

Enforcement of Arbitral Awards where the Seat of the Arbitration is Australia

How the Eisenwerk Decision Might Still be a Sleeping Assassin

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This article examines the enforcement of foreign awards in Australia. It identifies and explains the difference between a “foreign award” and “international arbitration award,” observing it is a somewhat surprising but potentially significant distinction. The article then moves to consider the consequences of the distinction with particular reference to the Australian arbitral landscape. Australia has dual arbitration regimes operating at the state and federal level. Particular attention is given to the still controversial Queensland Supreme Court of Appeal decision in Australian Granites Ltd. v. Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH. The article concludes by promoting a line of interpretation that will effectively allow subsequent courts to avoid the potentially disastrous effects the Eisenwerk decision may yet still wreak.

I. INTRODUCTION

Over recent years there has been an increasing awareness in Australia of arbitration as the preferred method of dispute resolution in international transactions and a growing push to promote Sydney as an arbitral venue. In light of the growing number of arbitration clauses being included in international contracts naming Sydney (or other Australian cities) as the seat for the arbitration of any disputes that do arise, it is important that we consider how an award handed down in such an arbitration is to be enforced in Australia.

Part II of this article examines the enforcement of foreign awards in Australia. It identifies and explains the difference between a “foreign award” and “international arbitration award.” It is a somewhat surprising but potentially significant distinction.

In Part III we then move our consideration to the consequences of the distinction with particular reference to the Australian arbitral landscape. Australia has dual arbitration regimes operating at the state and federal level. It is here that the Queensland Supreme Court of Appeal decision in *Australian Granites Ltd. v. Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH*¹ could deliver another poison pill to international arbitration in Australia.

The article concludes by promoting a line of interpretation that will effectively allow subsequent courts to avoid the potentially disastrous effects of the *Eisenwerk* decision.

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¹ [2001] 1 Qd R. 461.

II. ENFORCEMENT OF FOREIGN AWARDS IN AUSTRALIA

Enforcement of foreign awards is clearly dealt with by Part II of the International Arbitration Act 1974 (Cth) (IAA). However, an award handed down in Australia does not fall within the definition of “*foreign award*” for the purposes of Part II of the IAA. A foreign award is defined in section 3 of the IAA as:

an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.

A. ENFORCEMENT OF “INTERNATIONAL” DOMESTIC AWARDS

Thus, if we have an arbitration in Sydney involving a Singaporean entity and an Australian entity, how does the Singaporean entity enforce any award handed down against the Australian entity, in Australia, given that the award is not a foreign award for the purposes of section 8 of the IAA?

The answer appears to be, Chapter VIII of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”). The Model Law is given force of law in Australia by section 16 of the IAA. Under Article 1(3) of the Model Law, an arbitration is “international” if:

- (a) the parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; or
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Whilst every foreign award (as defined in the IAA) would constitute an international arbitration award (for the purposes of the Model Law), not every international arbitration award will be foreign. It follows therefore that an arbitration held in Australia can be an “international” arbitration for the purposes of the Model Law, even though any award handed down in that arbitration is not a foreign award for the purposes of the IAA.

Section 20 of the IAA states that where, but for that section, both Chapter VIII of the Model Law and Part II of the IAA would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award. Simply stated, Part II of the IAA is the controlling legislation. However, as an award handed down in Australia does not fall within the definition of “foreign award” for the purposes of Part II of the IAA,

there is a very strong argument that section 20 of the IAA is therefore not enlivened and Chapter VIII of the Model law remains operative in relation to the award.

This is supported by the inclusion of section 19 in the IAA, which provides that, for the avoidance of doubt, if an award is to be enforced under the Model Law, the award is in conflict with the public policy of Australia if the making of the award was induced by fraud or corruption or a breach of natural justice occurred in connection with the making of the award. Whilst section 19 would appear somewhat redundant, given that one would expect both of these categories to fall within the public policy exception, the inclusion of this section in the IAA, expressly contemplating enforcement under the Model Law, supports the argument that international arbitral awards that fall outside of the bounds of Part II of the IAA are to be dealt with under Chapter VIII of the Model Law. If it were not so, section 19 would have no purpose—a position not possible under Australian law courtesy of the presumption against surplusage.²

B. NEW YORK CONVENTION

Allowing for enforcement of international arbitration awards which are not foreign is also consistent with Article I of the New York Convention, which states that, in addition to the Convention applying to the recognition and enforcement of awards made in another Convention country (that is, a foreign award), the Convention “shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

In the example set out above, the arbitration is clearly an international arbitration for the purposes of the Model Law, as the Singaporean entity has its place of business in a different country to the Australian entity. Given that the Model Law has force of law in Australia, in these circumstances it is difficult to see why the arbitral award should be considered a domestic award. The definition of “domestic arbitration agreement” in the uniform Commercial Arbitration Acts further suggests that such an award should not be considered as domestic. This is elaborated upon below.

C. THE U.S. APPROACH

This result is consistent with the outcome in the U.S. decision of *Bergesen v. Joseph Muller*.³ There an award handed down in New York pursuant to a dispute between two foreign parties was held to be non-domestic under the New York Convention.

Bergesen, a Norwegian corporation, and Joseph Muller Corporation, a Swiss corporation, participated in an arbitration in New York. When Bergesen attempted to

² As was said in *Project Blue Sky Inc. v. Australian Broadcasting Authority*, “the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Seldom will a construction that gives a provision no useful work to do achieve that end.” See *Plaintiff S157/2002 v. Commonwealth* (2003) 211 C.L.R. 476, 510; see also D.C. PEARCE & R.S. GEDDES, *STATUTORY INTERPRETATION IN AUSTRALIA* 35 (4th ed. 1996) (citing a long list of authorities).

³ 710 F.2d 928 (2d Cir. 1983).

enforce the award, handed down in New York, in the United States, Muller contended that the New York Convention did not extend to the enforcement of an arbitration award made in the United States because it was neither a “foreign” award nor an award “not considered as domestic” within the meaning of the Convention. The Court of Appeal for the Second Circuit observed:

We adopt the view that awards “not considered as domestic” denotes awards which are subject to the Convention not because [they were] made abroad, but because [they were] made within the legal framework of another country, e.g., produced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. We prefer this broader construction because it is more in line with the intended purposes of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards. Applying that purpose to this case involving two foreign entitled leads to the conclusion that this award is not domestic.⁴

D. DIFFERENT TESTS

Interestingly, there are slightly different criteria for enforcing an award under the Model Law and Part II of the IAA. As a result, there may be greater certainty when enforcing an international award handed down in Australia, as opposed to a foreign award (if one ignores any doubts created by the *Eisenwerk* decision, which will be discussed further below).

The criteria for enforcement of a foreign award, as laid down in section 8 of the IAA is as follows:

- (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.
- (2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory.

...

- (5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
 - (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him, under some incapacity at the time when the agreement was made;
 - (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

⁴ Bergsen, 710 F.2d at 932.

- (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;
 - (d) 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;
 - (e) 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
 - (f) the award has not yet become binding on the parties to the arbitration agreement 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.
- (6) Where an award to which paragraph (5)(d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.
- (7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:
- (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
 - (b) to enforce the award would be contrary to public policy.

The test laid down for enforcement of an international award in Article 35 of the Model Law is as follows:

- (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

The test laid down for refusing to enforce an international award in Article 36 of the Model Law is as follows:

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
 - (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (iv) the composition of the arbitral tribunal 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
 - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

As a result of slight textual differences, it is arguable that a court in Australia has a discretion as to whether to enforce a foreign award, given the adoption of the word “may” in section 8 of the IAA, rather than the “shall” that appears in the New York Convention and that has been adopted in Article 35(1) of the Model Law.

This is further supported by the exclusion of the word “only” in section 8(5) of the IAA, which appears in the New York Convention, making it clear that the reasons that follow for refusing to enforce an award constitute an exclusive list of reasons for refusing to enforce. Article 36 of the Model Law once again reflects the New York Convention position and also incorporates the equivalent of section 8(7) of the IAA within the exclusive list of reasons for refusing to enforce an award.

As such, if an international award is to be enforced pursuant to the Model Law rather than Part II of the IAA, it is arguable that such an award is not subject to the general discretion which may apply to foreign awards. This point was discussed by Lee J. in *Resort Condominiums Int’l Inc. v. Bolwell and another*⁵ and referred to (without expressing a concluded view on the existence of a general discretion) by McDougall J. in *Corvetina Technology Ltd. v. Clough Engineering Ltd.*⁶

⁵ *Resort Condominiums Int’l Inc. v. Bolwell & another* (1993) 118 A.L.R. 655.

⁶ [2004] N.S.W.S.C. 700.

III. CONSEQUENCES OF DISTINCTION

A. OPTING OUT OF THE MODEL LAW: COMMERCIAL ARBITRATION ACTS

Section 21 of the IAA allows parties to agree that their disputes are to be settled “otherwise than in accordance with the Model Law.” Given that an award cannot be enforced pursuant to section 8 of the IAA, where the seat of the arbitration is Australia, what happens if the parties to such an arbitration have opted out of the Model Law?

If an award falls outside of both the IAA and the Model Law, then it would have to be enforced pursuant to section 33 of the Commercial Arbitration Act (“CAA”) of the relevant state or territory. However, absent the framework provided by section 8 of the IAA or Article 35 of the Model Law, it is arguable that the bases for refusing to enforce a domestic arbitral award under the CAA would also apply to an international arbitral award handed down in Australia.

Under section 38 of the CAAs, judicial review on questions of law arising out of an award is available if the parties consent to the review or by leave of the court. Leave will only be granted where 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) a manifest error of law on the face of the award; or
- (b) strong evidence that the tribunal made an error of law and that determination of the question may add, or may be likely to add, substantially to the commercial law.

However, such leave is subject to any exclusion agreement under section 40 of the CAA, which states:

40 Exclusion agreements affecting rights under sections 38 and 39

- (1) Subject to this section and section 41:
 - (a) the Supreme Court shall not, under section 38(4)(b), grant leave to appeal with respect to a question of law arising out of an award, and
 - (b) no application may be made under section 39(1)(a) with respect to a question of law,

if there is in force an agreement in writing (in this section and section 41 referred to as an exclusion agreement) between the parties to the arbitration agreement which excludes the right of appeal under section 38(2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.

- (2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular arbitration agreement or to any other description of awards, whether arising out of the same arbitration agreement or not.
- (3) An agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the commencement of this Act and whether or not it forms part of an arbitration agreement.

- (4) Except as provided by subsection (1), sections 38 and 39 shall have effect notwithstanding anything in any agreement purporting:
 - (a) to prohibit or restrict access to the Supreme Court, or
 - (b) to restrict the jurisdiction of the Supreme Court.
- (5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration being an arbitration under any other Act.
- (6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case required, in which the question of law arises.
- (7) In this section, domestic arbitration agreement means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither:
 - (a) an individual who is a national of, or habitually resident in, any country other than Australia, nor
 - (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia,is a party at the time the arbitration agreement is entered into.

The negative language in section 40(7) can be confusing. To clarify, any arbitration involving a foreign party cannot be a domestic arbitration agreement. Thus, the example used at the beginning of this article would not be a domestic arbitration agreement because of the Singaporean party, meaning a pre-existing exclusion clause in the arbitral rules could be operative.

The most significant Australian authority on exclusion agreements appears to be *Raguz v. Sullivan*.⁷ It is apparent from the discussion of exclusion agreements, and relevant authorities, in Spigelman C.J. and Mason P.'s joint judgment, that an exclusion agreement may be incorporated by reference to arbitral rules; but it must be more than a mere agreement that an award will be "final and binding." This is logical given that section 28 of the CAAs provides that an award will be final and binding in any event. In *Raguz v. Sullivan*, it was held that the agreement that neither party to the arbitration would "*institute or maintain proceedings in any court*" encompassed an appeal to the NSW Supreme Court under section 38(2) and was therefore an exclusion agreement for the purposes of section 40.⁸

As is noted above, section 38 of the CAAs only permits judicial review if the parties consent to the review or by leave of the court.

⁷ (2000) 50 N.S.W.L.R. 236.

⁸ *Id.* at 253–54.

B. DANGER OF *EISENWERK*

The possibility of obtaining leave under section 38 of the CAAs compared to the general position in international arbitration where there is no right to review and revise the merits of an award is an issue that must be considered where parties agree to arbitrate in Australia and intend to opt out of the Model Law (and thus recourse to section 8 of the IAA is unavailable). Furthermore, the Queensland Supreme Court decision in *Australian Granites Ltd. v. Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* highlights a real danger that parties may be construed to have opted out of the Model Law by adopting certain arbitral rules, thereby exposing their awards to the possibility of review under section 38 of the CAAs. In that case, it was held that the parties had opted out of the Model Law by adopting the ICC Rules. In *Eisenwerk*, Pincus J.A. stated that:

It would have made little sense to agree to subject disputes to arbitration under both the Model Law and the ICC Rules, since the two are irreconcilable in a number of respects. For example, the provisions concerning the number and identity of the arbitrators are quite different: see as to the Model Law, Article 10 and s18 of the Act, and as to ICC arbitration, Articles 1 and 8 of the 1988 Rules.⁹

The rationale adopted by the court in *Eisenwerk* was then followed in two Singaporean cases, *John Holland Ltd v. Toyo Engineering Ltd*¹⁰ and *Dermajaya Properties Sdn Bhd v. Premium Properties Sdn Bhd*.¹¹ The Singaporean government moved quickly to statutorily overcome the effect of these decisions, however, there has been no such Australian action. Consequently, *Eisenwerk* is still there to be followed.

Assuming that *Eisenwerk* was followed, it would be necessary to consider the arbitral rules chosen by the parties to determine whether, to the extent the Model Law may be said to have been excluded, an exclusionary agreement could be found.

The most likely set of rules to be used in the context of an arbitration with an Australian city as seat are the Australian Centre for International Commercial Arbitration (ACICA) Rules. The problem will not arise where the ACICA Rules have been used, as although Article 33.2 merely states that the award is final and binding, Article 2.3 specifically states “[by] selecting these Rules the parties do not intend to exclude the operation of the UNCITRAL Model Law on International Commercial Arbitration,” an article drafted with the *Eisenwerk* decision in mind.

However, the same cannot be said of other popular international arbitral rules and an analysis is enlightening:

Article 31(2) of the UNCITRAL Rules; Article 32(2) of the Swiss Rules; Hong Kong International Arbitration Centre (HKIAC) arbitrations and Kuala Lumpur Regional Centre for Arbitration (KLRCA) arbitrations:

The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

⁹ *Supra* note 1, para. 10.

¹⁰ [2001] 2 S.L.R. 262.

¹¹ [2002] S.L.R. 164.

Article 27.8 of the Singapore International Arbitration Centre (SIAC) Rules:

By agreeing to have an arbitration under these Rules, the parties undertake to carry out the award without delay. Awards shall be final and binding on the parties from the date they are made.

HKIAC and KLRCA administered arbitrations have been included here as both centres promote the use of the UNICTRAL Arbitration Rules. The Swiss Rules are based on the UNCITRAL Rules and do not depart from them in this respect. It would seem very likely, applying the reasoning in *Raguz v. Sullivan*, that neither the UNCITRAL rule nor the SIAC rule would amount to an exclusionary agreement, thus potentially opening an award to significantly greater challenge than the parties may have intended.

Article 28(6) of the ICC Rules:

Every Award shall be binding upon the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

Article 26.9 of the LCIA Rules:

All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.

Both the ICC Rules and the LCIA Rules go beyond a mere reference to “final and binding” and are likely to be considered exclusionary agreements for the purposes of sections 38 and 39 CAA. Of these, the LCIA rule is the most explicit.

C. WHY *EISENWERK* SHOULD NOT BE FOLLOWED

With respect, we would submit that the proposition outlined by Pincus J.A. in *Eisenwerk* is incorrect and that the Model Law and ICC Rules (as an example) are certainly reconcilable. However, beyond this we suggest that there is a better interpretation that can be placed on section 21 of the IAA, such that it would not give rise to this issue. The reasoning adopted in *Eisenwerk* tends to suggest the view that section 21 is an “all or nothing” opt out provision, that is, either the parties agree to Model Law arbitration or they abandon it in its entirety. In our submission the better view is that section 21 permits the parties to opt out of any degree of the Model Law arbitration as they see fit. The Model Law acts as the default in the absence of clear party intent to the contrary. Thus, a decision to use a set of arbitral rules is only a decision to opt out of the Model Law to the extent that the rules are inconsistent.

The basis for this submission is twofold. First, the Model Law contains many provisions which are procedural in nature and beyond the ambit of most (if not all) current sets of international arbitration rules. In short, it has a very different and additional function that cannot be provided by party-chosen arbitral rules. Of crucial importance here is the

distinction between procedural rules and procedural law (otherwise known as the *lex arbitrii*). Secondly, although not clearly identified within the text of the Model Law itself, the Model Law does contain mandatory provisions. It is only when parties choose rules contrary to a mandatory provision that they should be understood as intending to exclude the Model Law in its entirety. Both of these points warrant further explanation.

The procedural provisions of the Model Law, as with the procedural provisions of the arbitration legislation of all countries, simply provide a framework for the conduct of an arbitration and are drafted in a permissive manner, that is, they provide a specified position on certain procedural issues should the parties fail to agree otherwise. Article 2 of the Model Law makes it quite clear that the parties to an arbitration agreement can authorize a third party, such as ACICA or the LCIA, to determine the issue and that if the parties agree to conduct their arbitration in accordance with a particular set of arbitration rules, such as the UNCITRAL Rules, then the position adopted on the procedural issues in such rules will constitute the parties agreement on such matters.

Article 2 of the Model Law states:

For the purposes of this Law:

...

- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

The Model Law, however, also deals with matters that parties have no legal authority to simply agree upon. These are in essence matters of law, the authority for which is traditionally accepted to be a grant of sovereign power. For example, just because two parties might nominate a particular domestic court to determine their dispute, this will not, in and of itself, mean that that court has the necessary power. The parties are merely *selecting* a court, they are not providing it with a grant of jurisdiction—only a parliament exercising a sovereign power can do that. This is an important difference to the situation of an arbitral tribunal, which does derive its power from the will of the parties.

A good example of this point can be found in Article 12(1) of the Model Law. This article places an obligation on the arbitrator and not on either of the parties to the arbitration agreement as such. It is therefore not something the parties could contract out of in the first place.

The second basis for the proposed interpretation of section 21 IAA is that the Model Law contains mandatory provisions. Despite early proposals to do so, the Model Law does not contain a list of mandatory provisions.¹² However, “the prevailing view, adopted

¹² See the Report of the Working Group on its seventh session, para. 176, U.N. Doc. A/CN.9/246 (March 6, 1984), where it is noted that the Working Group agreed that an article listing mandatory provisions should not be included, despite its appearance in earlier drafts.

by the UNCITRAL Working Group, was that it was desirable to express the non-mandatory character in all provisions of the final text which were intended to be non-mandatory.”¹³ By implication, therefore, one could assume that unless an article of the Model Law contains the phrase “unless agreed otherwise by the parties” or something similar then the article will be mandatory. This would be a dangerous assumption and making a determination on that basis alone would be unwise.

The issue is certainly a difficult one, as can be evidenced by the significant deliberations of the UNCITRAL Working Group on this topic alone. In our view the best test of whether a provision is mandatory or not is to ask: “If this provision is altered will it in some way affect a fundamental and innate quality of arbitration?”

A benefit of the proposed test is that it allows for degrees of autonomy or varying flexibility within the actual articles of the Model Law. It may be possible to vary some otherwise mandatory articles in such a way as to preserve the fundamental or innate nature of arbitration. An example of this can be found in Article 11(4) and is indeed contemplated by that article. The feature of the article that is mandatory is the need for a process to prevent one party stalling or frustrating the arbitration. The article provides for recourse to the courts if necessary but also notes that the parties may have determined an alternative procedure that achieves the same result.

On the basis of the proposed test and in the Australian context it is suggested the following Model Law provisions are mandatory.

1. *Article 8(1)*

Article 8(1) of the Model Law imposes a mandatory stay of court proceedings where there is a valid arbitration agreement. Applying the test proposed above, an innate aspect of arbitration is that it is intended to be a final and binding solution. Parties should not be permitted to renege on their initial intentions. It is, of course, possible that both parties decide the matter is best dealt with by the courts and pursue their dispute in that forum. This prospect does not affect the mandatory nature of Article 8. In that situation the arbitration agreement will have been abandoned and is therefore no longer operative, a possibility contemplated by Article 8 itself.

2. *Article 11(4) and (5)*

As noted above, Article 11(4) is a mandatory article in so far as the purpose is to ensure the arbitration proceeds, and cannot be frustrated by a now unwilling participant. Article 11(5) contains the mandatory requirement that arbitrators be impartial and independent. These can be seen to be fundamental to the prospect of the parties receiving equal treatment and a fair hearing, both essential characteristics of an arbitration.

¹³ *Id.* para. 177.

3. *Article 18*

Article 18 can be described as a true cornerstone of arbitration: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting [its] case.”¹⁴

4. *Article 24(4)*

This article is simply an extension of the principle outlined in Article 18. Without due notice a party will not be in a position to properly present its case.

5. *Article 27*

Article 27 allows a tribunal recourse to the assistance of a local court for the purpose of taking evidence. This article is considered mandatory under the test suggested above, as the taking of evidence is a fundamental feature of arbitration. The tribunal itself will not have the infrastructure for enforcing compliance with evidentiary orders, and so must be entitled to rely on the domestic courts.

None of the popular international sets of arbitral rules analysed above¹⁵ (or others that these authors are aware of) fall foul of any of these provisions. Accordingly, in the absence of other evidence a choice by parties to an arbitration agreement to utilize any of these rules should not be seen as a decision to depart from the Model Law in its entirety.

IV. CONCLUSION

This article has sought to identify and explain a potential issue in arbitration in Australia. It is not a fatal issue and it is hoped that with awareness will come avoidance of any uncertainty. By this we do not mean that parties should avoid arbitrating in Australia, to the contrary we are both strongly of the view that Australian cities are wonderful seats of arbitration. However, it is prudent that parties ensure that they do not unintentionally opt out of the Model Law in full (a potential outcome until *Eisenwerk* is revisited and overturned) and that they further ensure they have entered an exclusionary agreement for the purposes of the CAAs, if they do opt out of the Model Law.

There is good reason to believe that issues such as this one are being addressed and resolved at a law making level. Although not specifically on point, cases like *Administration of Norfolk Island v. SMEC Australia Pty Ltd.*,¹⁶ and *Abigroup Contractors Pty Ltd. v. Transfield Pty Ltd. & Obayashi Corp.*,¹⁷ have all demonstrated a judicial willingness to interpret a

¹⁴ Model Law, art. 18.

¹⁵ The rules analysed were the ACICA Rules, the UNCITRAL Rules, the Swiss Rules, the SIAC Rules, the ICC Rules, and the LCIA Rules.

¹⁶ [2004] N.E.S.C. 1.

¹⁷ Supreme Court of Victoria, October 16, 1998, unreported.

reference to state law as not being an opt out decision pursuant to section 21 of the IAA. In our submission, the issue of a conflicting law would be a far greater one than a not otherwise inconsistent rule.

Futhermore, considerable encouragement for international arbitration in Australia generally can be drawn from statements such as those made by Allsop J. in the very recent Full Federal Court decision of *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd.*:¹⁸

However, to the extent that *The "Kiukiang Career"*, ... can be seen to be authority, albeit obiter, for the proposition that the phrase "arising out of" cannot include a claim based on pre-contract representations and that the phrase should not be analysed (subject to any particular factual aspect of the case) ... then I am persuaded that it is wrong and inconsistent with the approach of modern authority to which I have referred. *Because of the importance of the issue to commerce in this country, my view is that I should not merely expose my disagreement, but should take the step so far as it is up to me to bring the views of this Court into conformity with the Court of Appeal of New South Wales and other decisions of courts in Australia and elsewhere concerning the approach to the construction of arbitration clauses.* So, to the extent that the reasoning in *The "Kuikiang Career"* is inconsistent with that set out above, I am persuaded that it is wrong and should be departed from.¹⁹

¹⁸ [2006] F.C.A.F.C. 192 (December 20, 2006).

¹⁹ *Id.* para. 184 (emphasis added).