. A common example would be claims arising under the Australian Consumer Legislation and, in particular, claims for misleading and deceptive conduct (*See Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172). Other examples would include relevant corporations, tax and workplace legislation.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The parties are free to choose the law of the arbitration agreement. Where the contract is silent, the following rules apply:

a) the courts identify the law that the parties intended would govern the arbitration agreement by implication; and
b) if an implied choice of law cannot be identified, the court will apply the law to which the arbitration agreement has the "closest and most real connection" (*Bonython v Commonwealth* [1948] 75 CLR 589).

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to agree on the arbitrators, including the number of arbitrators and any qualifications.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. For an international arbitration, if the parties fail to agree on the number of arbitrators, the default number of arbitrators is three (Article 10 of the Model Law). For domestic arbitration, the default number is one (Section 10(2) of the CAA).

If the parties are unable to agree on the appointment of a three-panel tribunal, each party shall appoint one arbitrator, and the two appointed arbitrators will appoint the third arbitrator.

If the two appointed arbitrators cannot agree or the parties cannot agree on the appointment of a sole arbitrator or if the system breaks down, the court may make the appointment (Articles 11(3) and (4) of the Model Law). Similar provisions exist in the CAA.

By regulation, the court's power to appoint arbitrators under the IAA has been delegated to the Australian Centre for International Commercial Arbitration ("**ACICA**").

An arbitration agreement is not inoperable merely because the appointing body no longer exists (*Broken Hill City Council v Unique Urban Built Pty Ltd* [2018] NSWSC 825).

An arbitrator who has acted as a mediator must obtain the written consent of all parties to continue acting in the arbitration, failing which the arbitrator's mandate is terminated (Section 27D(4) of the CAA and *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2019] NSWCA 2). There is no equivalent provision for international arbitration under the IAA.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Generally, no. The court will only intervene where:

a) the parties are unable to agree on the arbitrator or where the system of appointment has broken down (see question 5.2 above); or

b) where there are justifiable doubts as to impartiality or independence or a lack of agreed qualifications. A challenge to the impartiality or independence of an arbitrator may be made under Articles 12 and 13 of the Model Law (and Sections 12 and 13 of the CAA), but only within 15 days after becoming aware of the constitution of the arbitral tribunal or the relevant circumstances. Institutional rules may also allow challenges to arbitrators (see, for example, Rules 21 and 22 of the ACICA Rules).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Arbitrators are required to be independent and impartial. A challenge based on the arbitrator's independence, neutrality and/or impartiality turns on evidence of actual or apprehended bias. The test for apprehended bias involves an enquiry into whether a fair-minded lay observer might reasonably apprehend that the arbitrator might not bring an impartial mind to the resolution of the dispute.

Only a "real danger of bias" will suffice. Tenuous associations will be disregarded. So, for example, in *Sino Dragon Trading Ltd v Noble Resources International Pty Ltd* [2016] FCA 1131, a challenge based solely on an indirect relationship between a lawyer appointed as an arbitrator and his firm's office in China did not give rise to any real danger of bias.

Courts also acknowledge the significance of the International Bar Association ("**IBA**") *Guidelines on Conflicts of Interest in International Arbitration*, which set out a non-exhaustive list of scenarios that give rise to an appearance of a conflict of interest (Red and Orange List) as well as scenarios which do not (Green List).

Arbitrators are required to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence as soon as they are approached for an appointment. The arbitrator has an ongoing disclosure obligation during the term of his or her appointment (Article 12 of the Model Law).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Parties are generally free to agree on their own rules of procedure. In the event that the parties do not agree, the tribunal can conduct the arbitration in such a manner as it considers appropriate. The tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence (Article 19 of the Model Law and Section 19 of the CAA).

Both ACICA and the Resolution Institute (which are both Australian-based dispute resolution institutions) publish arbitration rules. Other institutional rules such as the UNCITRAL Rules are also commonly adopted.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The parties are free to agree on the procedure they consider appropriate, including any arbitration rules. Subject to such agreement or a direction of the tribunal, the default procedure is as set out in Article 23 of the Model Law. This requires an exchange of statements of facts in support of each parties' claim or defence together with supporting documents (Article 23 of the Model Law and Section 23 of the CAA).

Subject to any contrary agreement, the tribunal can hold oral hearings or the arbitration can be "on the papers only".

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Within Australia, the *Legal Profession Uniform Rules* require solicitors and barristers, respectively, to maintain a paramount duty to the court and the administration of justice. In these rules, a "court" is defined to include "arbitration", and this is not restricted to arbitration within Australia.

This duty, however, only applies to an Australian practitioner or a registered Australian foreign lawyer. Foreign lawyers are bound by the ethical rules of conduct that apply in their home jurisdiction.

Where there is a risk that the fairness and integrity of the proceedings may be compromised by differing ethical rules applicable to each parties' counsel, the tribunal may adopt the *IBA Guidelines on Party Representation in International Arbitration*, which set minimum standards of ethical behaviour regardless of the jurisdiction of the counsel involved. Article 9.2 of

the ACICA Rules 2021 requires that the parties use their best endeavours to ensure that their legal representatives comply with these guidelines.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators are, amongst other things, obliged:

a) to disclose circumstances that give rise to justifiable doubts as to their impartiality or independence (Article 12);
b) to treat parties equally and to give parties a reasonable opportunity to present their case (Article 18);
c) to determine the procedure in such a manner as the arbitrator considers appropriate (Article 19(2));
d) to determine the dispute in accordance with the rules of law chosen by the parties (Article 28(1)); and
e) to provide a reasoned award, unless otherwise agreed by the parties (Article 31).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Insofar as arbitration is concerned, there are no such rules. There are no restrictions placed upon the nationality or residency of arbitrators.

Further, there are no restrictions on the representation of a party. The following specific provisions apply:

a) Section 29 of the IAA allows parties to appoint representatives from any legal jurisdiction or any other person of their choice. Section 29(3) states that acting for a party in an arbitration, including appearing in front of a tribunal, does not breach any law regulating the admission or practice of law.
b) Similarly, Section 24A of the CAA allows parties to choose their own representative. Section 24A(2) of the CAA provides that no offence under the Legal Profession Uniform Law is committed by a non-Australian lawyer merely by representing a party in arbitration proceedings.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Both the IAA and CAA provide arbitrators with immunity for anything done or omitted to be done in good faith in his or her capacity as arbitrator.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

While the arbitration is on foot, the court should not intervene. The court's role is limited to aiding, supervising, maintaining and enforcing decisions of the tribunal. This includes:

a) staying court proceedings in favour of arbitration (Section 7 of the IAA);
b) the appointment of arbitrators where parties are unable to agree (Article 11 of the Model Law);
c) enforcing interim measures ordered by the tribunal (Article 17H of the Model Law);
d) assisting with the taking of evidence (Article 27 of the Model Law); and
e) recognising and enforcing tribunal awards (Article 35 of the Model Law).

The CAA gives courts similar powers for domestic commercial arbitrations.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless the parties agree otherwise, international tribunals may, under Article 17 of the Model Law, grant interim measures (also known as "temporary measures of protection" or "conservatory measures") directing a party to:

a) maintain or restore the *status quo* pending determination of the dispute;
b) take action that would prevent current or imminent harm or prejudice to the arbitral process itself;
c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
d) preserve evidence that may be relevant and material to the resolution of the dispute.

Domestic tribunals have similar powers under the CAA (see Section 17(3)).

Domestic and international tribunals may not make *ex parte* preliminary orders under Article 17B of the Model Law, directing another party not to frustrate the purpose of an interim measure requested.

Assistance may be sought from the court to enforce an interim measure ordered by the tribunal (Article 17H of the Model Law and Section 17H of the CAA).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

For both international and domestic arbitration, a court has the same power to issue interim measures in relation to arbitration proceedings as it has under its own interlocutory rules (Article 17J of the Model Law and Section 17J of the CAA and the court's inherent jurisdiction).

A request for interim relief from the court has no effect on the jurisdiction of the tribunal (Article 9 of the Model Law).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Where the tribunal has ordered an interim measure, the courts will enforce it subject to the limited grounds for refusing recognition under Article 17I of the Model Law. Interim measures sought from the court under Article 17J of the Model Law are ordered where the "balance of convenience test" is satisfied. In the case of freezing orders, the test under the court rules in each State and Territory is whether the applicant has a "good arguable case" and whether there is a danger that the enforcement of the award will go unsatisfied because the debtor absconds or assets are removed from Australia, disposed of or diminished in value.

The general view is that national courts should grant interim measures sparingly and only if there are compelling reasons to

do so (*Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66 at [128]). So as not to trespass on the role of the arbitral tribunal, courts may 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 (*Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (In Liquidation)* [2018] WASCA 174 at [154]). However, where there is no dispute as to whether the applicant had a "good arguable case", courts have granted freezing orders for longer periods (until further order) (*Duro Felguera Australia*).

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

There has been some uncertainty as to whether an anti-suit injunction in aid of an arbitration is available in addition to an application for a stay of proceedings under Section 7 of the IAA (or Section 8 of the CAA). In general, the view is that both remedies are available and that similar principles that apply to anti-suit injunctions in respect of foreign proceedings would apply (see *CSR Ltd v Cigna Insurance Australia* (1997) 146 ALR 402 at [434 to 435]).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

An arbitral tribunal may order a party to the arbitral proceedings to pay security for costs (Section 23K of the IAA and Section 17 of the CAA).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Interim measures ordered in a domestic or international arbitration (including a foreign arbitration) can be enforced by a court, subject to limited exceptions, which include, among others:

a) failure to provide security required by the tribunal for an interim measure; or
b) where the interim measure is incompatible with the powers conferred upon the court.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The parties have considerable freedom to determine the procedure for conducting arbitration proceedings. Failing an agreement, Article 19 of the Model Law gives international arbitral tribunals the power to determine the admissibility, relevance, materiality and weight of the evidence, and they are not bound by local rules of evidence. A similar provision in Section 19 of the CAA applies to domestic arbitrations.

Evidence, which may not be admissible in court proceedings, may be admissible in arbitrations, although the tribunal may give it less weight if it considers it less reliable.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Under Article 19(2) of the Model Law (and Section 19(2) of the CAA), tribunals have broad powers to conduct the arbitration, including issues relating to disclosure and witness evidence.

In practice, tribunals often have regard to the *IBA Rules on the Taking of Evidence* or the Chartered Institute of Arbitrators' *Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration*. Tribunals may attempt to limit the scope of discovery by proposing narrow categories of documents relevant to the specific issues in dispute.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Under Article 27 of the Model Law, the tribunal or a party, with the tribunal's approval, may request the court's assistance in taking evidence. The court may execute the request within its competence and according to court rules. Australian courts may, in addition to other forms of relief, issue letters rogatory – requesting foreign courts to obtain evidence from a witness outside Australia.

Under Section 23(3) of the IAA, a party to an arbitration may, with the permission of the tribunal, apply to court for a subpoena requiring a person (including a non-party) to produce documents to the arbitral tribunal or to attend for examination before the arbitral tribunal. Courts are further empowered to order a person to attend before the court for examination (Section 23A of the IAA).

Courts have shown a degree of flexibility in supporting requests for subpoenas, even when made early in the arbitration process. However, to avoid abuse, a subpoena will not be issued against a non-party unless the court is satisfied that it is reasonable in all the circumstances to do so (Section 23(5) of the IAA; see also *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd* [2018] VSC 316). Nor will a court exercise its powers to order a person to attend court for examination under Section 23A of the IAA unless the person is given an opportunity to make representations to the court (Section 23A(5) of the IAA).

The courts have similar powers to assist domestic arbitrations under the CAA (Sections 27 and 27A).

However, Australian courts have no jurisdiction to issue a subpoena for foreign seated arbitral proceedings under the IAA (*Samsung C&T Corporation, Re Samsung C&T Corporation* [2017] FCA 1169). As an alternative to issuing a subpoena, however, it may be possible to obtain evidence in Australia applying the procedure in the Hague Evidence Convention.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Under the Model Law, the tribunal is free to adopt procedures for the production of written and/or oral witness testimony that it considers appropriate. This would include the power to allow cross-examination.

Australian tribunals often adopt the provisions in the *IBA Rules on the Taking of Evidence in International Arbitration*.

Tribunals have the power to administer oaths or affirmations.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Common law privilege rules apply to arbitration proceedings. Under these rules, confidentiality attaches to statements and other materials brought into existence for the sole purpose of seeking or being furnished with legal advice by a practising lawyer or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings, including arbitrations.

Communications between a party and its in-house counsel will attract privilege if the in-house counsel is employed as a lawyer and consulted by the party in his or her professional capacity for the dominant purpose described above. Privilege will not attach if the in-house counsel is consulted to provide non-legal services, such as commercial advice.

Privilege can be waived expressly or implicitly; for instance, where a party discloses the effect of legal advice.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contains reasons or that the arbitrators sign every page?

The requirements for international and domestic arbitration awards follow Article 31 of the Model Law which requires the award to be in writing and signed by the arbitrators. There is no requirement to sign every page. In proceedings involving more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. An award will not be set aside merely because one of the appointed arbitrators failed to meaningfully engage in the arbitration; actual prejudice must be demonstrated (*Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2019] WASCA 16).

A date and place of the arbitration must be stated and the award must be delivered to each party.

A reasoned award must be given, unless the parties agree otherwise. In *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] 244 CLR 239, the New South Wales Court of Appeal confirmed that, unlike a court judgment, a tribunal award is only required to state the decision and explain succinctly what the decision is. A tribunal is not required to approach the task of issuing an award in the same manner as is required of a judge issuing a judgment. Nevertheless, a failure to state adequate reasons for accepting or rejecting material evidence can leave the award open to challenge (*Ottoway Engineering Pty Ltd v ASC AWD Shipbuilder Pty Ltd* [2017] SASC 69).

It should be added that the final award is only final if it deals with all the issues that were referred to arbitration, regardless of whether the arbitrator calls it a final award or not (*Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Constructions)* [2017] VSC 97).

A significant delay between the oral hearing and the making of an award may result in the award being set aside if it is found to have impaired the arbitrator's ability to assess the evidence (*Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2019] WASCA 16).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The correction of errors (the "slip rule") is addressed in Article 33 of the Model Law and Section 33 of the CCA. Within 30 days of receiving the award, unless the parties agree another time period, a party may, with notice to the other party, request the tribunal to correct any errors. A party can also within this time period request that the tribunal deals with claims which are presented in the proceedings but omitted in the award (Article 33(3) and Section 33(5)). The tribunal may, within 30 days, correct or amend the award on its own initiative (Article 33(3) and Section 33(4)).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Article 34 of the Model Law (and Section 34 of the CAA) sets out the very limited grounds on which a party can challenge an award; i.e., incapacity of a party, invalidity of the arbitration agreement, procedural irregularities, lack of arbitrability and public policy. The latter includes awards induced or affected by fraud or breach of the rules of natural justice (Section 19 of the IAA). In relation to natural justice, arbitrators are not bound to slavishly adopt the position advocated by one party or the other. Nor are they required to put every evaluation of the evidence to a party for consideration before making a determination (*Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, applied in *Mango Boulevard P/L v Mio Art P/L & Ors* [2017] QSC 87).

Nevertheless, courts will intervene where a party could not have reasonably foreseen that the arbitrator would proceed to determine an issue (*Hui v Esposito Holdings Pty Ltd* [2017] FCA 648).

Generally, no challenge lies against an award on the basis of an incorrect finding of fact or law. Courts recognise the difference between an excess of jurisdiction and a challenge to the merits of legal and factual questions, but superficially characterised as an excess of jurisdiction question (*Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 at [6]). The exception is where parties to a domestic arbitration agree to a right of appeal on a point of law and the court grants leave (Section 34A of the Uniform Acts). The application to challenge the award must be made within three months after the date on which it was served on a party.

In *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2019] WASCA 16, a domestic arbitration award was challenged on the grounds that there was misconduct by one of the three arbitrators in failing to meaningfully engage in the arbitration. The court agreed that this was misconduct, but when considering how to exercise its discretion to set aside the award, the court decided not to do so on the basis that the misconduct had no effect on the outcome of the case.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

While the courts have not ruled on this, it is unlikely that the parties could exclude the right of a party to seek recourse against an award under Article 34.

Other than that, parties to a domestic arbitration agreement can exclude the right of appeal on a point of law. There are no rights of appeal for international arbitrations.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, they cannot.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

There is no appeal on the merits from an international arbitration award issued under the IAA. Challenges to awards are limited to the grounds set out under Article 34 of the Model Law.

Under the Uniform Laws, parties can "opt in" to an appeal regime (Section 34A). If the parties "opt in", then an application for leave to appeal must be made within three months from the date the party received the award (Section 34A(6) of the CAA), and it must identify the question of law to be determined and the grounds on which an appeal should be granted (Section 34A(4)).

The court must not grant leave unless it is satisfied:

a) that the determination of the question of law will substantially affect a party's rights;
b) that the question of law is one which the tribunal was asked to determine; and
c) that, on the basis of the findings of fact in the award:
   i) the decision of the tribunal on the question is obviously wrong; or
   ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and
   iii) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. Australia signed the New York Convention in 1975 without reservations. The Convention has been enacted into domestic law pursuant to the IAA.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Australian courts lean in favour of recognising and enforcing arbitral awards, subject to narrow exceptions that are consistent with the Model Law; see, for example, *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, which dealt with an unsuccessful challenge to the enforcement of a China International Economic and Trade Arbitration Commission ("**CIETAC**") award in Australia where it was alleged that a party had not been given an opportunity to present its case in the arbitration proceedings. Courts have a discretion to adjourn the enforcement of an award where an application is on foot to annul the award. However, the approach has been to allow an adjournment only on condition that security for the full amount of the award is given (*Hyundai Engineering & Steel Industries Co Ltd v Alfasi Steel Constructions (NSW) Pty Ltd* [2018] FCA 1054).

International awards are recognised under Section 8 of the IAA and domestic awards are recognised under Section 35 of the CAA.

The process of enforcement involves an application to court and the production of an authenticated original or certified copy of the award.

There is, generally speaking, a two-stage process: (1) making an *ex parte* application for leave to enforce; and (2) if leave is granted, staying enforcement for the purpose of giving the debtor an opportunity to apply to the court to set aside the order. The latter involves an *inter partes* hearing.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Australian courts apply the *res judicata* principle to arbitration proceedings. Where a cause of action has been finally determined by a tribunal, it may not be re-heard by an Australian court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

An award will only be unenforceable on public policy grounds if it fundamentally offends Australia's notions of justice. The bar is set high and the courts read the public policy exception narrowly in line with the pro-enforcement purpose of the New York Convention.

The IAA states, non-exhaustively, that an award will be contrary to public policy in Australia if:

a) the making of the award was induced or affected by fraud or corruption; or
b) a breach of the rules of natural justice occurred in connection with the making of the award.

In line with a strong pro-arbitration trend, Australian courts apply a restrictive approach when considering challenges based on want of natural justice. For example, in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, the Federal Court rejected an application to set aside enforcement of an international award on the grounds of a denial of natural justice. The court held that a substantial denial of natural justice was required to enliven the court's discretion to set aside or resist enforcement of an award.

This approach has since been followed in a number of subsequent decisions, including in *Energy City Qatar Holding Co v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116, where the Federal Court granted an application to enforce an award, despite certain irregularities with the arbitral proceedings.

In *Beijing Jishi Venture Capital Fund (Limited Partnership) v Liu* [2021] FCA 477, however, the Federal Court of Australia refused to enforce an award against a party that had not been properly served with notice of the arbitration. The fact that the notice

was served on the husband was not sufficient because the right to be given proper was notice was a personal right. The court held that to enforce the award would be contrary to public policy.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Arbitration proceedings seated in Australia are confidential unless the parties otherwise agree, subject to certain limited exceptions (see Sections 27E to 27G of the CAA and Sections 23C to 23E of the IAA).

Arbitration-related court proceedings are not confidential.

Under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, ICSID arbitrations are not confidential, subject to limited exceptions.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Subject to the exceptions set out in Section 23D of the IAA for international arbitration and Section 27F of the CAA for domestic arbitration, information disclosed in arbitration proceedings may not be disclosed in subsequent proceedings. Information can be disclosed if it is necessary for enforcement.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

It is implicit in an arbitration agreement that an arbitrator shall have jurisdiction to exercise every right and discretionary remedy given to a court of law. However, common law rules concerning, amongst other things, the rule against penalties apply equally to arbitration.

However, it should be noted that the proportionate liability regimes in some States may not apply to arbitration.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Arbitrators have the power to award interest. Subject to the terms of any agreement or any law regulating a party's right to interest, the tribunal may award interest at a "reasonable rate" for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made (Section 25 of the IAA and Section 33E of the CAA) or thereafter from a date prescribed by the tribunal until the date of payment. The arbitral tribunal is also empowered to award interest (including compound interest) for the post-award period.

The right to interest is a matter for the tribunal's discretion. However, as a general rule, the rate of interest will, in the absence of an agreement to the contrary, be the maximum rate prescribed for Supreme Court judgment debts for each State or Territory. For example, in the Federal Court of Australia, the pre-judgment rate of interest is currently 4.1% and the post-judgment interest rate is 6.1% (effective from 1 July 2021 to 31 December 2021).

Where an arbitration award does not provide for post-judgment interest, courts enforcing the award will not allow interest. This is to reflect the award and not depart from it (*Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Unless the parties have otherwise agreed, arbitral tribunals may order that the costs of the reference, including fees and expenses of the arbitrator, shall be payable by a particular party. The general rule is that the successful party will receive its costs. Examples of where the general rule is displaced are where the successful party:

a) fails on particular issues, particularly issues that feature predominantly or involve significant time and costs;
b) unreasonably pursues points that have no merit; or
c) conducts itself in a manner that warrants it being deprived of its costs.

The tribunal may also have regard to "Calderbank offers".

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The tax laws in Australia are complex and an award may be subject to tax on a number of bases.

In relation to Goods and Services Tax ("**GST**"), an arbitration award may be taxable depending on whether the payment made under the award constitutes consideration for a "supply" and, if so, whether the supply is taxable, input-taxed or GST-free supply.

A supply can take many forms. It does not include damages arising from termination or breach of contract unless the damages relate to an earlier supply; for example, non-payment for the supply of goods and services.

A supply is taxable if it is connected with Australia and the person making the supply is registered or required to be registered. A supply is not connected with Australia if it is made by a non-resident.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Litigation funding is lawful in Australia and there is an active market. Litigation funding is available for arbitration.

Australian lawyers are prohibited from entering into contingency fee agreements under which fees are charged based on a percentage of the arbitration proceeds. This prohibition does not apply to litigation funders.

However, conditional costs agreements are permitted. Conditional costs agreements allow for payment of a premium or uplift fee calculated by reference to the legal fees (as opposed to the amount of the award).

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Australia has signed and ratified the ICSID Convention.

14.2 How many Bilateral Investment Treaties ("BITs") or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Australia is party to 16 BITs and 11 Free Trade Agreements ("**FTAs**"). Not all of these investment treaties include Investor-State Dispute Settlement ("**ISDS**") provisions, most notably the FTAs with Japan, Malaysia, New Zealand and the USA.

Australia is party to BITs with the following countries: China (11 July 1988); Papua New Guinea (20 October 1991); Poland (27 March 1992); Hungary (10 May 1992); Romania (22 April 1994); Czech Republic (29 June 1994); Laos (8 April 1995); Philippines (8 December 1995); Argentina (11 January 1997); Pakistan (14 October 1998); Lithuania (10 May 2002); Egypt (5 September 2002); Uruguay (12 December 2002); Sri Lanka (14 March 2007); and Turkey (29 June 2009).

Australia has ISDS provisions in the following FTAs: Singapore-Australia Free Trade Agreement (2003); Thailand-Australia Free Trade Agreement (2005); Australia-Chile Free Trade Agreement (2009); ASEAN-Australia-New Zealand Free Trade Agreement (2010); Korea-Australia Free Trade Agreement (2014); China-Australia Free Trade Agreement (2015); the Australia-Hong Kong Free Trade Agreement (2019); the Peru-Australia Free Trade Agreement (2020); and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**").

The Indonesia-Australia Comprehensive Economic Partnership Agreement also includes ISDS provisions.

The Energy Charter Treaty was signed by Australia in 1994, but never ratified. The Regional Comprehensive Economic Partnership Agreement ("**RCEP**") was signed by Australia on 15 November 2020, but is yet to be ratified. The Pacific Agreement on Closer Economic Relations ("**PACER Plus**") entered into force on 13 December 2020.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example, in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The language in Australia's BITs is broadly similar to that of BITs between many other States.

Existing BITs and FTAs include clauses entitling investors to treatment that is no less favourable than that accorded to investments of nationals from any third country ("most favoured nation" clauses); e.g., Article 9.4 of the China-Australia FTA (2015).

Australia has not yet applied the Model Investment Treaty provisions. However, many of the more modern FTAs apply wording similar to these provisions (such as the ISDS provisions in Chapter 9 of the Trans-Pacific Partnership ("**TPP**") Agreement).

There is no general requirement to exhaust local remedies.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Other than in exceptional circumstances, the common law defence of state immunity is not available to Australian State and Federal entities facing civil actions. Under the IAA, State and Federal entities are bound by arbitration awards and Australian courts readily uphold arbitration awards against such entities.

In respect of foreign States, the *Foreign States Immunities Act* 1985 (Cth) provides for limited state immunity. The actions of foreign States are generally immune from proceedings, unless it has submitted to the jurisdiction. However, the commercial activities of a foreign State are not immune from proceedings (Section 11 of the *Foreign States Immunities Act* 1985 (Cth)). In *Lahoud v The Democratic Republic of Congo* [2017] FCA 982, the court held that foreign state immunity was irrelevant in circumstances where the State had submitted to the jurisdiction of the ICSID tribunals.

In *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2021] FCAFC 3, the Federal Court of Australia Full Court distinguished between the "recognition" and "enforcement" of arbitral awards. The Court rejected Spain's state immunity argument on the basis that Spain submitted to Australia's jurisdiction for the purposes of recognition of awards by entering into the ICSID Convention. What was sought in the lower court was not the enforcement, but the recognition of awards.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the types of dispute commonly being referred to arbitration?

In March 2021, ACICA published the 2020 Australian Arbitration Survey. Some of the key findings from the survey include that:

a) there were 223 arbitrations reported between 2016 to 2019, with a total estimated dispute amount of over AUD 35 billion;
b) of the 223 arbitrations, 111 were international arbitrations and 109 were domestic arbitrations, with international arbitration accounting for around 75% of the estimated dispute value;
c) construction, engineering and infrastructure disputes accounted for almost half of the disputes both in number of disputes and value;
d) this was followed by disputes in the oil and gas industry, which accounted for around 20% in number of disputes, but approximately 34% in total value; and
e) over 50% of survey respondents reported that they were either "satisfied" or "very satisfied" overall with the arbitration process in matters they were involved.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Both of Australia's major arbitration institutions have recently issued new rules.

The *Resolution Institute Arbitration Rules 2020* apply to contracts that entered into force after 1 January 2020.

The *2021 ACICA Arbitration Rules* and *Expedited Arbitration Rules* also came into effect on 1 April 2021. Some of the key changes to the 2021 ACICA Rules deal with:

a) greater flexibility in multi-party and multi-contract arbitration;
b) disclosure of third-party funding;
c) early dismissal procedures;
d) enhanced oversight of arbitration costs;
e) effective case management, including time limits for rendering awards; and
f) use of technology including e-filing and virtual hearings.

15.3 What is the approach of the national courts in your jurisdiction towards the conduct of remote or virtual arbitration hearings as an effective substitute to in-person arbitration hearings? How (if at all) has that approach evolved since the onset of the COVID-19 pandemic?

Although there are no reported cases dealing with Australian courts' approach to virtual arbitration hearings, Australian courts have taken active measures to adopt virtual court hearings during the pandemic (see, for example, *Motorola Solutions, Inc. v Hytera Communications Corporation Ltd (Second Adjournment)* [2020] FCA 987). It is likely that Australian courts will also be supportive of virtual arbitration hearings.

Nick Longley advises his clients on matters relating to construction and construction insurance law with a focus on arbitration relating to major infrastructure, energy and renewables projects. He advises employers, main contractors, specialist subcontractors, construction professionals and insurers on all aspects of construction law. He also advises insurers and insureds on policy interpretation, claims and subrogated claims.

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