



# Arbitration

in 47 jurisdictions worldwide

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**GLOBAL ARBITRATION  
REVIEW**

THE INTERNATIONAL JOURNAL OF PUBLIC AND PRIVATE ARBITRATION

# Australia

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## Laws and Institutions

### 1 International multilateral conventions

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to arbitration is your country a party to?

Australia became a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on 24 June 1975. Australia's accession to the New York Convention is without reservations and is annexed to and given the force of law by the International Arbitration Act 1974 (IAA).

Australia is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) which is given the force of law by the IAA.

### 2 International bilateral agreements

Do bilateral agreements relating to arbitration exist with other countries?

Australia is a party to a number of bilateral investment treaties, with China (1988), Vietnam (1991), Papua New Guinea (1991), Poland (1992), Hungary (1992), Indonesia (1993), Hong Kong (1993), Romania (1994), the Czech Republic (1994), the Philippines (1995), Laos (1995), Argentina (1997), Peru (1997), Mexico (1997), Pakistan (1998), Chile (1999), India (2000), Egypt (2002), Lithuania (2002) and Uruguay (2003).

Australia is also a party to free trade agreements with New Zealand (1989), Singapore (2003), Thailand (2005), the United States (2005) and Chile (2008). Free trade agreements are under negotiation with ASEAN (together with New Zealand), China, Malaysia and under consideration with the Gulf Cooperation Council and Japan. With the exception of the Australia-US Free Trade Agreement, all other free trade agreements offer investor-state arbitration for the resolution of disputes.

Australia has signed the Energy Charter Treaty with a declaration under article 45(2) not accepting provisional application of the treaty and declarations concerning trade-related investment measures. The treaty has not yet been ratified.

### 3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

International arbitrations are governed by the IAA. Section 16 provides that the UNCITRAL Model Law has the force of law in Australia. Unless parties have excluded the Model Law by an agreement in writing, as permitted under section 21 of the IAA, the Model Law will apply to international arbitrations seated in Australia. If parties exclude the Model Law, the arbitration will still be governed by the IAA as the curial law. However, the arbitral procedural law will then be the law the parties have chosen, or in the absence of a choice, the Uniform Commercial Arbitration Act (CAA) of the state or territory in which the arbitration takes place will apply.

Domestic arbitrations are governed by the relevant CAA. The CAAs of the states and territories are largely uniform.

In relation to the sources of law for the recognition and enforcement of arbitral awards, as stated above, Australia is a signatory to the New York Convention. Section 8 of the IAA is based on article V of the New York Convention and provides that a foreign award may be enforced in the courts of a state or territory as if the award had been made in that state or territory in accordance with the laws of that state or territory. However, article 8 of the Model Law only extends to awards made in a Convention country outside Australia. Where the New York Convention does not apply, enforcement may be possible under article 35 of the Model Law. Where enforcement of awards is neither governed by the New York Convention (ie, foreign awards) nor the Model Law (eg, domestic awards), section 33 of the relevant CAAs will apply. Section 33 operates similarly to section 8 of the IAA.

Copies of the IAA and the various Commercial Arbitration Acts for the various states are located at [www.austlii.edu.au](http://www.austlii.edu.au).

### 4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The IAA enacts the Model Law as part of the law regarding international arbitrations. All other arbitrations are 'domestic arbitrations' and are governed by the CAAs in each state and territory.

The CAAs are significantly different from the Model Law. The most significant differences relate to the greater degree of judicial supervision and the possibility of limited appeals from awards under the CAAs.

**5 Mandatory provisions**

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

In relation to international arbitrations, article 18 of the Model Law stipulates that the arbitral tribunal must ensure that parties are treated equally and that each party is given a proper opportunity to present its case. Further, article 24(2) of the Model Law is also mandatory and requires an arbitral tribunal to give the parties proper notice of any hearing or meeting of the arbitral tribunal for the purposes of inspecting goods, properties or documents.

In relation to arbitrations regulated by the CCAs, section 14 provides that the arbitral tribunal may conduct proceedings in such manner as it thinks fit.

**6 Substantive law**

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Article 28(2) of the Model Law provides that in the absence of a designation of the law to be applied, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Section 22 of the CAA provides that the arbitral tribunal shall make decisions based on law. However, the section also goes further to say that where the parties agree in writing the arbitral tribunal is able to make decisions based on considerations of general justice and fairness. It is worth noting that in the event that parties agree to decisions being made according to these principals, the scope for appeal is diminished, given the deviation from set principles of law by the arbitral tribunal.

**7 Arbitral institutions**

What are the most prominent arbitral institutions in your country?

The following is a list of the most prominent professional institutions in Australia and contact details of the same.

**Australian Centre for International Commercial Arbitration**

Level 6/50 Park Street  
Sydney 2000  
Australia  
www.acica.org.au

The Australian Centre for International Commercial Arbitration (ACICA) maintains a panel of international arbitrators and a list of experienced arbitration practitioners, as well as providing information on international arbitration and maintaining involvement in education through the provision of various seminars. ACICA can appoint or recommend experienced arbitrators and charge administrative fees dependent on the sum in dispute. Fees for arbitrators are charged on an hourly rate and ACICA is able to hold security deposits for arbitrations prior to their commencement.

**Australian Chapter of the Chartered Institute of Arbitrators**

Level 6/50 Park Street  
Sydney 2000  
Australia  
www.arbitrators.org.au

The Australian Chapter of the Chartered Institute of Arbitrators (Australian Chapter (CIArb), provides both arbitration and mediation services.

**Institute of Arbitrators and Mediators**

Level 9, Phillip Street  
Sydney  
NSW 2000  
Australia  
www.iama.org.au

The Institute of Arbitrators and Mediators (IAMA) is an association providing accreditations and professional arbitration services, including introducing some of Australia's most eminent engineers, accountants, lawyers, building consultants, architects and other professionals to the practice of arbitration and mediation. Fees for arbitrators selected through IAMA will depend on whether the Institute has a protocol with another organisation to supply services, in which case the fee may be already set.

**Australian National Committee of the International Chamber of Commerce**

Level 3, 486 Albert Street East  
Melbourne  
Victoria 3002  
Australia  
www.iccaustralia.com.au

The Australian National Committee of the International Chamber of Commerce (ICC) is a government institute that promotes trade and investment and open markets for goods and services, as well as the free flow of capital. ICC fees will be charged on the usual basis.

**Arbitration agreement****8 Arbitrability**

Are there any types of disputes that are not arbitrable?

The question as to whether a dispute is arbitrable usually arises in the context of applications to stay court proceedings. Section 7(2)(b) of the IAA provides that the court must stay its proceeding if there is a valid arbitration agreement and the dispute 'involves the determination of a matter that, in pursuance of the arbitration agreement, is capable of settlement by arbitration'.

However there are exceptions, for example, the IAA is expressly subject to section 11 of the Carriage of Goods by Sea Act 1991 (Cth). This declares void an arbitration agreement in a bill of lading or similar document relating to the international carriage of goods to or from Australia, unless the arbitration agreement provides that the place of arbitration is in Australia. Further, section 8 of the Insurance Contracts Act 1984 (Cth) may affect the arbitrability of insurance-related disputes.

Australian courts generally follow the line of English authority in relation to the arbitrability of matters such as intellectual property rights, securities transactions, antitrust and competition laws, insolvency, illegality and fraud.

**9 Requirements**

What formal and other requirements exist for an arbitration agreement?

For international arbitrations, the Model Law and the New York Convention both contain form requirements for arbitration agreements that require that they be in writing. Article 7(2) of the Model Law specifically provides that arbitration agreements may be communicated in any form that provides a record of the agreement. In addition, the dispute must arise in respect of a defined legal relationship and concern a subject matter capable of settlement by arbitration.

For arbitrations conducted under of the CAAs, section 4(1) simply requires the arbitration agreement to be in writing.

#### 10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement will not be enforceable in circumstances where it is held to be invalid. An arbitration agreement might be invalid for reasons including misrepresentation in relation to the arbitration agreement or the dissolution of the relevant institution. It may also be invalid for lack of arbitrability or insolvency of the parties.

#### 11 Third parties

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The general rule is that an arbitration agreement cannot be extended to a non-signatory party. However, there are exceptions to this rule. An arbitration agreement may be assigned however there will be a further question as to the particular form, if any, which the assignment must take. Estoppel and agency are common law exceptions that may be raised by a party seeking to extend an arbitration to a non-signatory party. However, estoppel cannot rectify the requirement that an arbitration agreement be evidenced in writing. An agent, acting within his or her authority, can bind his or her principal by entering into a contract with an arbitration agreement. Similarly, an arbitration agreement can pass to the benefit of universal successors of companies.

#### 12 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Australian courts have been reluctant to recognise the group of companies doctrine. However, there is authority in Australian law to suggest that a non-signatory party can be bound to an arbitration agreement in circumstances where there was fraud or where the company structure used when entering into the arbitration agreement was a sham or facade, or incorporated for the purposes of masking the real purpose of the parent company: *Sharmant Pty Ltd v Official Trustee in Bankruptcy* and *Brewarrana Pty Ltd v Commissioner of Highways* (1988) 18 FCR 449; (1988) 82 ALR 530.

#### 13 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

A multiparty arbitration agreement is recognised under Australian arbitration law as long as it complies with the form requirements for arbitration agreements as set out above and that all parties are parties to the arbitration agreement.

Some arbitral rules contain provision for the specific procedure for the appointment of arbitrators in multiparty disputes, for example the arbitration rules of the Australian Centre for International Commercial Arbitration (ACICA) and, in the event of a multiparty dispute, the parties should ensure they adopt rules such as these.

In relation to domestic arbitrations, the CAAs do not provide for a specific procedure for the appointment of arbitrators in multiparty disputes. The CAAs do however contemplate consolidation of proceedings in section 26 and there is an optional provision of the IAA section 24 that also addresses consolidation of proceedings.

#### Constitution of arbitral tribunal

#### 14 Appointment of arbitrators

Are there any restrictions as to who may act as an arbitrator?

There are no restrictions as to the arbitrator's professional qualifications, nationality or residency. However, all arbitrators must be independent and impartial and the relevant tests are set out in article 12(2) of the Model Law and sections 44 and 45(1) of the CAA.

The procedure for the appointment of the arbitrator will largely be governed by the rules that the parties have agreed to adopt for the arbitration.

#### 15 Appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

For international arbitrations, the default procedure is set out in article 11(3) of the Model Law and provides that each party appoints an arbitrator and the arbitrators so appointed then appoint the third member of the tribunal. If a party fails to appoint an arbitrator, or the arbitrators cannot agree on the third arbitrator then the local Supreme Court may make the appointment.

For domestic arbitrations, the CAA (sections 6, 7 and 8) provide a default procedure which provides that in the absence of an agreed appointment process, the parties shall jointly agree on an arbitrator.

Additionally, the ACICA rules provide that if within 30 days after the receipt of a party's notification of the appointment of an arbitrator, the other party has not notified the first party of the arbitrator it has appointed, the first party may request ACICA to appoint the second arbitrator.

#### 16 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced?

Article 12(2) of the Model Law provides that an arbitrator may be challenged if circumstances exist that give justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed upon by the parties.

The procedure for challenging an arbitrator for international arbitrations is set out in article 13 of the Model Law. Article 13 provides for parties to agree on a procedure for challenging an arbitrator. Should such an agreement not be reached, the party wishing to challenge the arbitrator has 15 days after becoming aware of the constitution of the arbitral tribunal to submit a challenge in writing, outlining the reasons for the challenge. The arbitral tribunal will then decide whether the challenge is successful.

Challenging an arbitrator in a domestic arbitration is governed by the CAA. Section 44 enables the court, on application of a party to an arbitration agreement, to remove the arbitrator where it is satisfied that there has been misconduct on the part of the arbitrator, undue influence has been exercised in relation to the arbitrator or an arbitrator is incompetent or unsuitable to deal with the particular dispute.

**17 Relationship between parties and arbitrators**

What is the relationship between parties and arbitrators?

The relationship between the parties and the arbitrators is primarily based on contract. Under the terms of the contract the arbitrator agrees to settle the dispute between the parties in return for certain remuneration. Arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrator; however, an arbitrator will be liable for fraud in respect of anything done or omitted to be done in that respect (section 28 of the IAA and section 51 of the CAA).

**Jurisdiction****18 Court proceedings despite arbitration agreement**

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If litigation is commenced in an Australian court in the face of an international arbitration agreement, the counterparty to that arbitration agreement may apply for a stay of that litigation.

Section 7 of the IAA confers the relevant jurisdiction to grant the stay and the time for a party to raise this objection is before it makes its first submission to the court in relation to the substance of the dispute. See *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894.

Pursuant to section 53 of the CAA, if a party to an arbitration agreement commences proceedings in a court in respect of a matter agreed to be referred to arbitration by the agreement, a party may, apply to that court to stay the proceedings if the following conditions are satisfied:

- there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
- the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration.

An application to stay the proceedings may not be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance, unless leave is provided by the court to do so.

**19 Jurisdiction of arbitral tribunal**

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Article 16 of the Model Law incorporates the *Kompetenz-Kompetenz* principle, which provides that an arbitrator is empowered to rule on his or her own jurisdiction. A party has 30 days from an arbitral tribunal's ruling on its jurisdiction to request a court to make a determination on the issue, which will not be subject to appeal. If a party requests a court determination, the arbitral tribunal must suspend proceedings while the issue is being resolved by the court.

There is no such provision in the CCAs. However, if there is a dispute in relation to the existence of the contract, and therefore the arbitration agreement, the arbitral tribunal will usually suspend the proceedings until this is resolved by the court.

**Arbitral proceedings****20 Place and language of arbitration**

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

In relation to international arbitrations, article 20(1) of the Model Law provides that parties are free to agree on the seat of the arbitration and failing any such agreement, the seat will be decided by the arbitral tribunal or, where institutional rules are adopted, these rules may provide guidance for determining the seat of the arbitration.

Pursuant to article 22 of the Model Law, the default mechanism to determine the language of the arbitral proceedings is that the arbitral tribunal will decide.

For domestic arbitrations under the CAAs, there is authority to suggest that arbitrations are authorised to determine the seat of the arbitration on the basis that this is a procedural matter that is entrusted to them: *Re Whitwham Trustees* [1895] 39 Sol Jo 692.

**21 Commencement of arbitration**

How are arbitral proceedings initiated?

The procedure and necessary steps to initiate arbitral proceedings will usually be determined by the parties' agreement or the arbitral rules that the parties have agreed to adopt. Typically, proceedings are initiated by a notice of arbitration provided to the respondent or institution administering the proceedings (or provided to both), which can sometimes be supplemented by a statement of claim within an agreed time (article 23 of the Model Law).

**22 Hearing**

Is a hearing required and what rules apply?

Article 24 of the Model Law requires the arbitral tribunal to hold a hearing upon request by a party. With the exception of the principles of procedural fairness and natural justice, no rules apply as to how the hearing is to be conducted.

Section 14 of the CAA provides that the arbitral tribunal may conduct proceedings in such manner it deems fit.

Article 17 of the ACICA Rules is in similar terms to the Model Law in that it provides for the arbitral tribunal to conduct the arbitration in such manner as it considers appropriate and if either party requests, the arbitral tribunal shall hold hearings.

**23 Evidence**

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

In relation to international arbitrations under the Model Law, arbitrators are not bound by the local rules of evidence and may determine the admissibility, relevance, materiality and weight of the evidence (article 19(2)). In practice, a mixture of oral and written evidence is common.

Pursuant to the CAA, and in the absence of any agreement between the parties in this regard, arbitrators may inform themselves in such a manner as they think fit (section 19(3)). Section 19(1) provides for evidence to be given orally or in writing and shall, if required by the arbitrators, be given on oath or affirmation by affidavit.

Subject to any agreement between the parties, arbitral tribunals are permitted to appoint one or more expert witnesses to assist them (article 26 of the Model Law, section 19(3) of the CAAs). Typically an arbitrator would seek the consent of both parties before doing so and would provide any report of the expert to the parties for comment.

**24 Court involvement**

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Article 9 of the Model Law permits a party to request an interim measure from a court and for the court to grant such a measure. This would include orders for preservation of property. Under article 27 of the Model Law, the arbitral tribunal or a party with the approval of the arbitral tribunal, may request assistance from a competent court, or the production of documents or the attendance of witnesses. Such assistance will normally be provided. Australian courts have limited rights of intervention (article 5 of the Model Law). Australian courts are generally astute in ensuring that, where parties have agreed to submit their disputes to arbitration, they are held to their bargain.

**25 Confidentiality**

Is confidentiality ensured?

Under Australian law, arbitral proceedings and hearings are private in the sense that they are not open to the general public: *Eso v Plowman* [1995] 183 CLR 10. However, documents voluntarily produced by a party to arbitration proceedings are not automatically confidential. Parties may agree to keep such documents confidential; it is not, however, automatically implied that this will be the case.

Documents produced by a party under compulsion are, however, confidential, and may only be produced with the consent of the party to whom they belong or when a person is compelled by law to produce them.

**Interim measures****26 Interim measures by the courts**

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Article 9 of the Model Law does not exclude intervention by a court and provides that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for the court to grant such measure.

In general, the CAAs also permit intervention by the courts. Section 47 of the CAAs confers on the court the same power to make interlocutory orders for the purposes of, and in relation to, arbitration proceedings than it does for the proceedings in courts.

**27 Interim measures by the arbitral tribunal**

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Arbitral tribunals can award interim measures of protection both under the CAA and the Model Law.

Unless agreed otherwise, article 17 of the Model Law permits an arbitral tribunal to order any party to take such interim measure of protection as the arbitral tribunal considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with any such measure however any measures ordered by the arbitral tribunal must be in respect of the subject matter of the dispute.

Under Australian domestic law it appears that the arbitrator does not have power to order security for costs in the absence of a provision in the arbitration agreement. Section 37 of the CAA provides that the parties to an arbitration agreement shall at all times do all

things that the arbitral tribunal requires to enable a just award to be made. Arguably, this could extend to complying with an order for security. Under section 47 of the CAA, a court can make interlocutory orders. This has been held to extend to orders for security for costs. In addition, no party shall wilfully do or cause to be done any act to delay or prevent any award being made.

**Awards****28 Decisions by the arbitral tribunal**

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences if an arbitrator refuses to take part in a vote or sign the award?

Article 29 of the Model Law and section 15(b) of the CAA provide that any decision of the arbitral tribunal must be made by a majority of all its members. Therefore, if one arbitrator refuses to take part in a vote or sign the award, the other two could render the award. Section 12 of the CAA provides that where an arbitration agreement provides for the appointment of an even number of arbitrators, and they cannot determine a matter arising for determination the arbitrators may appoint an umpire who can decide. Section 15(c) of the CAA provides that if the arbitrators are equally divided in opinion, and one of the arbitrators has been appointed to preside (whether under this section or the agreement), the decision of the presiding arbitrator shall prevail.

**29 Form and content requirements**

What form and content requirements exist for an award? Does the award have to be rendered within a certain time limit?

The Model Law and the CAA do not prescribe a time limit for the making of an award. Article 31 of the Model Law provides that the award must be in writing, signed by the arbitrators and contain the date on which, and the place where, the award was made.

Section 29 of the CAA deals with the form of the award. Unless otherwise agreed in writing by the parties, the award must be in writing, signed and include a statement of reasons. There is no requirement that the award mentions the date and place it was made. Where an award is not made in writing, section 29(2) provides that the arbitrator shall, upon request by a party, within seven days after the award is made, give to the party a statement in writing signed by the arbitral tribunal containing the terms of the award and the reasons for making the award.

**30 Date of award**

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Article 33(2) of the Model Law permits a tribunal to correct a clerical or typographical error within 30 days of the date of the award. The date of delivery of the award is decisive if a correction or interpretation of the award is required. Article 33 of the Model Law provides that within 30 days of receipt of the award, unless otherwise agreed, a party may request the arbitral tribunal to correct any computation, clerical or typographical errors in the award. Such additional award is to be made within 60 days.

Further, article 34 of the Model Law provides that a party has three months from the date of delivery of the award to make an application to set the award aside.

**31 Types of awards**

What types of awards are possible and what types of relief may the arbitral tribunal grant?

An arbitral tribunal is entitled to make both interim and final awards; only final awards, however, can be enforced pursuant to the New York Convention. Under the Model Law, there does not appear to be an express power to make interim awards generally although article 17 confers power on the arbitral tribunal to order an interim measure of protection or the provision of security in connection with such a measure.

The types of relief that an arbitral tribunal may award include damages, declarations and orders for specific performance.

**32 Termination of proceedings**

By what other means than an award can proceedings be terminated?

Article 32 of the Model Law provides that an arbitral tribunal may issue an order for the termination of the proceedings where the claimant withdraws its claim, unless the respondent objects and the arbitral tribunal recognises a legitimate interest in obtaining a final settlement of the dispute, and it finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. Arbitral proceedings may also be terminated by agreement of the parties at any stage.

**33 Cost allocation and recovery**

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Unless there is a contrary agreement between the parties, the ability to award costs in an arbitration (including the fees and expenses of the arbitral tribunal) will be within the discretion of the arbitral tribunal (section 27(1) of the IAA – optional). Generally, the successful party will recover a substantial proportion, if not all, of its costs, including the arbitrators' fees.

**34 Interest**

May interest be awarded for principal claims and for costs and at what rate?

The Model law is silent as to the ability to award interest. While it is an optional provision, section 25 of the IAA permits the arbitrator to make an award of interest on the whole or any part of the claim at reasonable rates that the arbitral tribunal decides. In the event that the arbitral tribunal makes an award for the payment of money, it may order a party to pay interest on any unpaid portion from the date of the award (section 26, IAA (optional)).

Pursuant to section 31 of the CAA, unless a contrary intention is expressed in the arbitration agreement, where the arbitral tribunal or umpire determines to make an award for the payment of money, the arbitral tribunal or umpire can include in the sum for which the award is made, interest at a rate set by the arbitral tribunal or umpire (being a rate not exceeding the rate at which interest is payable on a judgment debt of the Supreme Court) on the whole or any part of the money 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 was made.

**Proceedings subsequent to issuance of award****35 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Yes. See question 30.

**36 Challenge of awards**

How and on what grounds can awards be challenged and set aside?

The Model Law provides that an application to set aside the award is the exclusive recourse against an award. Article 34 of the Model Law enables an arbitral award to be set aside where the party furnishes proof of incapacity of one of the parties, invalidity of the agreement, lack of notice of inability to present a case, award outside the submission, improper composition of the arbitral tribunal or arbitral procedure, the subject matter not being arbitral under the law of the state, or the award is in conflict of the public policy of the state. These grounds mirror the grounds under the New York Convention.

The CAA provides in section 38(2) that an appeal lies from an arbitrator's decision to the Supreme Court on any question of law arising out of an award. This is qualified by section 38(4), which states that an appeal on a question of law may only be brought with the consent of all parties to the arbitration agreement, or with the leave of the Supreme Court.

Leave of the court is granted only if the court considers that the determination of the question of law could substantially affect the rights of one or more of the parties and there is a manifest error of law on the face of the award, or strong evidence that the arbitral tribunal made an error of law (and the determination of the question may add, or may be likely to add, substantially to the commercial law), section 38(5) of the CAA. Leave is not to be granted if the parties have entered into an exclusion agreement (section 40 of the CAA).

**37** How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The Model Law does not contain any provision for appeals from arbitral awards. The only recourse available is an application to set aside the award. If such an application is made it would be heard by a single judge in either the Supreme or Federal Court where a limited right of appeal lies to a Court of Appeal or Full Court respectively. There is then the possibility of leave being given to appeal to the High Court. Parties could expect each level of appeal to take at least six months. Costs are generally awarded to the successful party and the level of costs will depend on the nature and complexity of the case.

**38 Recognition and enforcement**

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An arbitral award is enforced by leave of the court in the same manner as a judgment pursuant to section 8(2) of the IAA. Section 8 provides for the recognition and enforcement of 'foreign awards'. However, this only extends to awards made in a Convention country outside Australia. Where the New York Convention does not apply, a party may enforce an award pursuant to article 35 of the Model Law.

Section 33 of the CAAs also provides for the recognition and enforcement of awards and operates similarly to section 8 of the IAA.

**Update and trends**

Amendments to the IAA and the CAAs are currently being considered to bring the arbitration legislation in line with current trends.

The objects of the review are to consider whether the Act should be amended to:

- ensure it provides a comprehensive and clear framework governing international arbitration in Australia;
- improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration; and
- consider whether to adopt 'best practice' developments in national arbitral law from overseas.

A court may refuse recognition and enforcement if a party is able to prove that the grounds under the New York Convention apply (incapacity of one of the parties; the arbitration agreement is not valid under the applicable law; that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was unable to present his or her case in the arbitration proceedings; the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made) (section 8(5) of the IAA).

The procedure for enforcement is set out in section 9 of the IAA and requires production of the original award and arbitration agreement or certified copies.

**39** What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

This issue has not arisen before Australian courts however section 8(5)(f) of the IAA provides that a court may refuse to enforce an award in these circumstances. The court may also adjourn the proceedings or so much of the proceedings that relate to the award and order the party seeking to resist enforcement to provide suitable security (Section 8(8)).

**40 Cost of enforcement**

What costs are incurred in enforcing awards?

The costs incurred in enforcing an award include the lawyers' fees for time spent preparing the appropriate documentation required under the court rules, including an affidavit and a draft order giving permission to enforce the award. In addition there will be court filing fees and possibly other charges of commercial agents in identifying assets that can be seized in the jurisdiction or abroad.

**Other**

**41 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

As Australia is a common law country, arbitral tribunals are more likely to adopt an adversarial rather than an inquisitorial approach to arbitral proceedings. The use of written statements and categories of discovery is common. Party officers can give evidence.

**42 Regulation of activities**

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Australia, and in particular Sydney, is increasingly seen as an attractive venue for arbitration. This is due to the availability of experienced and relatively inexpensive counsel and arbitrators. There are no important restrictions on foreign practitioners, including foreign arbitrators, although foreign practitioners are not permitted to give advice on local law.

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