

GUIDE TO ARBITRATION PLACES (GAP)

AUSTRALIA

CHAPTER PREPARED BY

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Australia has been an arbitration-friendly jurisdiction for over 100 years — before the Commonwealth of Australia was established and while the Australian States were still colonies of the United Kingdom.¹ Australian courts have seen the value of arbitration as a consensual, alternative dispute resolution mechanism for generations, and support it.

Traditionally, arbitration was commonly used as a method of dispute resolution in the construction and infrastructure sectors. Now, however, many commercial parties choose arbitration to resolve domestic and international disputes in a broad range of sectors, including the fields of energy, commodities, trade, investment and general corporate and commercial transactions. Indeed, arbitration is increasingly even being employed in non-conventional areas, including family law and regulatory disputes.

Strong and steady growth of the Australian economy over the past two decades, along with the opening of Asian markets, has accelerated the trend towards the use of arbitration, particularly to resolve international disputes. This also means that many Australian lawyers have experience in (or, indeed, specialise in) arbitration matters.

Australia continues to develop as an attractive hub for international arbitration. Its robust legislative framework together with the strongly supportive approach of Australia courts to the enforcement of arbitral awards and agreements make it an ideal choice of seat for commercial parties.

Key places of arbitration in the jurisdiction?	Sydney, Perth, Melbourne.
Civil law/common law environment? (if mixed or other, specify)	Common law.
Confidentiality of arbitrations?	Though Australian law does not recognise inherent confidentiality in arbitration, legislation provides that commercial arbitrations are confidential (unless the parties agree otherwise).
Requirement to retain (local) counsel?	Parties can either retain external counsel or be self-represented.
Ability to present party employee witness testimony?	Yes; there is nothing in Australian law that prohibits this.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	Yes; permitted if agreed by the parties.
Availability of interest as a remedy?	Yes; there are no restrictions prescribed in respect of the awarding of interest.
Ability to claim for reasonable costs incurred for the arbitration?	Yes; costs are for the arbitral tribunal to decide.

¹ See *Arbitration Act 1892* (NSW).

Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangements and some alternative fee arrangements are prohibited. Third-party funding is permissible.
Party to the New York Convention?	Yes.
Party to the ICSID Convention?	Yes.
Compatibility with the Delos Rules?	Yes.
Default time-limitation period for civil actions (including contractual)?	Generally 6 years.
Other key points to note?	ϕ
World Bank, Enforcing Contracts: Doing Business score for 2020?	79.0
World Justice Project, Rule of Law Index: Civil Justice score for 2024?	0.74

ARBITRATION PRACTITIONER SUMMARY

The legal regime applicable to commercial arbitrations reflects Australia's federal structure (in which the federal Parliament has only defined powers). International commercial arbitrations are the subject of federal legislation, the *International Arbitration Act 1974* (Cth) (as amended) (the ***International Arbitration Act***) which, broadly, implements the Model Law as the law of Australia. The *International Arbitration Act* also provides for the recognition and enforcement of foreign awards (implementing Australia's obligations under the New York Convention). For domestic commercial arbitrations, all Australian States and self-governing Territories have now enacted legislation that is essentially in the same terms as the Model Law.

Date of arbitration law?	Australia adopted the 2006 UNCITRAL Model Law for international commercial arbitration in its federal legislation in 2010. Australian States individually adopted it for domestic commercial arbitrations between 2010 and 2017. Before that, , there was legislation facilitating international and domestic commercial arbitrations. Australia ratified and implemented the ICSID Convention for investor-State arbitrations in 1991.
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	Yes; Australia has adopted the UNCITRAL Model Law with some modifications, which are essentially procedural.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes; the Federal Court of Australia as well as many of the State Supreme Court have procedures under which arbitration matters can be heard by judges with experience and expertise in arbitration.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Wholly supportive.
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Yes.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	None.
Do annulment proceedings typically suspend enforcement proceedings?	Annulment or set-aside proceedings do not automatically suspend enforcement proceedings, but permit courts to suspend them.
Courts' attitude towards the recognition and enforcement of	Foreign awards that have been annulled or set aside at their seat are unlikely to be recognised or enforced in Australia.

foreign awards annulled at the seat of the arbitration?	
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	An award following an arbitration in which a hearing was conducted remotely (in whole or in part) despite a party's objection is likely to be recognised and enforced in Australia.
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	In general, Australian public bodies may be parties to arbitration agreements, and awards against them can be recognised and enforced. Foreign States may claim a foreign State immunity.
Is the validity of blockchain-based evidence recognised?	Due to its novelty, there is significant uncertainty and lack of clarity about whether blockchain-based evidence will be recognised in Australian law (or for arbitrations seated in Australia). However, in principle, there is no reason why blockchain-based evidence cannot be recognised.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	This will depend on whether the recording of the agreement or award on the blockchain is considered to be "in writing", a matter about which there is uncertainty and scope for debate.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	In general, Australian law does not require original documents for recognition and enforcement. Though there is uncertainty and scope for argument, in principle a party may be able to provide a duly certified copy of a blockchain arbitration agreement or blockchain arbitral award.
Other key points to note?	ϕ

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model law? 1985 or 2006 version?

In Australia, there is “an integrated statutory framework for international and domestic arbitration which implements the [Model Law]”.²

International commercial arbitrations (i.e., arbitrations with a seat or legal place outside Australia, or with a connection outside Australia) are governed by federal legislation. Domestic commercial arbitrations are governed by State and Territory legislation.

Foreign arbitral awards and international commercial arbitrations are the subject of the *International Arbitration Act 1974* (Cth). In 1989, the *International Arbitration Act* was amended to apply the 1985 Model Law to international commercial arbitrations.³ In 2010, the *International Arbitration Act* was amended to apply the 2006 Model Law to international commercial arbitrations.⁴ The *International Arbitration Act* also provides for the recognition and enforcement of foreign arbitration agreements and awards (including foreign domestic arbitration awards)⁵ and the application of the ICSID Convention for investor-State arbitrations.⁶

Domestic commercial arbitrations are the subject of legislation in the States and Territories of Australia. All States and the self-governing Territories have now essentially adopted the 2006 version of the Model Law in legislation, with largely uniform legislation:

Commercial Arbitration Act 2010 (NSW) (commenced 1 October 2010)
Commercial Arbitration Act 2011 (Vic) (commenced 17 November 2011)
Commercial Arbitration Act 2011 (SA) (commenced 1 January 2012)
Commercial Arbitration (National Uniform Legislation) Act 2011 (NT) (commenced 1 August 2012)
Commercial Arbitration Act 2011 (Tas) (commenced 1 October 2012)
Commercial Arbitration Act 2013 (Qld) (commenced 17 May 2013)
Commercial Arbitration Act 2012 (WA) (commenced 7 August 2013)
Commercial Arbitration Act 2017 (ACT) (commenced 1 July 2017)

The amended laws apply retrospectively to agreements entered before their commencement date.

Because the New South Wales legislation (**NSW Act**) was first enacted, and because the other jurisdictions enacted legislation “in substantially the same form” as the New South Wales legislation,⁷ we have referred only to the NSW Act in this analysis. Helpfully, the section numbering in the NSW Act tracks the corresponding Articles of the Model Law.⁸

1.2 Key modifications made to the UNCITRAL Model Law

The modifications to the Model Law are largely procedural, and generally expressly empower Australian courts to support commercial arbitration. For example, the legislation provides for the issues of subpoenas

² *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, (2019) 267 CLR 514 [13] (Kiefel CJ and Gageler, Nettle, and Gordon JJ).

³ See *International Arbitration Amendment Act 1989* (Cth). This legislation also changed the title of the Act from the *Arbitration (Foreign Awards and Agreements) Act 1974* to the *International Arbitration Act 1974*.

⁴ See *International Arbitration Amendment Act 2010* (Cth).

⁵ *International Arbitration Act 1974* (Cth) Part II.

⁶ *International Arbitration Act 1974* (Cth) Part IV, inserted by the *ICSID Implementation Act 1990* (Cth).

⁷ *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, (2019) 267 CLR 514 [13] n 28 (Kiefel CJ and Gageler, Nettle, and Gordon JJ).

⁸ See NSW Act, part 1A, note.

in Australia in support of international and domestic commercial arbitrations⁹ and the consolidation of related arbitrations.¹⁰

1.3 When was the arbitration law last revised?

The last major revision of the arbitration laws was to adopt the 2006 version of the Model Law (between 2010 and 2017). Minor revisions have been made since then:

International Arbitration Act 1974 (Cth) last amended in 2018
Commercial Arbitration Act 2010 (NSW) last amended in 2018
Commercial Arbitration Act 2011 (Vic) last amended in 2015
Commercial Arbitration Act 2011 (SA) not amended since commencement
Commercial Arbitration (National Uniform Legislation) Act 2011 (NT) last amended in 2018
Commercial Arbitration Act 2011 (Tas) not amended since commencement
Commercial Arbitration Act 2013 (Qld) not amended since commencement
Commercial Arbitration Act 2012 (WA) not amended since commencement
Commercial Arbitration Act 2017 (ACT) last amended in 2018

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

In the absence of an express choice of law by the parties, an arbitration agreement will generally be governed by the system of law that is most closely connected to it. Australian courts are likely to follow the approach of the Supreme Court of the United Kingdom in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*,¹¹ in which it was held that absent an express choice of law to the contrary, an arbitration agreement will ordinarily be governed by the system of law that is most closely connected to it. In most cases, that will be the law of the seat of arbitration, which (in an international or other multi-jurisdictional context) may differ from the law governing the contract.

2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

In the absence of an express choice by the parties, the court will infer a seat, venue, or place of the arbitration by reference to the governing law of the arbitration agreement and the parties' other connections.

2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

The separability principle (i.e., that the arbitration agreement is independent from the rest of the contract in which it is contained) is well-established in Australian law¹² and has been expressly recognised in Australia through the adoption of Article 16 of the Model Law.¹³

2.4 What are formal requirements (if any) for an enforceable arbitration agreement?

There are subtle differences between the requirements for arbitration agreements to be in writing in Australian law.

⁹ *International Arbitration Act 1974* (Cth) s 23, NSW Act s 27A.

¹⁰ *International Arbitration Act 1974* (Cth) s 24, NSW Act s 27C.

¹¹ [2020] UKSC 38, [2020] 1 WLR 4117.

¹² See *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170, (2017) 257 FCR 442 [351]–[352] (Allsop CJ and Besanko and O'Callaghan JJ), citing *Ferris v Plaister* (1994) 34 NSWLR 474, *QH Tours Ltd v Ship Design and Management (Aust) Pty Ltd* (1991) 33 FCR 227. See also *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 [42] (Martin CJ).

¹³ *International Arbitration Act 1974* (Cth) s 16(1), NSW Act s 16(2).

For domestic commercial arbitrations, and the support of international commercial arbitrations, Australia has adopted Option 1 to Article 7 of the Model Law, treating an agreement recorded in any form as an agreement in writing.¹⁴

For the enforcement of foreign arbitral awards in Australia, Australia is party to, and has implemented, the New York Convention.¹⁵ Article II(2) of the New York Convention requires an “agreement in writing” to include an arbitral clause in a contract, or an arbitration agreement signed by both parties, or contained in an exchange of letters. However, Australian courts have taken a broad view of what is a sufficient exchange of documents for the purposes of the New York Convention.¹⁶

2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

The High Court of Australia — Australia’s apex court — has confirmed that the ultimate foundation of arbitration is the parties’ consent.¹⁷ Therefore, it is only in very limited circumstances that a third party not privy to the arbitration agreement may be a party to the arbitral proceedings.

However, Australian law treats a party claiming “through or under” a party to an arbitration agreement as also being a party to the arbitration agreement.¹⁸ For instance, it has been held that a liquidator of a party can be bound by an arbitration agreement on that basis.¹⁹ It has also been held that the assignee of an interest in property claims “through or under” the assignor and is therefore bound by an arbitration agreement between the assignor and the original counterparty.²⁰ The categories are not closed and may extend (for example) to parties’ subsidiaries.

2.6 Are there restrictions to arbitrability? In the affirmative:

Australian courts have taken a broad view on the scope of commercial disputes that are capable of resolution by arbitration (i.e., that are arbitrable). The general position is that “it is only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will be held to be non-arbitrable.”²¹

Commercial disputes that have been held to be arbitrable include claims involving breach of fiduciary duties, fraud, serious misconduct, claims for the removal of a trustee, at least some claims for breach of the *Competition and Consumer Act 2010* (Cth) (e.g., for damages or loss caused by misleading or deceptive conduct) and contraventions of the *Corporations Act 2001* (Cth), notwithstanding that such claims may entail the grant of statutory remedies by the arbitral tribunal.

¹⁴ *International Arbitration Act 1974* (Cth) s 16(2). For domestic commercial arbitrations, Option 1 of Article 7 has been replicated in State and Territory legislation: NSW Act s 7.

¹⁵ See *International Arbitration Act 1974* (Cth) s 2D(d) and part II.

¹⁶ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, (2006) 157 FCR 45 [148]–[156] (Allsop J; Finn and Finkelstein JJ agreeing).

¹⁷ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5, (2013) 251 CLR 533.

¹⁸ See *International Arbitration Act 1974* (Cth) s 7(4), NSW Act s 2(1) (definition of “party”).

¹⁹ *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332.

²⁰ *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, (2019) 267 CLR 514 [73] (Kiefel CJ and Gageler, Nettle, and Gordon JJ).

²¹ *Rinehart v Welker* [2012] NSWCA 95, (2012) 95 NSWLR 221 [167] (Bathurst CJ; McColl and Young JJA agreeing).

2.6.1 Do these restrictions relate to specific domains (such as anti-trust, employment law etc.)?

"The common element to the notion of non-arbitrability [is] a sufficient element of legitimate public interest in [the] subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate."²²

Disputes that will not be arbitrable in Australia include:²³ criminal prosecutions (including imposition of fines²⁴) and determinations of status (e.g., divorce proceedings, bankruptcy proceedings, and corporate insolvencies and applications to wind up companies²⁵).

Though certain intellectual property disputes are not arbitrable because they involve public rights (e.g., whether to grant or to revoke a patent),²⁶ purely private disputes such as whether a party has breached a licence to use or exploit intellectual property are arbitrable.²⁷

Disputes that the law provides are to be determined by a special or particular tribunal are also unlikely to be arbitrable.²⁸

There are other specific restrictions to arbitrability. For example:

- arbitration agreements in a bill of lading (or similar document) relating to the international carriage of goods to and from Australia are void unless the seat or place of arbitration is Australia;²⁹ and
- an insurance contract cannot require disputes to be referred to arbitration (though parties can agree to arbitrate disputes after they have arisen).³⁰

2.6.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)?

State entities,³¹ including States themselves,³² can be party to arbitration agreements.

There is no express restriction on consumers being party to arbitration agreements. However, depending on the circumstances, an arbitration agreement with a consumer (e.g., included as part of a standard form contract or a contract of adhesion) may not be enforceable, either as an unfair contract term³³ or because inclusion of the term amounts to unconscionable conduct.³⁴

²² *Comandante Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, (2006) 157 FCR 45 [200] (Allsop J; Finn and Finkelstein JJ agreeing). This formulation has been subsequently adopted and approved: e.g., *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268, (2011) 279 ALR 772 [63] (Hammerschlag J), *Rinehart v Welker* [2012] NSWCA 95, (2012) 95 NSWLR 221 [211] (McColl JA).

²³ See *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268, (2011) 279 ALR 772 [64] (Hammerschlag J).

²⁴ *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 [189] (Austin J) quoting MJ Mustill and SC Boyd, *Law and Practice of Commercial Arbitration in England* (2nd ed, 1989), p 149.

²⁵ *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170.

²⁶ *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268, (2011) 279 ALR 772 [66] (Hammerschlag J).

²⁷ *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268, (2011) 279 ALR 772 [71] (Hammerschlag J)

²⁸ *Rinehart v Welker* [2012] NSWCA 95, (2012) 95 NSWLR 221 [213] (McColl JA), citing *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* [2011] NSWSC 195, (2011) 80 NSWLR 398.

²⁹ *International Arbitration Act 1974* (Cth) s 2C, *Carriage of Goods by Sea Act 1991* (Cth).

³⁰ *Insurance Contracts Act 1984* (Cth) s 43.

³¹ See *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10,

³² E.g., *Western Australia v Mineralogy* [2020] WASC 58, *Mineralogy Pty Ltd v Western Australia* [2020] QSC 344.

³³ See Australian Consumer Law (*Competition and Consumer Act 2010* (Cth) sch 2) part 2-3.

³⁴ See Australian Consumer Law (*Competition and Consumer Act 2010* (Cth) sch 2) s 20; *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No 13)* [2021] WASC 214 [56] (Le Miere J).

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

In general, Australian law gives primacy to arbitration (where there is an applicable and enforceable arbitration agreement) over litigation, through the potential operation of either a mandatory stay, a discretionary stay, or both.

The mandatory stay is that contained in Article 8 of the Model Law,³⁵ which requires a court to refer the parties to arbitration where there is an operative arbitration agreement if requested by a party to the arbitration agreement “not later than when submitting the party’s first statement on the substance of the dispute”. This is given effect by staying the litigation.³⁶

A court may also order a discretionary stay where the mandatory stay does not operate in its terms. For example, in a recent case, a discretionary stay was ordered where there were several interrelated disputes and the mandatory stay applied to only some of them.³⁷

3.1.2 If the place of the arbitration is outside of the jurisdiction?

In addition to the Model Law provision,³⁸ for foreign arbitration agreements (including agreements providing for arbitration the place of which is outside Australia), there is a separate provision which permits a court to stay proceedings that can be resolved by an operative arbitration agreement “upon such conditions (if any) as [the court] thinks fit”.³⁹

Unlike the Model Law provision, there is no express time limit for an application under that provision. However, a party’s right under that provision has been held to have been waived by active participation in court proceedings.⁴⁰

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The orthodox view of Australian courts is that “although parties are free to agree to submit their differences or disputes as to their legal rights and liabilities for determination by an ascertained or ascertainable third party by way of contract, the jurisdiction of [a court] cannot be ousted by a pactio [i.e., an agreement]”.⁴¹ Any injunction issued by an arbitrator will not prevent a party from commencing proceedings.

However, Australian courts will generally recognise and enforce foreign⁴² and domestic⁴³ arbitral proceedings and awards in accordance with their terms. An Australian court will therefore generally enforce a restraint ordered by an arbitral tribunal that is empowered by the arbitration agreement to restrain a party to the

³⁵ Which applies to both international commercial arbitrations (*International Arbitration Act 1974* (Cth) s 16(1)) and domestic commercial arbitrations (NSW Act s 8(1)).

³⁶ *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd (No 2)* [2015] NSWSC 564.

³⁷ *CPB Contractors Pty Ltd v Celsus Pty Ltd* [2017] FCA 1620, (2017) 353 ALR 84 [124]–[125] (Lee J).

³⁸ Cf. *Shanghai Foreign Trade Corporation v Sigma Metallurgical Co Pty Ltd* (1996) 133 FLR 417, 427–428, 439 (Bainton J). Article 8 of the Model Law is contained in Chapter I of the Model Law and therefore section 20 of the *International Arbitration Act* does not apply.

³⁹ *International Arbitration Act 1974* (Cth) s 7(2).

⁴⁰ *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846.

⁴¹ *CPB Contractors Pty Ltd v Celsus Pty Ltd* [2017] FCA 1620, (2017) 353 ALR 84 [40] (Lee J).

⁴² *International Arbitration Act 1974* (Cth) s 8.

⁴³ Model Law Art 35, NSW Act s 35.

arbitration from engaging in conduct (e.g., maintaining litigation in Australia), subject to the usual bases on which an award may be set aside or not enforced.

The same result may be reached by alternative paths. For example, if there is an arbitration on foot, then regardless of the efficacy of any injunction or restraint ordered by the arbitral tribunal, the defendant may apply to stay the litigation.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to anti-suit injunctions/anti-arbitration injunctions or orders, but not only)

The grounds on which an Australian court can intervene in an arbitration seated outside Australia are limited.

It is open to Australian courts, in an appropriate case, to issue an anti-suit injunction or an anti-arbitration injunction in relation to an arbitration seated outside Australia. In a recent case, an Australian court issued an anti-arbitration injunction preventing a party from proceeding with a New York arbitration.⁴⁴

Conversely, Australian courts are also empowered to support arbitrations seated outside Australia. For example, Australian courts are able to issue subpoenas at the request of parties to arbitrations (including arbitrations seated outside Australia).⁴⁵

4. The conduct of the proceedings

4.1 Can parties retain foreign counsel or be self-represented?

Subject to the parties' arbitration agreement (and any orders of the arbitral tribunal), parties can be self-represented, represented by local counsel, or represented by foreign counsel in international commercial arbitrations seated in Australia⁴⁶ and domestic commercial arbitrations.⁴⁷

4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances be of gravity such as to justify this outcome?

For international and domestic commercial arbitrations, Australian law provides that there are "justifiable doubts" about independence or impartiality for the purposes of Article 12 of the Model Law "only if there is a real danger of bias on the part of [the arbitrator or prospective arbitrator] in conducting the arbitration".⁴⁸ This wording is intended to pick up the test in the House of Lords in *R v Gough*,⁴⁹ and not the lower threshold for the disqualification of judicial officers under domestic Australian law,⁵⁰ namely "whether a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial mind to the resolution of the question he or she is required to decide".⁵¹

⁴⁴ *Kraft Food Group Brands LLC v Bega Cheese Ltd* [2018] FCA 549, (2018) 358 ALR 1.

⁴⁵ *International Arbitration Act 1974* (Cth) s 23; see also s 23A.

⁴⁶ *International Arbitration Act 1974* (Cth) s 29.

⁴⁷ NSW Act s 24A.

⁴⁸ *International Arbitration Act 1974* (Cth) s 18A, NSW Act s 12(5)–(6).

⁴⁹ [1993] AC 646. See *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 [197] (Beach JJ).

⁵⁰ See *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 [191], [193], [198] (Beach JJ) citing *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 [6]–[8] (Gleeson CJ and McHugh, Gummow, and Hayne JJ).

⁵¹ *GetSwift Ltd v Webb* [2021] FCAFC 26, (2021) 388 ALR 75 [27] (Middleton, McKerracher, and Jagot JJ).

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Australian courts are empowered to exercise the powers of a “court or other authority” under Article 11 of the Model Law to appoint arbitrators where the parties cannot agree.⁵²

Australian courts are generally supportive of arbitration and, where parties have agreed to arbitration, will strive to give effect to that intention. For example, in a 2015 case, a court faced with a “pathological” arbitration agreement (which referred to rules that do not exist and do not appear to have ever existed) determined to refer the parties to arbitration and stayed litigation.⁵³

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

Australian courts are empowered to grant interim measures in support of both international and domestic commercial arbitrations under Article 17J of the Model Law.⁵⁴ Australian courts are also required to recognise and enforce interim measures granted by arbitral tribunals in international and domestic commercial arbitrations.⁵⁵

The willingness of Australian courts to grant interim measures in aid of arbitration can be seen from the recent case of *Trans Global Projects Pty Ltd (in liq) v Duro Felguera Australia Pty Ltd*,⁵⁶ where the court granted freezing orders against the respondent’s assets after finding that there was a risk that the respondent would dissipate its assets and a danger that a prospective arbitral award in favour of the applicant would be left unsatisfied. The decision was upheld on appeal.⁵⁷

Applications to recognise and enforce or grant interim measures can be made on an *ex parte* basis in accordance with the usual procedural requirements under Australian law. Those circumstances generally require evidence that service of the application would frustrate the order.⁵⁸

4.5 Other than arbitrators’ duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Under Australian law, arbitrations are not inherently confidential.⁵⁹ However, legislation now provides that information relating to arbitral proceedings is confidential for both international commercial arbitrations⁶⁰ and domestic commercial arbitrations.⁶¹ Exceptions to the obligation of confidentiality include where the parties agree, where the arbitral tribunal or a court permits disclosure, and (for international commercial arbitrations) where the Transparency Rules require disclosure.⁶²

⁵² *International Arbitration Act 1974* (Cth) s 18, NSW Act s 11.

⁵³ *Robotunits Pty Ltd v Mennel* [2015] VSC 258, (2015) 49 VR 323.

⁵⁴ *International Arbitration Act 1974* (Cth) s 16, NSW Act s 17.

⁵⁵ Model Law Art 17H (applied for international commercial arbitrations by *International Arbitration Act 1974* (Cth) s 16), NSW Act s 17H.

⁵⁶ [2018] WASC 136.

⁵⁷ *Dura Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)* [2018] WASC 174, (2018) 53 WAR 201.

⁵⁸ Cf. *Mineralogy Pty Ltd v Western Australia* [2020] QSC 344.

⁵⁹ *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

⁶⁰ *International Arbitration Act 1974* (Cth) ss 15(1) (definition of “confidential information”), 23C.

⁶¹ NSW Act s 2(1) (definition of “confidential information”), 27E.

⁶² *International Arbitration Act 1974* (Cth) s 22(3).

4.5.2 Does it regulate the length of arbitration proceedings?

Australian law does not expressly regulate the length of arbitration proceedings. However, Article 18 of the Model Law requiring parties to have a “full opportunity to present the party’s case” has been modified in Australia such that it requires a party to be “given a reasonable opportunity to present the party’s case”.⁶³ In reliance on English authority, it has been held in Australia that “in the context of a modern arbitration, a reasonable opportunity is a question of degree and may be satisfied provided the issue is somehow raised, even if only briefly”.⁶⁴

Consistent with that position, Australian courts have construed the ground for refusal of enforcement of a foreign award where the party was “unable to present his or her case in the arbitration proceedings”⁶⁵ as requiring the party to have had “a reasonable opportunity, in all the circumstances, to present its case”.⁶⁶

4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?

Australian law adopts the Model Law provision that permits the arbitral tribunal (unless otherwise agreed by the parties) to meet at any place it considers appropriate.⁶⁷

Australian law does not expressly refer to remote hearings (either to permit them or prohibit them). It is likely that an Australian court will regard a remote hearing as providing a reasonable opportunity to present each party’s case.⁶⁸

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

Australian law permits arbitral tribunals to grant interim measures for both international and domestic commercial arbitrations.⁶⁹ The conditions under which, and the circumstances in which, interim measures can be granted are set out in the Model Law, except that a tribunal may not make a preliminary order directing another party not to frustrate the purpose of an interim measure.⁷⁰ Also, in domestic commercial arbitrations, there is no provision for ex parte applications for interim measures.⁷¹

Australian courts are required to recognise and enforce interim measures granted by arbitral tribunals in international and domestic commercial arbitrations.⁷² Recognition or enforcement of an interim measure may only be refused on very limited grounds, in accordance with the Model Law.⁷³

⁶³ *International Arbitration Act 1974* (Cth) s 18C, NSW Act s 18.

⁶⁴ *Hui v Esposito Holdings Pty Ltd* [2017] FCA 648, (2017) 345 ALR 287 [225] (Beach J), citing *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 Lloyd’s Rep 86 [106] (Popplewell J).

⁶⁵ *International Arbitration Act 1974* (Cth) s 8(5)(c), cf. New York Convention Art V(1)(b).

⁶⁶ *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223 [98] (Gleeson J), citing *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109, (2013) 304 ALR 468 [3] (Allsop CJ and Besanko and Middleton JJ), *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326.

⁶⁷ Model Law Art 20(2) (applied for international commercial arbitrations by *International Arbitration Act 1974* (Cth) s 16), NSW Act s 20(3).

⁶⁸ Cf. *International Relief and Development Inc v Ladu* [2014] FCA 887 [102] (Kenny J).

⁶⁹ Model Law Art 17 (applied for international commercial arbitrations by *International Arbitration Act 1974* (Cth) s 16), NSW Act s 17.

⁷⁰ *International Arbitration Act 1974* (Cth) s 18B, NSW Act s 17B (note).

⁷¹ NSW Act ss 17B, 17C (notes).

⁷² Model Law Art 17H (applied for international commercial arbitrations by *International Arbitration Act 1974* (Cth) s 16), NSW Act s 17H.

⁷³ Model Law Art 17I (applied for international commercial arbitrations by *International Arbitration Act 1974* (Cth) s 16), NSW Act s 17I.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

Australian law confers power on the arbitral tribunal to determine the admissibility, relevance, materiality, and weight of any evidence.⁷⁴ Australian law does not impose any express restrictions on evidence (e.g., on the presentation of testimony by a party employee).

4.5.6 Does it make it mandatory to hold a hearing?

For both international commercial arbitrations and domestic commercial arbitrations, an arbitral tribunal is required to hold hearings if requested by a party.⁷⁵

4.5.7 Does it prescribe principles governing the awarding of interest?

For both international and domestic commercial arbitrations, subject to the parties' agreement,⁷⁶ an arbitral tribunal may include interest on a monetary award "at such reasonable rate as the tribunal determines 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 is made".⁷⁷ Such interest may only be simple interest, not compound interest (or interest on interest).⁷⁸

Additionally, for both international and domestic commercial arbitrations, unless otherwise agreed by the parties to the arbitration, the arbitral tribunal may direct that interest (including compound interest) accrue on unpaid awarded amounts.⁷⁹ Also, where a foreign arbitral award does not include interest, interest will accrue in Australia once enforced as a judgment of a court.⁸⁰

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

For both international and domestic commercial arbitrations, subject to the parties' agreement, Australian law empowers the arbitral tribunal to determine the costs of the arbitration (including the fees and expenses of the arbitral tribunal).⁸¹

In Australian litigation, "the award [of costs] is discretionary but generally that discretion is exercised in favour of the successful party", in contrast to the American rule where "in the absence of limited statutory exceptions each party bears its own costs".⁸² It can be expected that a similar approach will be taken by tribunals in domestic commercial arbitrations and international commercial arbitrations seated in Australia.

⁷⁴ Model Law Art 19(2) (applied for international commercial arbitrations by *International Arbitration Act 1974* (Cth) s 16), NSW Act s 19(3).

⁷⁵ Model Law Art 24(1) (applied for international commercial arbitrations by *International Arbitration Act 1974* (Cth) s 16), NSW Act s 24(2).

⁷⁶ *International Arbitration Act 1974* (Cth) ss 22(2), 25(2)(b), NSW Act s 33E(2)(b).

⁷⁷ *International Arbitration Act 1974* (Cth) s 25(1), NSW Act s 33E(1).

⁷⁸ *International Arbitration Act 1974* (Cth) s 25(2)(a), NSW Act s 33E(2)(a).

⁷⁹ *International Arbitration Act 1974* (Cth) ss 22(2), 26, NSW Act s 33F.

⁸⁰ See *Energy City Qatar Holding Co v Hub Street Equipment Pty Ltd (No 3)* [2020] FCA 1219 [3] (Jagot J).

⁸¹ *International Arbitration Act 1974* (Cth) ss 22(2), 27, NSW Act s 33B.

⁸² *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56, (2007) 234 CLR 52 [25], [29] (Gleeson CJ and Gummow, Hayne, and Crennan JJ).

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

In both international commercial arbitrations and domestic commercial arbitrations an arbitrator “is not liable for anything done or omitted to be done ... in good faith in his or her capacity as arbitrator”.⁸³

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

It is difficult to imagine circumstances in which persons participating in good faith in an arbitration proceeding will (for that reason alone) attract criminal liability.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes.⁸⁴

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

Australian law has no concept of “annulment” of an award. However, Australian law permits applications to set aside an award under the limited grounds set out in Article 34 of the Model Law.⁸⁵ There are examples in Australia of such applications being successfully made.⁸⁶

Australian law does not provide for the waiver of the right to set aside the award. However, in general all rights under Australian law may be waived or abandoned (e.g., by acting inconsistently with the right).⁸⁷ Choice of law issues may arise about the law that applies to any waiver.⁸⁸

5.3 What atypical mandatory requirements apply to the rendering of a valid award at a seat in the jurisdiction?

Australia has no atypical mandatory requirements for the rendering of a valid award at a seat in the jurisdiction.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

There is no provision for the appeal of an international commercial arbitration award.

For domestic commercial arbitrations, parties can (by agreement) permit an appeal of a question of law arising out of an award to the Supreme Court of the seat or place of the arbitration (subject to the leave of the court).⁸⁹ The parties must agree to the appeal within 3 months after the date of the award.⁹⁰ The Supreme

⁸³ *International Arbitration Act 1974* (Cth) s 28(1), NSW Act s 39(1).

⁸⁴ Model Law Art 31(2) (applied for international commercial arbitrations by *International Arbitration Act 1974* (Cth) s 16), NSW Act s 31(3).

⁸⁵ *International Arbitration Act 1974* (Cth) s 16 (applying Article 34 of the Model Law for international commercial arbitrations), NSW Act s 34.

⁸⁶ See, e.g., *Hui v Esposito Holdings Pty Ltd* [2017] FCA 648, (2017) 345 ALR 287.

⁸⁷ Cf. *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846 (considering waiver of the right to stay litigation where the dispute is also the subject of an arbitration agreement).

⁸⁸ *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846 [472]–[496] (Beach J) (holding that U.S. law applied to questions of waiver, as U.S. law governed the arbitration agreement).

⁸⁹ NSW Act s 34A.

⁹⁰ NSW Act s 34A(1)(a), (6).

Court may only grant leave if the question of law: (1) will substantially affect the rights of one or more of the parties, (2) the arbitral tribunal was asked to determine the question, (3) the tribunal was obviously wrong or the question is of general public importance and the tribunal's decision is at least open to serious doubt, and (4) it is just and proper to determine for the court to determine the question.⁹¹

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Domestic commercial arbitration awards are recognised as binding throughout Australia.⁹² They can be readily enforced, essentially as if they were a judgment of the Supreme Court of the enforcing State. Where an award is not in English, the Court may request a translation.⁹³

With regard to international commercial arbitration awards seated in Australia, the provisions on recognition and enforcement in Chapter VIII of the Model Law apply.⁹⁴ The Supreme Court of the relevant State or Territory and the Federal Court of Australia are “competent courts”.⁹⁵ The specific procedure depends on the court in which action is taken to enforce the award, but will generally require provision of the award (original or certified copy) and the arbitration agreement (original or certified copy).

Foreign awards are recognised and enforced under provisions implementing the New York Convention rather than the Model Law.⁹⁶ Foreign awards are to be recognised as binding on parties,⁹⁷ and may be enforced in Supreme Courts of States and Territories or the Federal Court of Australia as if the award were a judgment of that court.⁹⁸ The specific procedure depends on the court in which action is taken to enforce the award, but will generally require provision of the award (original or certified copy) and the arbitration agreement (original or certified copy).

Foreign states may assert foreign state immunity when an award comes to be enforced. An exception to foreign state immunity is where the state has waived such immunity from an Australian court's jurisdiction. The High Court of Australia found that Spain has waived its immunity in an investor-state dispute by ratifying the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).⁹⁹ However, in a case concerning the New York Convention, the Full Federal Court of Australia in 2025 concluded that India had not waived its foreign state immunity in relation to a non-commercial dispute by virtue of ratifying the New York Convention subject to a reservation that India would only apply that Convention to commercial disputes.¹⁰⁰ As at March 2025, the respondent companies have sought special leave to appeal to the High Court of Australia.

Depending on the circumstances (including the seat of the arbitration and the court in which enforcement is sought), there may be a time limit to commence action to enforce an arbitral award. The base time period depends on the jurisdiction (e.g., 3 years in the Northern Territory,¹⁰¹ 6 years in New South Wales,¹⁰²

⁹¹ NSW Act s 34A(3).

⁹² NSW Act s 35(1).

⁹³ NSW Act s 35(3).

⁹⁴ *International Arbitration Act 1974* (Cth) s 16 (applying Chapter VIII of the Model Law for international commercial arbitrations).

⁹⁵ *International Arbitration Act 1974* (Cth) s 18(4).

⁹⁶ *International Arbitration Act 1974* (Cth) ss 8, 20.

⁹⁷ *International Arbitration Act 1974* (Cth) s 8(1).

⁹⁸ *International Arbitration Act 1974* (Cth) ss 8(2)–(3).

⁹⁹ *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l* [2023] HCA 11, (2023) 275 CLR 292.

¹⁰⁰ *Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2.

¹⁰¹ *Limitation Act 1981* (NT) s 18.

¹⁰² *Limitation Act 1969* (NSW) s 20.

Victoria,¹⁰³ Western Australia,¹⁰⁴ and Queensland¹⁰⁵), and there are complex provisions governing the extension of such periods. In any event, as time passes enforcement may become more difficult (e.g., because the award debtor can better argue that the award creditor has abandoned its right to enforce the award).

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

There is no automatic suspension of a right to enforce an award following an application to set aside (or appeal) an award.

However, for foreign awards, courts are expressly empowered to suspend enforcement where an application has been made to set aside or suspend a foreign award in the seat of the award, and may require the award debtor to provide “suitable security”.¹⁰⁶ A similar situation applies for international commercial arbitrations seated in Australia¹⁰⁷ and domestic commercial arbitrations.¹⁰⁸

Also, as a matter of practice, it can be expected that an application to set aside an award would usually be raised defensively in response to an application for enforcement, such that the issues would be heard by a court at the same time. A similar situation occurs in relation to foreign awards, where challenges to an award are usually raised as a defence to an application to enforce such that the issues are heard at the same time.¹⁰⁹

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Australian law expressly permits a court to refuse to enforce an award if the award “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”.¹¹⁰ The circumstances in which a court will enforce an award that has been annulled at its seat will likely be rare.¹¹¹

5.8 Are foreign awards readily enforceable in practice?

Yes, foreign awards are readily enforceable in practice.

¹⁰³ *Limitation of Actions Act 1958* (Vic) ss 5(1), 28.

¹⁰⁴ *Limitation Act 2005* (WA) ss 13, 29.

¹⁰⁵ *Limitation of Actions Act 1974* (Qld) ss 10, 41.

¹⁰⁶ *International Arbitration Act 1974* (Cth) s 8(8).

¹⁰⁷ Model Law Art 36(2) (applied by *International Arbitration Act 1974* (Cth) s 16).

¹⁰⁸ NSW Act s 36(2).

¹⁰⁹ See, e.g., *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd* (No 2) [2020] FCA 1116, *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* (No 2) [2012] FCA 276, (2012) 201 FCR 535.

¹¹⁰ *International Arbitration Act 1974* (Cth) s 8(5)(f).

¹¹¹ Cf. *Maximov v OJSC Novolipetsky Metallurgicheskyy Kombinat* [2017] EWHC 1911 (Comm), [2017] 2 Lloyd's Rep 519.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

6.1.1 Contingency fee arrangements.

In general,¹¹² Australian lawyers are prohibited by their professional standards regulations from entering into arrangements with clients that provide for contingency fees.¹¹³ Any such arrangements are void.¹¹⁴ These prohibitions will apply to arbitrations.

6.1.2 Alternative fee arrangements.

In general, Australian lawyers are permitted to enter into alternative fee arrangements, including for arbitrations. Any alternative fee arrangement must charge costs “that are no more than fair and reasonable in all the circumstances”.¹¹⁵ There are also restrictions on conditional fee arrangements that provide for an uplift fee on the occurrence of an event, including that they not exceed 25% of the otherwise-chargeable legal fees for litigious matters.¹¹⁶

6.1.3 Third-party funding.

Third-party funding, particularly for class actions and representative proceedings, is now a common and accepted part of the Australian legal landscape.¹¹⁷ The old torts of champerty and maintenance have been abolished or become extinct.¹¹⁸ There is not likely to be any restriction on third-party funding for domestic or international commercial arbitrations, except perhaps in rare and exceptional circumstances amounting to an abuse of process.

7. Arbitration and technology

7.1 Is the validity of blockchain-based evidence recognised?

There are currently no provisions in Australian arbitration law about blockchain-based evidence. For international and domestic commercial arbitrations, subject to the parties’ agreement, the arbitral tribunal is empowered to determine the admissibility of evidence, including blockchain-based evidence.¹¹⁹

In principle, there is no reason under Australian law why blockchain-based evidence could not be recognised. There are examples of Australian courts, applying Australian evidence law, accepting evidence about the

¹¹² The regulation of Australian lawyers differs depending on the State and Territory in which they practice, however the general prohibitions are common. Additionally, there is now a limited exception in Victoria permitting contingency fees in limited circumstances for class actions or representative proceedings, but this does not apply to arbitrations: *Supreme Court Act 1896* (Vic) s 33ZDA.

¹¹³ See, e.g., *Legal Profession Uniform Law (NSW)* s 183(1).

¹¹⁴ See, e.g., *Legal Profession Uniform Law (NSW)* s 185.

¹¹⁵ See *Legal Profession Uniform Law (NSW)* s 172(1).

¹¹⁶ See *Legal Profession Uniform Law (NSW)* s 182(2)(b).

¹¹⁷ Cf. *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386, *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 94 ALJR 51, *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 95 ALJR 305.

¹¹⁸ See *Gladstone Ports Corporation Ltd v Murphy Operator Pty Ltd* [2020] QCA 250.

¹¹⁹ Model Law Art 19(2) (applied to international commercial arbitrations by *International Arbitration Act 1974* (Cth) s 16), NSW Act s 19(3).

contents of computer databases or computer systems, which would potentially apply to a computer-recorded decentralised ledger or blockchain.¹²⁰

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

Whether an arbitration agreement or award recorded on a blockchain is enforceable is likely to depend on whether the agreement or award is “in writing”, which is unclear. In a different statutory context, an Australian court has held that a USB drive is not “writing”.¹²¹

Where the Model Law applies (i.e., for domestic commercial arbitrations and international commercial arbitrations except for the recognition and enforcement of foreign awards), it may be that a blockchain record falls within the expanded definition of “in writing” including electronic communications containing information accessible so as to be usable for subsequent reference.¹²²

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

Australian law typically does not require original documents for recognition and enforcement, and permits duly certified copies to be relied on.¹²³ It is open for a court to be satisfied based on evidence (including expert evidence) that a blockchain-based arbitration agreement or award are duly certified copies.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

Australian courts will typically treat an arbitrator’s signature or certification as prima facie evidence of valid certification, which must be disproved by the challenging party.¹²⁴ In other contexts, Australian courts have treated electronic signatures the same way as wet-ink signatures.

8. Is there likely to be any significant reform of the arbitration law in the near future?

There are no current proposals for significant reform of Australian arbitration laws. Given the relatively recent amendment and harmonisation of Australian arbitration laws (such that the 2006 version of the Model Law essentially applies to all international and domestic commercial arbitrations), there is unlikely to be any significant amendment in the foreseeable future.

9. Compatibility of the Delos Rules with local arbitration law

There is no incompatibility of the Delos Rules with Australian arbitration law (for either domestic or commercial arbitrations).

¹²⁰ See, e.g., *Australian Competition and Consumer Commission v Worldplay Services Pty Ltd* [2004] FCA 1138, (2004) 210 ALR 562 [72]–[75] (Finn J) (admitting evidence from the domain name system), *Australian Competition and Consumer Commission v Dataline. Net. Au Pty Ltd* [2005] FCA 153 [35]–[36] (Kiefel J) (relying on evidence about contents of a computer system), *Dyno Nobel Inc v Orica Explosives Technology Pty Ltd* [2019] FCA 1552 (admitting evidence about contents of the Internet Archive’s Wayback Machine).

¹²¹ *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd* [2017] NSWSC 194 [73]–[81] (Hammerschlag J).

¹²² Model Law Art 7(4) (Option 1) (applied to international commercial arbitrations by *International Arbitration Act 1974* (Cth) s 16), NSW Act s 7(5).

¹²³ See *International Arbitration Act 1974* (Cth) s 9(1), which also applies to enforcement proceedings of domestic commercial arbitrations in the Supreme Court of New South Wales: *Uniform Civil Procedure Rules 2005* (NSW) r 47.6(2).

¹²⁴ See *International Arbitration Act 1974* (Cth) s 9(2)(a), (5), which also applies to enforcement proceedings of domestic commercial arbitrations in the Supreme Court of New South Wales: *Uniform Civil Procedure Rules 2005* (NSW) r 47.6(2).

10. Further Reading

Clyde Croft et al, *International and Australian Commercial Arbitration*, LexisNexis, 2021

John Hockley et al, *Australian Commercial Arbitration*, LexisNexis, 2015

Doug Jones, *Commercial Arbitration in Australia*, 2nd ed., Thomson Reuters, 2013

Rashda Rana, Michelle Sanson, *International Commercial Arbitration*, Thomson Reuters, 2011

ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, <i>i.e.</i> with offices and a case team?	<p>Australian Centre for International Commercial Arbitration (ACICA), incorporating: (i) Australian Maritime & Transport Arbitration Commission; and (ii) Perth Centre for Energy & Resources Arbitration</p> <p>Australian Disputes Centre</p> <p>Resolution Institute (formerly the Institute of Arbitrators and Mediators Australia)</p>
Main arbitration hearing facilities for in-person hearings?	<p>Australian Disputes Centre, Sydney</p> <p>Melbourne Commercial Arbitration and Mediation Centre</p>
Main reprographics facilities in reasonable proximity to the above main arbitration providers with offices in the jurisdiction?	<p>Law In Order</p> <p>Law Image</p> <p>LitSupport</p>
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	<p>VIQ Solutions</p> <p>Epiq</p> <p>Law In Order</p> <p>Opus 2</p> <p>TransPerfect</p> <p>Optima Juris</p>
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	<p>2M Language Services</p> <p>Australian Multi Lingual Services</p> <p>TransPerfect</p>
Other leading arbitral bodies with offices in the jurisdiction?	None