This is the published version:


Available from Deakin Research Online:

http://hdl.handle.net/10536/DRO/DU:30057990

Reproduced with the kind permission of the copyright owner. OA permission granted to the author.

Copyright : 2013, Australian National University
International arbitration is an important area of federal jurisdiction and federal legislative competence, and has attracted significant policy attention in Australia. This paper undertakes a study of pro-arbitration judicial policy in recent arbitration-related Australian case law which touches upon the continuing applicability of the controversial 1999 *Eisenwerk* decision of the Queensland Court of Appeal. Against this pro-arbitration judicial policy context, this paper reviews five *Eisenwerk*-related cases handed down between 2010 and 2012. It concludes that despite pro-arbitration judicial policy being embedded as a requirement of reasoning in decisions under the *International Arbitration Act 1974* (Cth), there is mixed evidence of such policy in the cases surveyed. This paper concludes that the extent to which this policy is evidenced largely corresponds with the degree to which contemporary decisions have departed from *Eisenwerk*.

I INTRODUCTION

There have been periods of lesser and periods of greater judicial and legislative support for the arbitral process.\(^1\)

International commercial arbitration is (subject to one's definition)\(^2\) a form of alternative dispute resolution. It is not, however, completely insulated from domestic


\(^{2}\) Alternative dispute resolution sometimes refers to non-adjudicatory forms of dispute resolution, which excludes arbitration from its scope — see, eg, Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th ed, 2012) 2-3 [1.10]. On the other hand, it has been remarked that 'arbitration is the usual method for the resolution of international commercial disputes'— Michael Pryles, 'The Case for International Arbitration' [2003] *Yearbook of the Australian Mining and Petroleum Law Association* 1, 4 (emphasis added).
judicial systems. A complex relationship exists between State courts and international commercial arbitration. This paper undertakes a study of pro-arbitration judicial policy in recent arbitration-related Australian case law which touches on the continuing applicability of *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* (‘*Eisenwerk*’). The Queensland Court of Appeal’s intervention into the arbitral process in *Eisenwerk* is one example of the interface between arbitration and the courts.

Consideration of this issue is timely. Arbitration is commonly observed to be the ‘principal,’ ‘preferred’ or ‘normal’ means of settling international commercial disputes. Empirical research conducted through the School of International Arbitration at Queen Mary, University of London supports these assertions. Its 2006 and 2008 studies both reported higher preferences for international arbitration compared to transnational litigation, though the relatively narrower gap disclosed in the 2008 study has been noted in the literature. Further, its 2010 study found that of the 68 per cent of respondent corporations having dispute resolution policies, 81 per cent involved ‘a position to adopt arbitration rather than state court litigation’ and for 10 per cent the use of arbitration fell in the ‘[m]ust comply at all times’ category. In the specific sale of goods context, the Global Sales Law Survey similarly concluded that international trade disputes are ‘primarily a matter for arbitral tribunals’.

---


11. Ibid 6 [1].

The federal government recognises that international commercial arbitration represents a ‘market’. Mistelis suggests that attracting 'arbitration cases and arbitration work' to a jurisdiction 'is good for local lawyers [and] good for the local economies'. International arbitration has been described as 'the new black' in Australia and as one commentator observed, 'it is incontrovertible that international arbitration is an area of federal jurisdiction which is significant for Australia's national interest'. In his foreword to The International Arbitration Act 1974: A Commentary, Justice James Allsop goes so far as to describe that Act as 'one of Australia's most important pieces of legislation'.

When the topic of international commercial arbitration is addressed in the Australian context, reference is often made to Singapore and Hong Kong — both established international commercial arbitration centres in the Asia-Pacific region. Pro-arbitration judicial policy is seen as a key aspect of Australia rising to the ranks of these neighbours. As noted by Megens and Cubitt:

For Australia to truly rival Singapore and Hong Kong as the preferred seat for international arbitration in the Asia-Pacific region, there must exist a legislative framework that is tailored to international arbitration and a judicial system that provides support and consistency rather than interference.

This paper analyses the recent line of cases having a bearing on the continued applicability of Eisenwerk. In so doing, it reflects on those cases through the prism of pro-arbitration judicial policy and considers the extent to which manifestation of that policy has brought the Eisenwerk principle to its end.

II THE 'WHO, WHY, WHAT, WHERE AND HOW' OF PRO-ARBITRATION POLICY IN THE AUSTRALIAN COURTS

What, then, is meant by pro-arbitration judicial policy? And why is it important? In this Part, pro-arbitration judicial policy is explained as a concept sourced to the federal

---

government's policy platform, the purposive approach to statutory interpretation, the core ideas underpinning the Convention on the Recognition and Enforcement of Foreign Arbitral Awards20 (‘New York Convention’) and aspects of the promotional and operational work of the Australian judiciary.

In essence, this paper uses the term pro-arbitration judicial policy as a term of art — describing a judicial approach to arbitration-related case law which is international in perspective and moreover sophisticated, to the point that the court's demonstrated and high-level understanding of the arbitral process truly supports rather than frustrates it. Pro-arbitration judicial policy is not merely minimal court intervention21 — rather, contextually appropriate court intervention.22

A Federal government policy — promoting Australia as a regional centre for international commercial arbitration

Pro-arbitration policy (in a general sense) is an element of the current federal government’s policy platform. Overall ‘low levels of [international commercial arbitration] activity’ has been a matter of ‘concern’ amongst Australian policy makers.23 The federal government’s policy, by way of response, is to promote Australia as a regional centre for international commercial arbitration.

This policy position had its genesis in the Attorney-General’s announcement on 21 November 2008 of a review of the International Arbitration Act 1974 (Cth) (the ‘IAA’). This is the key piece of federal legislation regulating international commercial arbitration in Australia. At this time, the Attorney-General stated that the federal government was ‘committed to developing Australia as a regional hub for international commercial dispute resolution’.24 The Discussion Paper released that day asserted that ‘[t]his review will ensure that the [IAA] best supports international arbitration in Australia’.25

To this end, the International Arbitration Amendment Act 2010 (Cth) was passed, making several amendments to the IAA. In the same year, the federal government (with the New South Wales government) assisted in establishing the Australian International Disputes Centre in Sydney.26 More recently, the International Arbitration Regulations 2011 (Cth) have built upon the 2010 legislative reforms by nominating the

26 Australian International Disputes Centre, About Us <http://www.disputescentre.com.au/About-Us>. The AIDC currently houses several Australian arbitration bodies — ACICA, the Australian branch of CIArb, the Australian Maritime and Transport Arbitration Commission, and the Australian Commercial Disputes Centre.
Australian Centre for International Commercial Arbitration as an appointing authority under the IAA.27

This activity represents a form of pro-arbitration policy at a political level. However, what is of more imminent interest for the purposes of this paper is the extent to which judicial decision-making in arbitration-related case law is consistent with the government’s policy position. It is this degree of consistency which will inform this paper’s assessment of pro-arbitration judicial policy as that term is described above.

B The International Arbitration Act 1974 (Cth) — A purposive interpretation

It might be queried why this case law should be consistent with government policy. The strict separation of judicial power from the executive and the Parliament is a key feature of the separation of powers in Australia as expounded in the Boilermakers’ Case.28 The starting point for this analysis is the interpretative methodology that must be applied by the courts to the IAA. An analysis of this methodology confirms that pro-arbitration judicial policy, understood as courts supporting the arbitral process by demonstrating an internationally minded and sophisticated understanding of arbitration, is a legitimate element of legal reasoning in the application of that statute.

It is proper for Australian courts to approach arbitration-related litigation on the basis of pro-arbitration judicial policy because the IAA is facilitative legislation29 and the purposive approach to statutory interpretation requires interpretation against that context. The purposive approach also stands to secure more consistent interpretation of the IAA across the various State and federal courts having jurisdiction with respect to the Act. Such consistency has been emphasised by the High Court in the ‘very stringent test’30 explained in Farah Constructions Pty Ltd v Say-Dee Pty Ltd31 — whereby intermediate courts ’should not depart from decisions … in another jurisdiction on the interpretation of Commonwealth legislation … unless they are convinced that the interpretation is plainly wrong’.32

The purposive approach to statutory interpretation is, at the Commonwealth level, embodied in the Acts Interpretation Act 1901 (Cth) s 15AA. According to this provision, ‘the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.’ Applying this provision to the IAA, the Act’s purposes should inform its construction. Following the coming into force of the International Arbitration

---

27 International Arbitration Regulations 2011 (Cth) reg 4.
Amendment Act 2010 (Cth) on 6 July 2010,33 these purposes are now given statutory basis in an objects section. Pursuant to the new post-amendment IAA s 2D,34

The objects of this Act are:
(a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
(b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
(c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
(d) to give effect to Australia’s obligations under the [New York Convention]; and
(e) to give effect to the [United Nations Commission on Intergovernmental Trade Law (‘UNCITRAL’) Model Law on International Commercial Arbitration]35...

...However while the Acts Interpretation Act 1901 (Cth) s 15AA would ordinarily underpin the purposive interpretation of federal legislation, in the case of the IAA the legislature has gone further and has enacted specific interpretative rules. The International Arbitration Amendment Act 2010 (Cth) inserted a new s 39 into the IAA.36 That provision requires courts to consider the IAA’s objects when undertaking various tasks under the Act.37 These tasks include deciding whether to enforce an award,38 performing functions pursuant to art 6 of the Model Law39 and performing any other functions with respect to the IAA, the Model Law, or any agreement or award to which the IAA applies.40 These tasks also include interpretation of the IAA and the Model Law,41 and the interpretation of an agreement or award to which the IAA applies.42 Further, courts are required not only to consider the IAA’s objects but also take into account two further ‘fact[s]’ — that ‘arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes’,44 and that ‘awards are intended to provide certainty and finality’.45 These two considerations, as well as all

33 International Arbitration Amendment Act 2010 (Cth) s 2. For the specific amending clause — see sch 1 cl 1.
34 A sixth objects paragraph refers to implementation of the ICSID Convention, though this is not relevant to the international commercial arbitration context of this paper — International Arbitration Act 1974 (Cth) s 2D(f).
36 International Arbitration Amendment Act 2010 (Cth) sch 1 cl 26.
37 International Arbitration Act 1974 (Cth) s 39(2)(a). See also ESCO Corporation v Bradken Resources Pty Ltd (2011) 282 ALR 282, 294 [64].
38 International Arbitration Act 1974 (Cth) s 39(1)(a)(i)–(iv).
39 Ibid s 39(1)(a)(v).
40 Ibid s 39(1)(a)(vii)–(viii).
41 Ibid s 39(1)(b).
42 Ibid s 39(1)(c).
43 Ibid s 39(2)(b).
44 Ibid s 39(2)(b)(i).
five objects contained in IAA s 2D that are relevant to international commercial arbitration, reflect concerns to promote and facilitate international commercial arbitration. As explained by Foster J in the Federal Court case of Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd:46

The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.47

By broadening the range of considerations beyond the IAA’s objects per se, and requiring courts to take them into account in relation to functions other than the interpretation of the IAA, the new IAA s 39 operates as an extension on the purposive approach that would otherwise apply by virtue of the Acts Interpretation Act 1901 (Cth) s 15AA. It thereby embeds pro-arbitration judicial policy as a legitimate element of judicial reasoning in the application of the IAA. In applying the IAA, courts are legally required to approach it in a way that is internationally-minded and facilitates arbitration. A sophisticated understanding of arbitration itself is integral to satisfying this requirement.

An additional layer of analysis also supports the use of pro-arbitration judicial policy under Australian law. The IAA implements the terms of the New York Convention into domestic law.48 The Convention contains mechanisms designed to ensure the enforceability of international arbitration agreements49 and awards.50 It has been described by Wetter as ‘the single most important pillar on which the edifice of

46 (2011) 277 ALR 415.
47 Ibid 436 [126].
49 New York Convention art II. Pursuant to art II(1) of the New York Convention, the courts of Contracting States are required to recognise arbitration agreements and pursuant to art II(3) of the New York Convention they must (at the request of a party) refer matters within the scope of valid arbitration agreements back to arbitration.
50 Ibid arts III–IV. Article III of the New York Convention requires the courts of Contracting States to recognise international arbitration awards as binding and enforce them; art IV concerns evidentiary requirements for enforcement; and arts V–VI concern the grounds on which recognition and enforcement of foreign arbitral awards may be denied or adjourned.
international arbitration rests',\textsuperscript{51} while Lord Mustill has gone so far as to suggest that it 'perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law'.\textsuperscript{52} As at 10 May 2013, the \textit{New York Convention} boasts 149 Contracting States, with Lichtenstein, Tajikstan, Sao Tome and Principe, and Myanmar most recently acceding on 7 July 2011, 14 August 2012, 20 November 2012 and 16 April 2013 respectively.\textsuperscript{53} Because '[t]he Act is intended to give effect to the [New York] Convention' it 'must be interpreted in light of the Convention'.\textsuperscript{54}

The \textit{IAA} sets out the \textit{Convention} in its sch 1, but unlike the \textit{Model Law}, it is not simply given 'the force of law in Australia'\textsuperscript{55} by reference. Instead, the \textit{Convention's} terms are implemented by Part II of the Act. Pursuant to the High Court's decision in \textit{Applicant A v Minister for Immigration and Ethnic Affairs}\textsuperscript{56} (\textit{Applicant A}), where domestic legislation implements the terms of a convention, the rules of interpretation contained in the \textit{Vienna Convention on the Law of Treaties}\textsuperscript{57} (the '\textit{VCLT}') should be applied rather than those found in the \textit{Acts Interpretation Act 1901 (Cth)}.\textsuperscript{58} As explained by Brennan CJ:\textsuperscript{59}

If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.\textsuperscript{60}

Pursuant to art 31(1) of the \textit{VCLT} (with emphasis added), '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Further, art 32 of the \textit{VCLT} provides that recourse may be had to supplementary materials to either confirm the meaning that would result from an application of art 31 of the \textit{VCLT}, or in circumstances where that interpretation 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'. As further explored in

\textsuperscript{52} Lord Michael Mustill, 'Arbitration: History and Background' (1989) 6(2) \textit{Journal of International Arbitration} 43, 49.
\textsuperscript{54} Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011) 277 ALR 415, 421 [21] (Foster J). See also \textit{ESCO Corporation v Bradken Resources Pty Ltd} (2011) 282 ALR 282, 295 [73] (Foster J).
\textsuperscript{55} \textit{International Arbitration Act 1974 (Cth)} s 16(1).
\textsuperscript{56} (1997) 190 CLR 225.
\textsuperscript{58} \textit{Applicant A v Minister for Immigration and Ethnic Affairs} (1997) 190 CLR 225, 230–1 (Brennan CJ), 239–40 (Dawson J), 251–3 (McHugh J), 277 (Gummow J), 292, 294–5 (Kirby J).
\textsuperscript{59} Brennan CJ was in the minority, however all five justices agreed on the interpretative principle relevant here.
\textsuperscript{60} \textit{Applicant A v Minister for Immigration and Ethnic Affairs} (1997) 190 CLR 225, 230–1.
Section C below, the New York Convention’s purposes are decidedly pro-arbitration. Thus, a VCLT-interpretation (in accordance with the High Court’s directive in Applicant A) would also support the use of pro-arbitration judicial policy in Australian arbitration-related case law.

C The New York Convention — pro-enforcement bias at the heart of the global arbitration regime

Section B explored the interpretative methodologies surrounding the IAA and why these should lead to the use of pro-arbitration judicial policy in Australia. However, the analysis need not be so parochial. Pro-arbitration judicial policy is a phenomenon rooted in the very essence of the modern legal framework for regulating international commercial arbitration, built around the New York Convention.

The New York Convention’s importance in the present context lies in the fact that its purposes are ‘to promote international commerce and the settlement of international disputes through arbitration’ and ‘to make it easier to enforce foreign awards’. Such purposes are reflected in the case law. To take just one example, in Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [No 2], Foster J noted that ‘the 1958 New York Convention is intended to facilitate the recognition and enforcement of foreign arbitral awards in Convention countries’.

These purposes manifest themselves in what has been termed the New York Convention’s ‘pro-enforcement bias’. This is a phrase employed not only in the literature but also in local and international case law. This pro-enforcement bias is not strictly identical to pro-arbitration judicial policy as that term is used in this paper — the latter (as described above) is wider; the former is concerned with the specific issue of promoting the recognition and enforcement of foreign arbitral awards. As explained in the US decision of Parsons & Whittemore Overseas Co Inc v Societe Generale de L’Industrie du Papier (RAKTA), the ‘basic effort’ of the New York Convention is ‘to promote international commerce and the settlement of international disputes through arbitration’.

References:

63 (2011) 277 ALR 441.
64 Ibid 443 [12].
66 See, eg, Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd [No 2] [2012] FCA 1214 (2 November 2012) [30], [34], [39], [50], [55], [183] (Murphy J); Traxis Europe SA v Balaji Coke Industry Pvt Ltd [No 2] (2012) 201 FCR 535, 555 [90] (Foster J); ESCO Corporation v Bradken Resources Pty Ltd (2011) 282 ALR 282, 298 [85] (Foster J).
68 508 F 2d 969 (2nd Cir, 1974).
remove preexisting obstacles to enforcement’.\textsuperscript{69} The Convention’s pro-enforcement bias is often cited in the context of narrowly reading the art V New York Convention grounds for refusing recognition and enforcement\textsuperscript{70} and in particular the public policy exception.\textsuperscript{71} It also manifests itself in the proposition that awards are ‘prima facie liable to be enforced’\textsuperscript{72} under the New York Convention regime. However, reasoning which utilises the narrower pro-enforcement bias concept is necessarily consistent with the idea of pro-arbitration judicial policy. To borrow terminology from the criminal law field, it might be called a ‘lesser included’.\textsuperscript{73}

The legal basis for Section B’s analysis lay in Australian statutory interpretation methodologies. In discussing the legal basis for the New York Convention’s pro-enforcement bias, reference is often made to the VCLT. The substance of arts 31(1) and 32 of the VCLT were introduced in Section B. Both provisions ostensibly support a pro-enforcement bias interpretation of the New York Convention.

The problem in a formal sense with this analysis is that it overlooks the VCLT’s non-retroactivity. Pursuant to art 4 of the VCLT, its rules ‘appl[y] only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States’. The VCLT came into force on 27 January 1980. However, the New York Convention was opened for signature on 19 June 1958 and came into force on 7 June 1959. Therefore, strictly, the VCLT is irrelevant to the New York Convention’s interpretation at international law.

Nevertheless, the necessity of interpreting the Convention in light of its pro-enforcement bias is confirmed through an alternate avenue of analysis — customary international law. The first part of art 4 of the VCLT reads ‘[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention …’ The interpretative rules in arts 31 and 32 of the VCLT are in fact codifications of the principles otherwise applicable at customary international law.\textsuperscript{74} Thus while arts 31 and 32 of the VCLT are strictly inapplicable in themselves, the rules they embody apply and exist independently of their codification in treaty form. The position remains that the New York Convention should be interpreted according to its pro-enforcement bias (which is

\textsuperscript{69} Ibid 973. See also Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [No 2] (2011) 277 ALR 441, 443 [12] (Foster J).

\textsuperscript{70} See International Council for Commercial Arbitration (ed), above n 57, 14–15. See also Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd [No 2] [2012] FCA 1214 (2 November 2012) [55], [183] (Murphy J).

\textsuperscript{71} See, eg, Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd [No 2] [2012] FCA 1214 (2 November 2012) [50] (Murphy J); Traxys Europe SA v Balaji Coke Industry Pvt Ltd [No 2] (2012) 201 FCR 535, 555 [90] (Foster J); Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011) 277 ALR 415, 439 [132] (Foster J); Parsons & Whitleymore Overseas Co Inc v Societe Generale de L’Industrie du Papier (RAKTA), 508 F 2d 969, 973 (2nd Cir, 1974).

\textsuperscript{72} ESCO Corporation v Bradken Resources Pty Ltd (2011) 282 ALR 282, 292 [53] (Foster J) — in the context of the New York Convention’s implementation in Australia through the IAA.

\textsuperscript{73} In the criminal law context, a ‘lesser included’ offence is ‘[a] crime that is composed of some, but not all, of the elements of a more serious crime and … is necessarily committed in carrying out the greater crime’ — Bryan Garner (ed), Black’s Law Dictionary (West, 9th ed, 2009) 1187.

\textsuperscript{74} Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, 294 (Kirby J).
necessarily consistent with courts applying pro-arbitration judicial policy as defined above).

D  The Australian judiciary — spreading the good word

Reorienting the analysis away from judicial decision-making itself, pro-arbitration judicial policy is reflected in the extra-judicial activities of a growing number of Australian judges as well as in the organisational structures becoming embedded within the Australian courts.

Some members of the judiciary have expressed concern at recent civil procedure reforms which seek to entrench alternative dispute resolution (‘ADR’) in the dispute resolution process. Through the Civil Dispute Resolution Act 2011 (Cth), parties to disputes in the Federal Court of Australia and the Federal Circuit Court are required to each file a ‘genuine steps statement’ which outlines ‘the steps that have been taken to try to resolve the issues in dispute between the applicant and the respondent in the proceedings’ or alternatively ‘the reasons why no such steps were taken’. The intention behind these procedures is to encourage dispute resolution outside of formal court structures and ‘[i]n many cases, some form of ADR would be a genuine step appropriate for parties to consider’. Critics have queried the utility of the legislation — with Justice Steven Rares of the Federal Court asking ‘[w]hy should people be stopped from coming to court because some law says you’re not entitled to it’ and noting ‘particularly useless’ disputes that can arise over what a genuine steps statement is. Such concern has not surfaced with respect to promoting the arbitration of international commercial disputes. Australian judges have instead actively supported development of the local international commercial arbitration market. Historically jealous guardians of their jurisdiction, judges now appreciate the importance of an integrated dispute resolution framework and the practical advantages obtained by diverting some disputes out of the court system.

76 Both Courts are within the exhaustive definition of ‘eligible court’ under the Act — Civil Dispute Resolution Act 2011 (Cth) s 5.
77 Ibid ss 6, 7 (with respect to applicants and respondents, respectively).
78 Ibid ss 6(2)(a)-(b) (with respect to applicants). Respondents’ statements must either indicate agreement with the applicants’ statement or ‘the respect in which, and reasons why, the respondent disagrees’ — ibid s 7(2).
79 Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth) 2.
81 Quine, above n 75.
82 See, eg, the famous remarks of Scrutton LJ that ‘[t]here must be no Alsatia in England where the King's writ does not run’ — Czarnikow v Roth, Schmidt and Company [1922] 2 KB 478, 488.
83 The Supreme Court of Victoria, for example, ‘sees itself as a … real partner with the providers of … ADR services’ — Chief Justice Marilyn Warren, Remarks at the
It is therefore unsurprising that a number of prominent Australian judges actively promote the idea of international commercial arbitration in Australia through seminars, speeches and conference presentations around the world. To take just a few examples, Chief Justice Marilyn Warren and Justice Clyde Croft, both of the Supreme Court of Victoria, have acted in this capacity over recent years, as has the recently-appointed High Court Justice Patrick Keane in his former office as Chief Justice of the Federal Court.

In addition, international commercial arbitration is being actively facilitated by Australian courts through their organisational structures. At issue here is the development of specialised arbitration lists dealing with international commercial arbitration matters, such as the 'benchmark' List G for 'arbitration proceedings' established by the Victorian Supreme Court's Practice Note No 2 of 2010.

---


88 Monichino, 'The Need to Centralise', above n 16, 127.

The rationale for arbitration lists lies in the observation that 'by having all arbitration matters brought in a specialist list ... and heard by select judges experienced in arbitration, a body of jurisprudence will develop which is consistent, reliable and arbitration friendly'.

Croft J of the Supreme Court of Victoria identifies several benefits of specialist arbitration lists, namely that:

- courts with specialist lists are 'likely to be more aware of the specific issues that arise in the arbitration context';
- 'a consistent body of arbitration related decisions can be developed by judges that have an interest and expertise in arbitration'; and
- the 'procedures to be applied [can be made] clear and easily accessible'.

It can thus be seen that the existence of and justification for specialised arbitration lists is closely tied in with the execution of pro-arbitration judicial policy as that term is described as an element of legal reasoning in Sections B and C above.

## III EISENWERK, THE MODEL LAW AND 'OPTING OUT'

Manifestation of the pro-arbitration judicial policy analysed in Part II, with respect to case law having a bearing on the continued applicability of Eisenwerk, is assessed in Part IV. Before that assessment is undertaken, some remarks can be made about Eisenwerk, the Model Law and the idea of 'opting out'.

Eisenwerk was a decision of the Queensland Court of Appeal handed down in 1999, though it was not reported in the Queensland Reports until 2001. The case was highly controversial.

It involved application of a now-superseded provision of the IAA — the old IAA s 21. This paper refers to this provision as the 'old' IAA s 21 to distinguish it from IAA s 21 as currently in force following the passage of the International Arbitration Amendment Act 2010 (Cth).

The old IAA s 21 provided as follows:

If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.

As a result of IAA s 16(1), the Model Law is given 'the force of law in Australia'. Therefore, considering the effect of IAA s 16(1) together with its old s 21, the Model Law operated as would be described by the law and economics movement as a set of 'default rules'.

The Model Law provided a default regulatory regime for international commercial arbitrations seated in Australia. However, it was open to the parties to agree (in writing) to subject themselves to a different body of law to govern the arbitration.

---

89 Megens and Cubitt, 'Emerging Trends', above n 19, 42 (emphasis added).
90 Croft, 'The Development of Australia as an Arbitral Seat', above n 85, 13–14.
There is nothing inherently insidious about the operation of IAA s 16(1) in conjunction with its old s 21 per se. To the contrary — procedural flexibility is a hallmark feature of international commercial arbitration. Thus the similar opt-out mechanism in Singapore’s arbitration legislation was amended, rather than discarded, after a controversial and Eisenwerk-like interpretation in John Holland Pty Ltd v Toyo Engineering Corp (Japan).\(^{93}\) The importance of procedural flexibility is recognised not only in the international commercial arbitration literature but is also empirically confirmed by research conducted through the School of International Arbitration. Its 2006 study found that procedural flexibility was ‘the most widely recognised advantage’ of arbitration amongst its respondents.\(^{94}\) Similarly, the School’s 2008 study found that procedural flexibility was an advantage of arbitration that ‘most counsel spoke of’.\(^{95}\) Further, the Redfern & Hunter commentary specifically advert to the possibility that parties to an international commercial arbitration seated in one State may wish to subject themselves to a foreign lex arbitri — however unwise or inadvisable such a decision might be.\(^{96}\) Opt-out mechanisms exist in the arbitration laws of other prominent arbitral seats in the region, such as Singapore (as mentioned above),\(^{97}\) and the current lack of an opt-out provision in the IAA was recently noted by Chief Justice Patrick Keane of the Federal Court at the 6th Annual AMTAC Address.\(^{98}\)

The reason that Eisenwerk ‘caused instant consternation’\(^{99}\) throughout the Australian arbitration community was not so much a consequence of these provisions’ existence, but rather the interpretation Eisenwerk placed on the old IAA s 21. Applying that provision, Eisenwerk held that ‘by expressly opting for one well-known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the Model Law’.\(^{100}\) The ‘form of arbitration’ referred to in Eisenwerk was the parties’ adoption of the ICC Arbitration Rules.\(^{101}\) Constitutionally speaking, the activation of the old IAA s 21 in these circumstances meant that the Model Law was displaced without the selection of an alternative lex arbitri; the relevant State or Territory Uniform Commercial Arbitration Act would no longer be suppressed by the operation of s 109 of the Commonwealth

---

\(^{94}\) School of International Arbitration, Corporate Attitudes 2006, above n 8, 6 [2.2].  
\(^{95}\) School of International Arbitration, Corporate Attitudes 2008, above n 8, 5.  
\(^{97}\) International Arbitration Act (Singapore, cap 143A, 2002 rev ed) s 15.  
\(^{100}\) Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH [2001] 1 Qd R 461, 466 [12] (Pincus JA).  
Constitution, and the arbitration would therefore be regulated by the relevant State or Territory law.  

Much has been written about Eisenwerk and the error its reasoning committed in treating a choice of procedural rules (clearly foreseen and accommodated by art 19(1) of the Model Law) as evidencing an intention to displace the Model Law — essentially that it ‘seemed to conflate’ contractually agreed-upon arbitration rules with the applicable lex arbitri. In doing so, Eisenwerk lacks pro-arbitration judicial policy as defined by failing to adopt an internationally minded perspective or a sophisticated understanding of international commercial arbitration. It is not the intention or purpose of this paper to revisit the question of whether Eisenwerk was rightly decided, which has been exhaustively considered in the literature and has been answered with a resounding ‘no’. Rather, what is of contemporary significance are the cases which between 2010 and the time of writing have followed — and what is of particular interest given current federal government policy is the extent to which their reasoning displays evidence of pro-arbitration judicial policy.

These cases are, of course, only a subset of the (growing) corpus of recent Australian arbitration-related case law. For practical reasons, that entire body of case law cannot be analysed here. For the purposes of this paper, the Eisenwerk line of cases are a useful and interesting illustration of the pro-arbitration judicial policy concept at work (or not). They are a self-contained sample of cases running along a consistent theme that provide an informative basis for this paper’s analysis.


104 Rudge and Miles, above n 103, 43.

IV THE END OF EISENWERK? — A CASE STUDY IN PRO-ARBITRATION JUDICIAL POLICY

In this Part, five cases having a bearing on the continued applicability of Eisenwerk are analysed for evidence of this pro-arbitration judicial policy. These cases, handed down between 2010 and the time of writing, are:

- **Cargill International SA v Peabody Australia Mining Ltd**\(^{106}\) (‘Cargill International’);
- **Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS**\(^{107}\) (‘Wagners’);
- **Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB**\(^{108}\) (‘Lightsource’);
- **Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd**\(^{109}\) (‘Castel’); and
- **Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd**\(^{110}\) (‘Rizhao Steel’).

In addition relevant reforms effected through the International Arbitration Amendment Act 2010 (Cth) are considered, which are particularly relevant to this Part’s analysis of Castel and Rizhao Steel.

A **Cargill International — The New South Wales Supreme Court**

*Cargill International* was a case handed down by Ward J in the Supreme Court of New South Wales on 11 August 2010. A partial award had been rendered in an arbitration conducted pursuant to an arbitration agreement adopting the ICC Arbitration Rules.\(^{111}\) The respondent in the arbitration and the plaintiff in the litigation (Cargill International) sought to challenge the award, raising bases for doing so under both the now-repealed *Commercial Arbitration Act 1984* (NSW) s 38(4)(b) and art 34(2)(b)(ii) of the Model Law.\(^{112}\) In determining this challenge, Ward J was required to identify which regime governed the arbitration,\(^{113}\) and thus to reassess the Queensland Court of Appeal’s reasoning in *Eisenwerk*.

Ward J relevantly held that the parties’ arbitration clause was distinguishable from the clause in *Eisenwerk*, but in the event this analysis was wrong, her Honour went on to hold that:

- the parties’ arbitration agreement did not enliven the old IAA s 21; and
- *Eisenwerk* was plainly wrong and should not be followed.\(^{114}\)

Concluding that the Model Law therefore applied, Ward J ultimately held that the Model Law ground of challenge was not made out.\(^{115}\)

---

\(^{106}\) (2010) 78 NSWLR 533.


\(^{108}\) (2011) 250 FLR 63.

\(^{109}\) (2012) 201 FCR 209.

\(^{110}\) (2012) 43 WAR 91.

\(^{111}\) *Cargill International SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533, 535–6 [1], 547 [39].

\(^{112}\) Ibid 537 [8]–[10].

\(^{113}\) Ibid 537 [8].

\(^{114}\) See her Honour’s summary of the decision at ibid 542 [31].
A strong sense of pro-arbitration judicial policy can be discerned in Ward J's consideration of Eisenwerk.

In recounting the Eisenwerk principle, the Court concluded that first:

*Eisenwerk* stands as authority for the proposition that, by expressly adopting a different 'form of arbitration' (there, that being the ICC Rules), parties will be taken to have shown a sufficient intention not to adopt the form or system of arbitration provided for under the Model Law (and that this is sufficient to amount to an opt out agreement for the purposes of the [old IAA s 21]) and second, that there is a distinction between the procedural rules governing an arbitration and the *lex arbitri*, not properly appreciated by *Eisenwerk*, such that the decision was plainly wrong and should not be followed.

The pro-arbitration judicial policy underlying this decision can be seen in the Court's efforts to reach a conclusion regarding *Eisenwerk* which paid due regard to the Model Law's internal structure and which was informed by the relevant academic literature. While her Honour emphasised that this literature merely 'confirms the view I would in any event have formed', a number of local and international commentaries concerning *Eisenwerk* were referred to.

Ward J's decision rejects a feature of Australian arbitration jurisprudence which, as outlined in Part III above, was widely perceived as undesirable. For example, the then federal Attorney-General the Hon Robert McClelland MP remarked in a December 2009 speech that 'I am sure no one here needs reminding of the impact that the *Eisenwerk* decision has had on Australia's reputation internationally'. To this extent, it 'demonstrates a mature understanding of international commercial arbitration' and has a pro-arbitration effect consistent with the implementation of pro-arbitration judicial policy.

### B Wagners — The Queensland Court of Appeal

A very different approach to *Eisenwerk* was taken by the Queensland Court of Appeal in *Wagners*. That case came before the Court (constituted by McMurdo P, Muir JA and White JA) by way of a case stated relating to an existing arbitration, and judgment was rendered on 20 August 2010 — just nine days after *Cargill International*. The case stated asked the Court to consider three questions:

---

115 Ibid 545 [31]. Ward J also found that the CAA claim would have been rejected in any event — ibid 542–6 [31].
116 Ibid 549 [45].
117 Ibid 555–560 [68]–[77].
118 Ibid 560–1 [84]–[91].
119 See especially Model Law arts 19(1), 2(e).
120 *Cargill International SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533, 560 [83].
121 Ibid 558–560 [80]–[83].
122 McClelland, 'More Effective and Certain', above n 13.
124 Matt Skinner and Justin Simpkins, 'Enforcement of Foreign Awards in Australia' (2011) 77 *Arbitration* 54, 57. See also Megens and Cubitt, 'Emerging Trends', above n 19, 40 — suggesting that New South Wales can be characterised as 'a [S]tate which has a progressive approach to arbitration'.

• whether the parties’ arbitration agreement (adopting the *UNCITRAL Arbitration Rules*)\(^{125}\) constituted an opt-out agreement under the old IAA s 21;
• whether adoption of those Rules (as opposed to the *ICC Arbitration Rules*) distinguished the case from the *Eisenwerk* ‘principle’; and
• if not, whether *Eisenwerk* was correctly decided.\(^{126}\)

The parties’ motivation for litigating appears to have been their desire to clarify ‘the applicable supervisory law’ so as to support ‘the efficacious conduct of the arbitration’ and to ensure the parties ‘know at an early stage of the arbitration their rights of judicial review of any award’.\(^{127}\) *Cargill International*, discussed in Section A above, is a good illustration of how these rights of recourse can differ depending on the applicable regime.

Unlike Ward J, the Queensland Court of Appeal was not so ready to declare *Eisenwerk* wrongly decided. Instead, it took a radically different view of the nature of the *Eisenwerk* holding, and confined the decision to its facts. It held that the *Eisenwerk* ‘principle’ was ‘in truth, no principle at all’.\(^{128}\) Rather, the Court viewed *Eisenwerk’s* conclusion as one relating to the construction of the particular contractual terms at issue in that case.\(^{129}\) The Court justified this view by pointing out that conclusions as to the construction of contractual terms in one case do not necessarily bind courts in future cases even when considering identical terms, given that contractual interpretation is a task undertaken in context.\(^{130}\)

*Wagners* can be viewed as manifestly lacking the pro-arbitration judicial policy underpinning *Cargill International*. The Court treated the key issue as entirely one of contractual interpretation. In Muir JA’s assessment, ‘whether the parties have agreed that any dispute between them is to be settled otherwise than in accordance with the *Model Law* depends on the construction of [the arbitration agreement]’.\(^{131}\) While contractual interpretation is part of the jigsaw, it is not the only puzzle piece at play. Equally, analysing opt out issues under the old IAA s 21 involves the meaning of that provision — that is, statutory interpretation. That question is one of law, with relevant case law thus carrying precedential effect. The implications of this point were not adequately addressed by the Court. In addition, while it is true that contractual interpretation is a task undertaken in context, there are areas of the law where precedential value is ascribed to the interpretation of contractual terms for policy reasons — for example, in construing terms found in insurance contracts. The requirements of pro-arbitration judicial policy could arguably dictate a similar approach be taken to the construction of arbitration agreements.


\(^{128}\) Ibid [42] (Muir JA).

\(^{129}\) Ibid.

\(^{130}\) Ibid [43] (Muir JA).

\(^{131}\) Ibid [31].
Muir JA downplayed the statutory interpretation issue by noting that the ‘intention of Parliament’ was not ‘relevant … except in as much as the relevant intention finds its expression in the clear, unambiguous language of [the old IAA] s 21’. To this, three points can be made. First, one might query whether the old IAA s 21 is as clear and unambiguous as suggested, given the diverging approaches taken by different courts in *Eisenwerk*, *Cargill International*, *Wagners* and *Lightsource* (analysed in Section C below). Secondly, Megarry J’s cautionary words in *John v Rees* seem apposite in this context:

As everybody who has anything to do with the law knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.\(^{134}\)

And thirdly, statutory interpretation is inescapably tied up with the notion of pro-arbitration judicial policy. This was demonstrated in Part II above. In international law, the *New York Convention* must be interpreted in accordance with its pro-enforcement bias and more broadly, interpretation of the IAA by Australian courts is legally required to occur in accordance with pro-arbitration judicial policy. This is so given the new IAA ss 2D and 39 inserted by the *International Arbitration Amendment Act 2010* (Cth), but is also the result that would be required under the purposive approach to statutory interpretation enshrined in the *Acts Interpretation Act 1901* (Cth) s 15AA.

Thus, some authors describe *Wagners* as ‘arbitration-unfriendly’.\(^{135}\) Megens and Cubitt go so far as to suggest that [o]ne would query why any arbitration practitioner, given the choice, would want to have an arbitration seated in Queensland’.\(^{136}\) While not in so many words, what these concerns essentially reflect is the decision’s lack of pro-arbitration judicial policy. However, not all assessments of *Wagners* have been critical. Rudge and Miles suggest that taken together, *Cargill International* and *Wagners* ‘will perhaps go some way towards repairing the damage international observers have perceived’.\(^{137}\) Whilst acknowledging *Wagners* did not ‘go as far as’ *Cargill International*, these authors suggest the decision ‘is nevertheless encouraging’\(^{138}\) and that taken together with *Cargill International* the cases ‘represent a statement to the international arbitral community … that Australia’s judiciary is arbitration friendly’.\(^{139}\) Consequently, Rudge and Miles ‘commend these decisions to the reader’.\(^{140}\)

On balance, it is difficult to accept the view that *Wagners* expresses ‘opposition to the conclusion drawn … in *Eisenwerk*’.\(^{141}\) Rather, the decision sidesteps the important statutory interpretation dimension of the old IAA s 21’s operation, and in doing so escapes the need to comment on *Eisenwerk*’s correctness. For this reason, the preferable

---

132 Ibid.
134 Ibid 402.
137 Rudge and Miles, above n 103, 43.
138 Ibid 51.
139 Ibid 53.
140 Ibid.
141 Ibid.
view is that Wagners fails to evidence the pro-arbitration judicial policy underpinning Cargill International.

C  **Lightsource — The ACT Supreme Court**

Following the decisions in *Cargill International* and *Wagners*, Smith and Cook suggested that *Eisenwerk* had ‘not [been] followed in later cases’. However, on 12 April 2011, Refshauge J handed down the ACT Supreme Court’s judgment in *Lightsource*. This decision demonstrated that the end of *Eisenwerk* had not yet come.

*Lightsource* concerned a dispute between Lightsource, an Australian software reseller, and Pointsec, a Swedish software developer. The parties entered into the ‘PMT Partner Agreement Australia’ on 2 October 2003, ‘whereby [Pointsec] granted to [Lightsource] a non-exclusive, non-transferable right to market and distribute certain of [Pointsec’s] software products and services in the Australian Capital Territory’.

After a dispute arose under the contract, Lightsource commenced ACT Supreme Court proceedings on 16 March 2007 alleging unconscionability and unjust enrichment.

The parties had included a dispute resolution clause (cl 12.8) in their contract. That clause provided for the arbitration of any disputes in Sweden through the Stockholm Chamber of Commerce, using the *SCC Expedited Rules*. Swedish law was the contract’s governing law. Pointsec sought to have the ACT Supreme Court litigation stayed on the basis of this clause. It also sought to have service of the originating application set aside, though as this point turned purely on the application of the *Court Procedures Rules 2006* (ACT) it is not considered any further by this paper.

Pointsec’s claim that cl 12.8 justified a stay of proceedings was put on four different and alternative bases:

- section 7 of the *International Arbitration Act 1974* (Cth) — which is the domestic implementation of the obligation of Australian courts to stay proceedings in the face of a valid arbitration agreement contained in art II(3) of the *New York Convention*;
- article 8 of the *Model Law* — which is the equivalent provision requiring a stay of proceedings found in the *Model Law*;
- section 53 of the *Commercial Arbitration Act 1986* (ACT) — which provides for staying litigation in the context of domestic commercial arbitration; and

---

142 Smith and Cook, above n 103, 113.
143 *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63, 66 [1]-[2].
144 Ibid 66 [3].
145 Ibid 67-8 [12].
146 Ibid 66-7 [4].
149 Ibid 68 [16]. See also 69 [30].
150 Ibid 68 [16]. See also 69 [30].
the Court's 'inherent power and jurisdiction to stay proceedings before it'.

For the purpose of this paper's analysis, the key element of *Lightsource* relates to its application of art 8 of the *Model Law*. It is the Court's consideration of the *Model Law* art 8 argument that caused it to have reference to *Eisenwerk* and which is also most interesting for the purposes of analysing pro-arbitration judicial policy. While the Court noted the 'very similar terms' upon which art 8 of the *Model Law* and IAA s 7 operated, the Court's decision relating to IAA s 7 turned on a contractual interpretation issue relating to cl 11.7 of the PMT Partner Agreement Australia. With respect to the third and fourth alleged bases for a stay, neither raised issues concerning international commercial arbitration under which an analysis of pro-arbitration judicial policy (or *Eisenwerk*) becomes relevant.

Article 8(1) of the *Model Law*, like IAA s 7(5), contains an exception to the requirement of a stay where the arbitration agreement is 'inoperative or incapable of being performed'. On the basis of cl 11.7 of the PMT Partner Agreement Australia, this was fatal to the IAA s 7 argument. The art 8 *Model Law* argument could have been dismissed for the same reason. However, instead, Refshauge J invoked *Eisenwerk* as the reason for the claim's failure.

Referring to the old IAA s 21, Refshauge J noted that '[t]he Agreement does not expressly so provide' that the *Model Law* would not apply. His Honour also acknowledged that '[t]here is no evidence before me that the parties have otherwise so agreed'. Nonetheless, on the basis of *Eisenwerk* and the parties' choice of the SCC Expedited Rules, the Court held that the parties had impliedly excluded the *Model Law*. In the words of Refshauge J, 'I have perused the [SCC Expedited Rules] and there are real differences between [them] and the *Model Law*'. Thus it was held that 'the parties have agreed ... to proceed other than in accordance with the *Model Law*'. Consequently, art 8 of the *Model Law* was held to be inapplicable.

This decision is troubling from a pro-arbitration judicial policy perspective. First, it does not make any reference to the IAA s 2D statutory objects. This is not just a matter of good practice — it is *required* of courts performing 'functions' or 'exercising ...
powers' under the Model Law by IAA ss 39(1)(a)(vi) and (2)(a).\textsuperscript{161} Making a determination under art 8 of the Model Law is apt to be described as a function or an exercise of power under the Model Law, thus as a matter of law reference to the IAA's 2D objects is required. Particularly relevant in this case could have been the objects of 'facilitat[ing] the use of arbitration agreements'\textsuperscript{162} and also 'giv[ing] effect to the UNCITRAL Model Law'.\textsuperscript{163}

While the Lightsource judgment was handed down on 12 April 2011, the proceedings themselves had been initiated on 16 March 2007 and the stay application was heard on 28 May 2008.\textsuperscript{164} Thus notwithstanding the date of judgment, from a practical perspective, Lightsource might be thought of as the first in time in this line of five cases and as (in essence) a case pre-dating the International Arbitration Amendment Act 2010 (Cth). Even if this perspective is taken and the IAA's 2D issue is put to one side, critiques from a pro-arbitration judicial policy perspective remain. For example, the decision contains no critical assessment of Eisenwerk. This is surprising given the decision's infamy, the close scrutiny it has received in the academic literature, and the fact that two Australian superior courts had within the previous 12 months come to very different conclusions regarding its precedential value.

Further, and perhaps most fundamentally, pro-arbitration judicial policy is demonstrably lacking in Lightsource given the Court's failure to contextualise the old IAA's 21's operation against the sphere of applicability of the Model Law. To demonstrate this point, an analysis of that scope is required. Though the analysis is technical, had it been undertaken by the Court, the relevance of art 8 of the Model Law would not have been dismissed (at least, not for the reasons given); the reach of the old IAA's 21 would have been narrowed; and pro-arbitration judicial policy would have been furthered.

Lex arbitri are generally conceived of as being territorial in their application.\textsuperscript{165} In other words, they apply as the baseline procedural law governing an international commercial arbitration if that arbitration is seated within the relevant State.\textsuperscript{166} The Model Law operates in this fashion. As a general rule, its application is territorial in the


\textsuperscript{162} International Arbitration Act 1974 (Cth) s 2D(b).

\textsuperscript{163} Ibid s 2D(e).

\textsuperscript{164} The fact that nearly three years elapsed between Lightsource's application and the Court's decision has not escaped criticism — see Monichino, '2010 / 2011 Review', above n 18, 224.


\textsuperscript{166} Jeffrey Waincyrmer, Procedure and Evidence in International Arbitration (Kluwer, 2012) 170; Blackaby et al, above n 5, 180 [3.51]. As the House of Lords has explained, '[t]he parties have chosen their forum; they must take its rules unless, as far as is lawfully possible, they expressly exclude them' — SA Coppée Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd (in liq) [1995] 1 AC 38, 66 (Lord Slynn).
sense that most of its provisions 'apply only if the place of arbitration is in the territory of this State'.

However, art 8 of the Model Law is one of a number of exceptions. Article 8 of the Model Law is thus able to be applied by an Australian court — to refer litigating parties back to arbitration — even if the seat of arbitration is not Australia. This is a logical consequence of the provision's purpose. Securing compliance with arbitration agreements would be frustrated if a party could unilaterally choose to litigate outside the arbitral seat with impunity.

Article 8 of the Model Law, and the other provisions mentioned as exceptions to the general rule in art 1(2) of the Model Law, can be viewed as a discrete part of the Model Law having operation independent of the Model Law acting as lex arbitri. Thus, should the Model Law not apply, these specific provisions must still be able to be invoked by an Australian court. This is true where, as is envisaged by art 1(2) of the Model Law, the seat of arbitration is outside Australia. It is argued here to also be true where, under the old IAA s 21, the parties displace the Model Law's application (whether by virtue of a genuine agreement or through the operation of Eisenwerk).

In Lightsource, the seat of arbitration was Sweden and the adoption of the SCC Expedited Rules led the Court to invoke the old IAA s 21 (on the basis of Eisenwerk). Neither of these facts preclude the operation of art 8 of the Model Law. Applying pro-arbitration judicial policy, as required by IAA s 39 and a consideration of the IAA s 2D statutory objects, should have led the ACT Supreme Court to this conclusion and should have led it to assess whether art 8 of the Model Law required a stay (though given the Court's decision with respect to IAA s 7, the answer would most likely still have been no).

D Enter the Amendments

Before considering Castel and Rizhao Steel, the final two cases relevant to Eisenwerk's continued applicability, a further factor must be injected into this paper's analysis — the legislative reforms effected to the IAA through the International Arbitration Amendment Act 2010 (Cth). These reforms directly touch on the Eisenwerk point and were the subject of consideration in both Castel and Rizhao Steel, which are analysed in Sections E and F below.

Following the International Arbitration Amendment Act 2010 (Cth), the power of parties to opt out of the Model Law has been removed. The old IAA s 21, which has so far been the focus of analysis in this paper, has been replaced. The new IAA s 21, which sits under the heading 'Model Law covers the field', now provides that:

- If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.

This new IAA s 21 is radically different to the old, and affects two distinct policy decisions. One is to ensure that all international commercial arbitrations seated in

---

167 Model Law art 1(2).
168 Ibid.
170 International Arbitration Amendment Act 2010 (Cth) sch 1 cl 16.
Australia are governed by the Model Law as the relevant \textit{lex arbitri}.\footnote{171} Thus opt outs of any kind are no longer permitted. The second is to legislatively reverse \textit{Eisenwerk}.\footnote{172} If opt-outs are no longer possible, the effect of \textit{Eisenwerk} is nullified as there is no legal avenue available for Australian courts to interpret the parties’ choice of arbitration rules as being inconsistent with the Model Law. As alluded to by the new heading of IAA s 21, this provision effectively operates to create a Commonwealth Constitution s 109 inconsistency with the State and Territory Uniform Commercial Arbitration Acts\footnote{173} so far as an arbitration falls within the scope of the Model Law — that is, in relation to international commercial arbitrations. State and Territory legislation now unambiguously operates in the province of domestic commercial arbitration only.

What remained ambiguous however was the temporal reach of the new IAA s 21. Despite quite detailed regulation of the time at which many amending clauses in the \textit{International Arbitration Amendment Act 2010 (Cth)} take effect,\footnote{174} there is nothing in the Act which clarifies the point in time at which the new IAA s 21 is operative.\footnote{175} Early commentary operated on the assumption that the new IAA s 21 would operate only in relation to arbitration agreements entered into after the date on which the \textit{International Arbitration Amendment Act 2010 (Cth)} received royal assent\footnote{176} — being 6 July 2010.\footnote{177}

However, after further analysis, an important complication was discovered — the

\footnote{171}{See the issues and problems with respect to the old IAA s 21 discussed in the Revised Explanatory Memorandum, International Arbitration Amendment Bill 2010 (Cth) 15-16 [112].}

\footnote{172}{See the discussion of \textit{Eisenwerk} in the Revised Explanatory Memorandum, International Arbitration Amendment Bill 2010 (Cth) 16 [113].}

\footnote{173}{\textit{Commercial Arbitration Act 1986 (ACT); Commercial Arbitration Act 1984 (NSW); Commercial Arbitration Act 1985 (NT); Commercial Arbitration Act 1990 (Qld); Commercial Arbitration and Industrial Referral Agreements Act 1986 (SA); Commercial Arbitration Act 1986 (Tas); Commercial Arbitration Act 1984 (Vic); Commercial Arbitration Act 1985 (WA). Under the new Uniform Commercial Arbitration Act regime being progressively enacted across the Australian jurisdictions, international commercial arbitration is carved out and thus no s 109 inconsistency strictly arises — \textit{Commercial Arbitration Act 2010 (NSW) ss 1(1), 1(3)(c); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT) ss 1(1), 1(3)(c); Commercial Arbitration Act 2013 (Qld) ss 1(1), 1(3)(c); Commercial Arbitration Act 2011 (SA) ss 1(1), 1(3)(c); Commercial Arbitration Act 2011 (Tas) ss 1(1), 1(3)(c); Commercial Arbitration Act 2011 (Vic) ss 1(1), 1(3)(c); Commercial Arbitration Act 2012 (WA) ss 1(1), 1(3)(c).}}

\footnote{174}{International Arbitration Amendment Act 2010 (Cth) ss 2(1), (3).}

\footnote{175}{Albert Monichino and Alex Fawke, ‘International Arbitration in Australia: 2011 / 2012 in Review’ (2012) 23 Australasian Dispute Resolution Journal 234, 235. This was expressly recognised by the Western Australian Court of Appeal — \textit{Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd} (2012) 43 WAR 91, 123-4 [146] (Martin CJ). Cf ibid s 2(1).
Specifically, there is no application rule in sch 1 pt 2 for the IAA s 21 amendment contained in sch 1 pt 1 cl 16 — see Garnett and Nottage, ‘What Law’, above n 169, 957.}


spectre of the 'black hole' arbitration.\textsuperscript{178} If the new IAA s 21 only applies to arbitration agreements entered into after 6 July 2010, it is possible that a pre-existing arbitration agreement could still (pursuant to the old IAA s 21) exclude the Model Law but at the same time not be governed by the relevant State or Territory Commercial Arbitration Act as the new State and Territory regimes operate immediately (irrespective of when an arbitration agreement is concluded).\textsuperscript{179} Thus, despite enactment of the new IAA s 21, questions remain over the continued applicability of the old IAA s 21 (and thus by implication the continued applicability of Eisenwerk) where an arbitration agreement was concluded before 6 July 2010. Statistical data published by the International Chamber of Commerce demonstrates that there are often a number of years (sometimes a great number of years) between the conclusion of an arbitration agreement and the initiation of proceedings,\textsuperscript{181} confirming the practical importance of this issue.

E Castel — The Federal Court of Australia

These questions were explored by the Federal Court of Australia in Castel, a decision handed down by Murphy J on 23 January 2012. Castel did not examine the Eisenwerk principle \textit{per se}, though it did address the temporal reach of the new IAA s 21 and in doing so indirectly addressed the continued applicability of Eisenwerk. The decision, which concerned a challenge to the Federal Court's jurisdiction to enforce a non-foreign award\textsuperscript{182} pursuant to the IAA and the Model Law, was based on an application of s 39B(1A)(c) of the Judiciary Act 1903 (Cth)\textsuperscript{183} with Murphy J's analysis of the new IAA s 21 strictly constituting \textit{obiter dicta}.\textsuperscript{184} Nonetheless, the Court's analysis is instructive in the quest to assess whether the end of Eisenwerk has finally come (and the

\textsuperscript{178} Garnett and Nottage, 'What Law?', above n 169, 969-70. See also Monichino and Fawke, above n 175, 235-6.

\textsuperscript{179} Commercial Arbitration Act 2010 (NSW) sch 1 cl 2(1)(a); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT) s 43(1)(a); Commercial Arbitration Act 2013 (Qld) s 42(1)(a); Commercial Arbitration Act 2011 (SA) sch 1 cl 8(1)(a); Commercial Arbitration Act 2011 (Tas) sch 1 cl 2(1)(a); Commercial Arbitration Act 2011 (Vic) s 43(1)(a); Commercial Arbitration Act 2012 (WA) s 43(1)(a).

\textsuperscript{180} Commercial Arbitration Act 2010 (NSW) ss 1(1), 1(3)(c); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT) ss 1(1), 1(3)(c); Commercial Arbitration Act 2013 (Qld) ss 1(1), 1(3)(c); Commercial Arbitration Act 2011 (SA) ss 1(1), 1(3)(c); Commercial Arbitration Act 2011 (Tas) ss 1(1), 1(3)(c); Commercial Arbitration Act 2011 (Vic) ss 1(1), 1(3)(c); Commercial Arbitration Act 2012 (WA) ss 1(1), 1(3)(c).

\textsuperscript{181} This observation is repeatedly borne out in the annual Statistical Reports published in the ICC International Court of Arbitration Bulletin (though the ICC has not published data concerning the years that ICC dispute contracts were formed since 2007). See especially International Chamber of Commerce, '2000 Statistical Report' (2001) 12(1) ICC International Court of Arbitration Bulletin 5, 10 — noting that an ICC arbitration filed in 2000 related to a contract formed more than 50 years earlier in 1947.

\textsuperscript{182} Murphy J's judgment uses the term 'non-foreign award' to describe an international commercial arbitration award handed down in an Australian seated arbitration, as opposed to a 'domestic award' which is more apt to describe an award in a purely domestic arbitration involving only Australian parties — Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd (2012) 201 FCR 209, 212 [14].

\textsuperscript{183} Ibid 221 [57].

\textsuperscript{184} Ibid 221 [59]. See also Monichino and Fawke, above n 175, 241.
extent to which pro-arbitration judicial policy influenced that result). For the purpose of this paper, the decisions of Murphy J following later in 2012 concerning the substance of the challenge to recognition and enforcement\(^{185}\) and the orders in the proceedings\(^{186}\) will be put to one side, as will the recently delivered High Court decision upholding the constitutional validity of the Model Law’s implementation through the IAA arising out of the case.\(^{187}\) The key point for present purposes is the Court’s analysis of the temporal operation of the new IAA s 21 in the original 23 January 2012 decision.

What is interesting about Castel is that the effect of Murphy J’s analysis vis-à-vis Eisenwerk is decidedly pro-arbitration, though pro-arbitration judicial policy plays only a limited role in the reasoning leading to that result. As to the temporal reach of the new IAA s 21, the Court suggested that the provision should be given retrospective effect and apply irrespective of when the relevant arbitration agreement was entered into.\(^{188}\) Should this obiter dicta opinion be accepted, the result is the complete end of the Eisenwerk principle. If the old IAA s 21 is given no lingering residual effect, there is no longer any space in which the Eisenwerk principle can operate.

Notwithstanding its strong pro-arbitration effect, Murphy J’s opinion is based on rather ordinary principles of statutory interpretation. At the heart of the Court’s reasoning was a consideration of ‘the general presumption in Australian law against retrospectivity of legislation, subject to clear contrary intention’.\(^{189}\) This general presumption is more precisely defined by the principle that under Australian law, substantive laws will be given only prospective effect while procedural laws will be given retrospective effect, subject to a contrary legislative intention.\(^{190}\) To this effect, Murphy J quoted\(^{191}\) the ‘leading case’\(^{192}\) of Maxwell v Murphy in which Dixon CJ remarked:

> Perhaps there could be no more practical summary of the principle, which, as was said, emerges from the English and Canadian cases, than the following,—’unless the language used plainly manifests in express terms or by clear implication a contrary intention—(a) A statute divesting vested rights is to be construed as prospective. (b) A statute, merely

\(\text{\textsuperscript{185}}\) Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd [No 2] [2012] FCA 1214 (2 November 2012).

\(\text{\textsuperscript{186}}\) Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd [No 3] [2012] FCA 1282 (19 November 2012).

\(\text{\textsuperscript{187}}\) TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 295 ALR 596. For the transcript of the High Court hearing see Transcript of Proceedings, TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia (2012) HCATrans 277 (6 November 2012). See also Monichino and Fawke, above n 175, 247–248.

\(\text{\textsuperscript{188}}\) Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd (2012) 201 FCR 209, 222–5 [65]–[81].

\(\text{\textsuperscript{189}}\) Ibid 222 [65].

\(\text{\textsuperscript{190}}\) See generally DC Pearce and RS Geddes, Statutory Interpretation in Australia (LexisNexis Butterworths, 7th ed, 2011) 322–345 [10.1]–[10.36].

\(\text{\textsuperscript{191}}\) Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd (2012) 201 FCR 209, 222 [66].

\(\text{\textsuperscript{192}}\) Pearce and Geddes, above n 190, 322 [10.1].
procedural, is to be construed as retrospective. (c) A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.193

On the approach of Murphy J, assessing the temporal reach of the new IAA s 21 was simply a matter of determining whether it was procedural or substantive in nature, and then asking whether Parliament had evidenced an intention to displace the relevant general rule.194 In answer to the first question, Murphy J argued that ‘[d]ealing as it does with arbitral law, the current s 21 should be construed as procedural and therefore retrospective’.195 Turning to the second question, it was suggested that ‘the available indications point to a Parliamentary intention that the current s 21 be given immediate effect upon enactment’.196

The main evidence of pro-arbitration judicial policy in Murphy J’s reasoning lies in his Honour’s contextual analysis of whether a contrary Parliamentary intention displaced the general rule of retrospectivity. Three elements of this reasoning might be described as pro-arbitration in nature. First, Murphy J rejected the argument that IAA s 30 required the new IAA s 21 to be given a prospective interpretation. That provision establishes the following rule:

This Part [which includes IAA s 21] does not apply in relation to an international commercial arbitration between parties to an arbitration agreement that was concluded before the commencement of this Part ...

According to Murphy J, ‘the “commencement of this Part” referred to in s 30 is intended to mean the commencement of Pt III as then enacted by the 1989 Act197 rather than involving a section-by-section application of the saving provision.198 Pro-arbitration judicial policy is evidenced in the Court’s commercially-flavoured consideration of the impracticality that the alternative construction would involve — ‘[s]uch a result would make it very difficult for people affected by the [IAA] and Model Law to understand the applicability of its provisions’ and ‘Parliament said nothing to indicate that it intended this strange result’.199

Secondly, Murphy J’s opinion is supported by reference to the International Arbitration Amendment Act 2010 (Cth)’s Explanatory Memorandum200 and Second Reading Speech.201 Both documents are framed around the federal government’s pro-arbitration policy platform identified in Part II; it was the then Attorney-General, the Hon Robert McClelland MP, who drove this policy and initiated the 2008 review of the IAA. And thirdly, Murphy J’s opinion takes account of the effective interaction of the IAA with the Commercial Arbitration Act 2011 (Vic). Relating the new IAA s 21 issue to

193 (1957) 96 CLR 261, 270 (citation omitted).
194 Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd (2012) 201 FCR 209, 223 [71].
195 Ibid.
196 Ibid.
197 Ibid 223 [73].
198 Ibid 223–4 [74].
199 Ibid.
200 Explanatory Memorandum, International Arbitration Amendment Bill 2009 (Cth). See ibid 224 [76].
the core dispute over the jurisdiction in relation to art 35 of the Model Law to enforce a non-foreign award, the Court noted that the Commercial Arbitration Act 2011 (Vic) does not apply, leading Murphy J to remark ‘I very much doubt that the Federal, State and Territory parliaments intend the result that no court is specified as “competent” to do so [ie. exercise jurisdiction to enforce non-foreign international arbitral awards].’

**F  Rizhao Steel — The Western Australian Court of Appeal**

On 9 March 2012, shortly after the jurisdictional decision in Castel, the Western Australian Court of Appeal delivered its judgment in Rizhao Steel. In that case, Rizhao Steel challenged the Supreme Court’s decision at first instance to enforce arbitral awards that had been made against it in favour of Koolan Iron Ore Pty Ltd and Mount Gibson Mining Ltd. The case raised jurisdictional issues as to whether the Commercial Arbitration Act 1985 (WA) or alternatively the IAA provided the legal basis for the enforcement order. It was ‘common ground’ prior to the Court of Appeal proceedings that the Commercial Arbitration Act 1985 (WA) applied. However, on appeal, Rizhao Steel argued that an enforcement order could only be made under the IAA. The Court of Appeal was thus faced with the same question as in Castel: does the new IAA s 21 apply to pre-6 July 2010 arbitration agreements? A peculiar feature of Rizhao Steel which differentiated it factually from Castel was that the relevant arbitration agreement pre-dated 6 July 2010, but so did commencement of the arbitration — with proceedings almost being concluded by that date. The case was ultimately decided on the procedural basis that it was not open to Rizhao Steel to argue a new point (previously withheld for forensic advantage) on appeal. Nevertheless, like Murphy J in Castel, the Court went on to analyse the IAA s 21 issue in obiter dicta.

Two distinct strands of reasoning are evident in the Court’s judgments. Martin CJ, Buss JA and Murphy JA:

- all ... agreed that the amended s 21 did not have retrospective effect where the dispute had been referred to arbitration prior to 6 July 2010 pursuant to a pre-6 July 2010 arbitration agreement in which the parties had selected the CAA as their lex arbitri.

- However, ‘the court was divided as to whether the new IAA s 21 applied to a pre-6 July 2010 arbitration agreement where arbitration proceedings had not been

---

202 Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd (2012) 201 FCR 209, 225 [81].
206 Monichino and Fawke, above n 175, 242.
208 Ibid 110–11 [87] (Martin CJ). See also 125 [153] (Buss JA, agreeing), 125 [154] (Murphy JA, agreeing on this point).
209 Ibid 113-14 [99]-[103].
210 Monichino and Fawke, above n 175, 243. See ibid 122 [139] (Martin CJ), 125 [153] (Buss JA, agreeing with Martin CJ), 135 [206] (Murphy JA).
commenced prior to the introduction of the new [IAA] s 21.211 Martin CJ (with Buss JA agreeing)212 suggested that the operation of the new IAA s 21 was not retrospective in such a case,213 contrary to the finding of Murphy J in Castel.214 On Martin CJ and Buss JA's view, the new IAA s 21 is not retrospective in all cases and by implication, scope remains for the continued applicability of Eisenwerk. Murphy JA suggested that the new IAA s 21's operation might be retrospective where the arbitration itself was commenced after 6 July 2010.215 This view implies a more limited scope for the continued operation of Eisenwerk remains.

As in Castel, both strands of opinion were grounded in ordinary domestic principles of statutory interpretation. Like Murphy J in Castel, Martin CJ referred to Maxwell v Murphy,216 describing it as the 'classical exposition' of the relevant principles.217 Martin CJ's opinion was essentially based on the premise that despite 'characterisation of the law as procedural', it 'is also necessary to assess the effect which the change in the law has upon vested rights'218 — and that the parties' contractual rights with respect to their chosen mode of dispute settlement vested at the time their arbitration agreement was concluded.219 Support for this approach was drawn from the Acts Interpretation Act 1901 (Cth) s 7(2)(c), concerning rights and obligations accrued or incurred under repealed legislation.220 The point on which Murphy JA differed was his Honour's assessment of whether the procedural rights conferred under the old IAA s 21 vested prior to the commencement of arbitral proceedings. His Honour explicitly adverted to the fact that '[t]hese appeals do not call for a determination of the effect of the repeal and substitution of s 21 with respect to agreements under which the parties had not referred their disputes at the time of the commencement of the Amendment Act'.221 Nevertheless, the point was discussed in the final paragraph of the Court's decision where Murphy JA suggested:

The situation may be different with respect to disputes not referred to arbitration prior to 6 July 2010. In that event, the arbitration agreement would be wholly executory, and the rights under the agreement to have any particular dispute settled by arbitration in accordance with its terms would arguably not have vested. As I have said, it appears to me that the contractual right was, in effect, to refer disputes to an arbitration to be governed by the Commercial Arbitration Act as it stood at the time of the referral. If, between the date of the arbitration agreement and the date of referral, the Commercial Arbitration Act had been modified directly by the Parliament of Western Australia, or by yielding to the operation of inconsistent Commonwealth legislation, it might be difficult to contend that there was a relevant accrued right which would invoke the principles of

211 Monichino and Fawke, above n 175, 243.
212 Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd (2012) 43 WAR 91, 125 [153].
213 See ibid 122 [139]. See also ibid 120-1 [132]–[133].
214 Monichino and Fawke, above n 175, 242.
215 Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd (2012) 43 WAR 91, 135-6 [207].
216 (1957) 96 CLR 261.
217 Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd (2012) 43 WAR 91, 119 [126].
218 Ibid 119-20 [128]. See also ibid 120 [131].
219 Ibid 120-1 [132]–[133].
220 Ibid 122 [137].
221 Ibid 125 [155].
statutory construction concerning retrospectivity. That point is, however, not necessary to decide in this case.\textsuperscript{222}

While the pro-arbitration judicial policy features of \textit{Castel} were limited, the \textit{Rizhao Steel} Court's analysis was even more domestically-focused. It is difficult to detect any elements of Martin CJ's leading judgment or Murphy JA's additional remarks that flavour the Court's reasoning with pro-arbitration judicial policy. In particular, Martin CJ considered that the extrinsic materials relied upon in \textit{Castel} were not of any assistance\textsuperscript{223} and also 'rejected' the contextual relevance of IAA s 30.\textsuperscript{224} Nevertheless, commentary has recognised the intuitive appeal of Murphy JA's approach, with Monichino and Fawke arguing that it 'is to be preferred (to the view of the majority, and also to the view in \textit{Castel}), from both a statutory interpretation and a policy perspective'.\textsuperscript{225}

\section*{V \ LESIONS LEARNED – THE PLACE OF PRO-ARBITRATION JUDICIAL POLICY IN THE AUSTRALIAN COURTS}

What can be learned from this paper's analysis? With respect to \textit{Eisenwerk}, the best conclusion that can be drawn on the current state of the authorities is that the infamous principle has possibly come to an end. In \textit{Cargill International} the Court, constituted by Ward J, expressly said as much — holding that \textit{Eisenwerk} was 'plainly wrong' and should not be followed in New South Wales.\textsuperscript{226} Nonetheless, the authorities do not all point in the one direction. The Queensland Court of Appeal's own reconsideration of the decision in \textit{Wagners} was far more equivocal, and \textit{Eisenwerk} was applied by the ACT Supreme Court in \textit{Lightsource}. Irrespective of \textit{Eisenwerk}'s correctness, the Federal Court of Australia's interpretation of the new IAA s 21 in \textit{Castel} forecloses any further effect for the principle, though \textit{Rizhao Steel}'s analysis differed. It must further be kept in mind that \textit{Castel} and \textit{Rizhao Steel}'s analyses of the new IAA s 21 were \textit{obiter dicta} only.\textsuperscript{227}

As established in Part II, pro-arbitration judicial policy is a required element of legal reasoning when applying the IAA and is also a requirement at international law with respect to the \textit{New York Convention}'s pro-enforcement bias. It is interesting to observe that the two decisions analysed in Part IV imposing the greatest obstacles for \textit{Eisenwerk}'s continued applicability — \textit{Cargill International} and \textit{Castel} — do display evidence of pro-arbitration judicial policy (the former moreso than the latter). Conversely, \textit{Wagners} and \textit{Lightsource} lack a solid pro-arbitration judicial policy focus and unsurprisingly are two decisions that fail to create distance from the \textit{Eisenwerk} holding.

While the pro-arbitration effect of a judgment is necessarily a different concept to the use of pro-arbitration judicial policy, in four of the five cases analysed in Part IV the two coincide. Those Courts making use, as the law requires, of pro-arbitration

\begin{thebibliography}
\bibitem[222]{222} Ibid 135-6 [207].
\bibitem[223]{223} Ibid 123 [141].
\bibitem[224]{224} Ibid [144].
\bibitem[225]{225} Monichino and Fawke, above n 175, 243.
\bibitem[226]{226} \textit{Cargill International SA v Peabody Australia Mining Ltd} (2010) 78 NSWLR 533, 561 [91].
\bibitem[227]{227} \textit{Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd} (2012) 43 WAR 91, 122 [140] (Martin CJ).
\end{thebibliography}
judicial policy (as that term is defined in this paper) delivered judgments with a pro-arbitration effect, and which were consistent with the federal government’s pro-arbitration policy platform outlined in Part II.

VI CONCLUSION

International arbitration is market driven, in that parties have a choice in terms of the jurisdictions in which they commence proceedings. If the legal system in Australia does not provide an attractive environment in which international arbitrations can occur, the parties may simply opt to go elsewhere.228

Analysing the extent of pro-arbitration judicial policy evident in Australian arbitration-related case law is an interesting but not merely academic exercise. As outlined in Part II, not only has the federal government adopted a policy platform supportive of international commercial arbitration, but pro-arbitration judicial policy is a legitimate element of (and legal requirement in) judicial reasoning. As it is a legal requirement, it is an important factor in Australian courts reaching legally ‘correct’ decisions. It is also potentially important in securing the consistent interpretation of the IAA as required by the High Court’s statement of principle in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.229

Realisation of a consistent pro-arbitration judicial policy approach in Australian case law can best be described as a work-in-progress. This is evident in this paper’s assessment of the five recent cases in the *Eisenwerk* line. For this reason it has been observed with respect to the case law more generally that ‘[d]espite Australia’s adoption of the [Model Law] in 1989 and other efforts, we have not yet succeeded in developing Australia even as a major arbital venue in our region’.230 As noted by Megens and Cubitt, ‘[l]egislative reform by itself will not suffice’ — rather ‘all participants in arbitration must make a concerted effort’.231 This suggestion encapsulates the importance of a supportive judiciary in promoting arbitration within Australia, through the means of pro-arbitration judicial policy. As Doug Jones (President of the Australian Centre for International Commercial Arbitration) has recently suggested, ‘[e]ven in jurisdictions that, on paper, have progressive arbitration laws, the attitude of the courts will play an essential role in shaping the legal environment in which the arbitration operates’.232

Parties to commercial contracts which incorporate arbitration agreements ultimately have a wide array of choices in selecting an arbitral seat. With respect to ICC arbitration in 2012, 92 cities in 59 different States were selected as arbitral seats233 — ‘ICC arbitrations can be (and are) seated almost anywhere in the world’.234 As noted

228 Warren, 'Conference Remarks', above n 83, 5.
231 Megens and Cubitt, 'Emerging Trends', above n 19, 41.
234 Born, above n 1, 156.
by Jones, since '[t]he national courts of the arbitral seat have the potential to impact significantly upon the arbitral process', '[s]electing an arbitral seat where the local courts are friendly to arbitration is fundamental in ensuring a smooth arbitral process'.

If the arbitration-related decisions of courts in a particular jurisdiction (such as Australia) do not evidence the pro-arbitration judicial policy which Part II established is required, it may be that parties to arbitration agreements will (in the words of Chief Justice Marilyn Warren) 'go elsewhere'. Such an outcome would be bad for the arbitration market in Australia; contrary to the correct principles for interpreting and applying the IAA and the New York Convention; contrary to securing 'correct' decisions under those instruments; and frustrating of the federal government's policy platform in support of international commercial arbitration in Australia.

Assessment of whether Australian arbitration-related judgments evidence pro-arbitration judicial policy was undertaken by this paper with reference to the five cases handed down between 2010 and the present time which have a bearing on the Eisenwerk principle's continued applicability. However, it is a question worthy of examination throughout the corpus of Australian international commercial arbitration jurisprudence. Many other significant international commercial arbitration-related decisions have been handed down by Australian courts in recent years including the High Court challenge to Australia's implementation of the Model Law, the first instance, appeal and costs decisions in Altain Khuder, and the broader discussion of arbitration issues undertaken in Lightsource. By extension, a similar enquiry could also be carried out with respect to case law concerning the various State and Territory (domestic) Commercial Arbitration Acts, such as the Court of Appeal and High Court decisions in Gordian Runoff. Much has been written about these decisions' pro- or anti-arbitration effects. A thorough analysis of the pro-arbitration judicial policy implications of these cases' reasoning was not possible within the confines of this paper, and thus no comment is made in this regard. However, such an

235 Jones, above n 232, 117.
236 Ibid 122.
238 TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 295 ALR 596.
239 Altain Khuder LLC v IMC Mining Inc (2011) 276 ALR 733.
240 IMC Aviation Solutions Pty Ltd v Altain Khuder LLC (2011) 282 ALR 717.
244 Westport Insurance Corporation v Gordian Runoff Ltd (2011) 244 CLR 239.
analysis would be a useful further contribution to the body of literature comprising Australia’s commercial arbitration discourse.

The assessment undertaken in this paper is also necessarily a continuing process. Litigation related to international commercial arbitrations seated both in Australia and abroad continues to come before the courts. Australia’s competition with Singapore and Hong Kong for a greater share of the regional arbitration market is ongoing. The way in which pro-arbitration judicial policy is evidenced in future decisions of the Australian courts, both relating to the *Eisenwerk* principle and of broader effect, will be watched with interest.