This is the authors’ final version of the item published as:


Available from Deakin Research Online:

http://hdl.handle.net/10536/DRO/DU:30082985

Reproduced with the kind permission of the copyright owner.

Copyright : 2016, The Author
THE AUSTRALIAN ARBITRATION FRAMEWORK

BENJAMIN HAYWARD*

This document is a written transcript (including references) of the Resolution Institute CPD seminar presented by Dr. Benjamin Hayward in Melbourne, at the Melbourne Conference and Training Centre, on 20 April 2016 – addressing the topic ‘The Australian Arbitration Framework’.

I  INTRODUCTION

Thank you very much to the Resolution Institute for hosting our seminar here at the Melbourne Conference and Training Centre this evening. It is a real pleasure to be able to speak here this evening on the topic of ‘The Australian Arbitration Framework’.

The world of fashion moves very quickly. Five years ago, in the *Asian International Arbitration Journal*, Professors Richard Garnett of the University of Melbourne and Luke Nottage of the Sydney Law School described arbitration as the ‘new black’ in Australia.¹ Unlike many fashion trends, however, interest in arbitration in Australia continues to grow. The broader awareness of arbitration as a means of resolving disputes outside of the courts continues to grow. And our arbitration law here in Australia continues to develop.

* Deakin University, Geelong, Australia: Deakin Law School. Dr. Benjamin Hayward is a Lecturer at the Burwood Campus of the Deakin Law School, and is the Coach of the Deakin Law School’s Willem C. Vis International Commercial Arbitration Moot and Vis (East) Moot teams. The author can be contacted at benhay@deakin.edu.au.

Today’s seminar topic is ‘The Australian Arbitration Framework’. It is actually one that is quite close to my heart and my interests. In my work as a Lecturer in the Deakin Law School, my main research interests lie in international commercial law, and in international commercial arbitration and the international sale of goods in particular. Much of my research work in both of these areas relates to the application of law – how and why particular laws apply to particular issues in arbitration and in international sales cases. My PhD thesis, which was completed at Monash University and which will be published in the next year with Oxford University Press, looks at one of these types of applicable law issues in detail – how arbitrators identify the substantive law that governs the parties’ rights and obligations in international commercial arbitration. Today though, in addressing the legal framework for arbitration in Australia, we’ll be focusing on the procedural laws and rules that make arbitration ‘work’ in this country.

To that end, this evening’s presentation will be divided up into five main topics.

First, by way of introduction, we will consider arbitration as a dispute resolution process that takes place outside the courts, but which is still very much grounded in law.

Secondly, we will look at Australia’s arbitration legislation as one part of Australia’s legal framework for arbitration.

Thirdly, we’ll turn to Australia’s arbitration institutions and their rules.

Fourthly, we’ll look to the role of the courts in supporting the arbitration process.
And then finally, we will conclude and I hope then have some time for questions.

Overall, the big-picture message here is that although arbitration is a means of resolving disputes outside of the courts, it is still very much a process grounded in law. Having an understanding of the legal framework underpinning arbitration is an essential first step in understanding how and why arbitration works in Australia.

II AN INTRODUCTION TO THE LEGAL FRAMEWORK FOR ARBITRATION IN AUSTRALIA – ARBITRATION OUTSIDE THE COURTS, BUT GROUNDED IN LAW

Looking then to this first topic for this evening’s seminar, arbitration is a dispute resolution process that takes place outside the courts, but which is still grounded in law.

Arbitration has a very long history. At one point in the past, it wasn’t necessarily the case that arbitrators were actually required to apply the law. In a very old English decision – the 1791 case of *Knox v Symmonds* – it was stated that an arbitrator ‘may relieve against a right, which bears hard upon one party; but which, having been acquired legally and without fraud, could not be resisted in a Court of Justice’. What is described here is the practice of arbitrators deviating from the application of law, where that deviation would be considered just in all the circumstances. However, over time, we moved away from this position.

Another old (but relatively more recent) English case – the 1886 English decision of *Re Carus-Wilson and Greene* – emphasised that the essence of arbitration was to ‘hold an inquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and

---

3 *Knox v Symmonds* (1791) 1 Ves Jr 369, 370.
decide upon evidence laid before him\textsuperscript{4} (ie. the arbitrator). In modern arbitration, arbitrators do decide cases according to law. It is only in very exceptional cases, where the parties specifically agree to arbitration conducted in equity, that arbitrators may apply more subjective principles of fairness to resolve cases.\textsuperscript{5}

There are actually a number of different bodies of law that apply, or that might apply, in arbitration. In a simple and exclusively-Victorian matter heard before the Victorian courts, the court would apply Victorian law and the proceedings would be conducted in accordance with that court’s procedural rules. Identifying the applicable law and procedure in a case like this would be quite straightforward. The position is not so simple in arbitration. Piecing together the jigsaw puzzle of potentially-applicable laws in arbitration is often a real challenge for people coming to understand arbitration for the first time.

The \textit{Redfern and Hunter} text, one of the key international commercial arbitration texts, describes this as ‘[a] complex interaction of laws’.\textsuperscript{6} Let’s put domestic arbitration to one side for the moment, and look to international commercial arbitration as an example for this point. According to the \textit{Redfern and Hunter} text, there are ‘at least five’ different sources of law having potential application in arbitration.\textsuperscript{7} These are:

- The law governing the arbitration agreement, and its performance;
- The law governing and giving legitimacy to the arbitral procedure;

\begin{itemize}
\item \textsuperscript{4} \textit{Re Carus-Wilson and Greene} (1886) 18 QBD 7, 9.
\item \textsuperscript{5} \textit{See, eg, Art. 28(3) Model Law.}
\item \textsuperscript{6} Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, \textit{Redfern and Hunter on International Arbitration} (Oxford University Press, 6th ed, 2015) 157 [heading (c)].
\item \textsuperscript{7} Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, \textit{Redfern and Hunter on International Arbitration} (Oxford University Press, 6th ed, 2015) 157 [3.07].
\end{itemize}
The law that governs the substance of the parties’ dispute (for example, the body of contract law that is applied to resolve the parties’ actual legal dispute);

- Other applicable rules, non-binding guidelines, and recommendations; and

- The law governing the recognition and enforcement of the award that the arbitrators ultimately render.\(^8\)

So we see here that so far as arbitration is concerned with the law, we aren’t just talking about the substantive law (such as contract law) that governs the parties’ actual dispute. We have a variety of other sources of laws and rules that set up the legal framework for the process of arbitration itself. It is these procedural laws and rules that we are looking to in this evening’s seminar. And turning now more specifically to this legal framework for arbitration in Australia, a good place to start is the Australian legislation governing international and domestic arbitration.

### III THE LEGAL FRAMEWORK – LEGISLATION

There are two key legislative regimes which provide the legal foundations for international and domestic arbitration in Australia. These are the *International Arbitration Act 1974* (Cth), and the State and Territory uniform *Commercial Arbitration Acts*. The State and Territory uniform *Commercial Arbitration Acts* have been progressively enacted since 2010, when the *Commercial Arbitration Act 2010* (NSW) was passed. Throughout the remainder of this evening’s presentation, the *Commercial Arbitration Act 2011* (Vic) will be referred to by way of example.

---

These Acts are procedural laws. They provide the foundations for arbitration in Australia because they are the Acts which provide a legal basis for recognising the legitimacy of arbitration. They also set out, as a matter of procedure, how arbitrations governed by those Acts are to be conducted. This is why it is important to emphasise their nature as procedural laws. They are concerned with the conduct of arbitrations, rather than the parties’ actual substantive disputes.

The reason why we have these two different legislative regimes is that the Commonwealth Act addresses international commercial arbitration, while the State and Territory Acts apply to domestic arbitration. Their applications are actually mutually exclusive. If an arbitration is an international commercial arbitration, it is only the International Arbitration Act 1974 (Cth) that can apply. And if a domestic arbitration is in issue, it is only the relevant State or Territory legislation that can apply, such as the Commercial Arbitration Act 2011 (Vic) in Victoria.

Even so, both regimes are based on the same best-practice model. The United Nations Commission on International Trade Law – otherwise known as UNCITRAL – is the United Nations organ concerned with international trade. It developed a Model Law on International Commercial Arbitration in 1985, and then revised that Model Law in 2006.9 The 2006 version of the Model Law is the basis for the international commercial arbitration regime set up under the International Commercial Arbitration Act 1974 (Cth). The 2006 version of the Model Law was also adapted to suit domestic arbitration, to form the basis of the uniform State and Territory domestic commercial arbitration Acts.

---

We can see the strict demarcation between these regimes for international and domestic arbitration in the application provisions of these respective schemes.

Starting first with international commercial arbitration, the *International Arbitration Act 1974* (Cth) attaches the *Model Law* in its Schedule 2. The *International Arbitration Act 1974* (Cth) s 16(1) then gives the *Model Law* effect, by providing that ‘the *Model Law* has the force of law in Australia’. As a piece of model legislation, the *Model Law on International Commercial Arbitration* is effectively a ‘prototype’ regime rather than an international convention that nations sign up to.\(^{10}\) It is a blueprint law that countries can then adopt as their own arbitration legislation. Through s 16(1) of the *Act*, it is implemented into Australian law, subject to certain altercations and additions contained in the body of the *Act*.

Art. 1 *Model Law* then sets out that Law’s sphere of application, and provides in Art. 1(1) *Model Law* that it applies to international commercial arbitration. These are two limitations – that an arbitration must be international, and that it must be commercial. The requirement that an arbitration be commercial is defined in a footnote – this term is to be given ‘a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not’.\(^ {11}\) The requirement that an arbitration be international is then defined in Art. 1(3) *Model Law*, as being an arbitration falling into one of four categories of case:

---

\(^{10}\) Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3\(^{rd}\) ed, 2010) 12 [1-008].

\(^{11}\) Art. 1(1) *Model Law*, n 2.
• An arbitration is international where the parties to the arbitration agreement have their places of business in different countries. For example, one party to the arbitration might have its place of business in Australia, while the other has its place of business in New Zealand. Or;

• An arbitration is international where the place of arbitration that the parties choose is outside the country where the parties have their places of business. For example, two parties might have their places of business in New Zealand, but agree to arbitrate in Australia. Or;

• An arbitration is international where a substantial part of the commercial relationship’s obligations, or the place with which the subject-matter of the dispute is most closely connected, is outside the country where the parties have their places of business. Or;

• Finally, an arbitration is international where the parties expressly agree that the subject-matter of the arbitration agreement relates to more than one country. The parties can therefore themselves determine that their arbitration is to be treated as an international commercial arbitration.

The exclusive reach of the *International Arbitration Act 1974* (Cth) for international commercial arbitration is then confirmed by s 21(1) of the *Act*. This section 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’. In other words, where we are concerned with an international commercial arbitration, the Commonwealth legislation covers the field. It is the *International Arbitration Act 1974* (Cth) (incorporating the Model Law) that constitutes the procedural law for the arbitration, to the exclusion of the State and Territory regimes.
Those State and Territory regimes then have their own exclusive operation with respect to domestic arbitrations. By domestic arbitration, we mean any commercial arbitration which is not considered international for the purposes of the *Model Law*. As we mentioned earlier, the *Model Law* was also the basis for these State and Territory regimes, however it was adapted by Australian legislatures for use in domestic arbitration, and then those adapted provisions are enacted as the sections of the State and Territory Acts. If you are to look to the Table of Provisions in the *Commercial Arbitration Act 2011* (Vic), for example, you will see that rather than implementing the *Model Law* by reference to a Schedule as the Commonwealth legislation does, the Act sets out the text of the adapted version of the *Model Law* section-by-section, and then the heading of each section cross-references the provision of the *Model Law* that it has been adapted from.

The *Commercial Arbitration Act 2011* (Vic) s 1(1) provides that the Act applies to domestic commercial arbitrations, and then s 1(3) explains what is meant by a domestic commercial arbitration – an arbitration where the parties have their places of business in Australia, and the arbitration is not one to which the *Model Law* and the *International Arbitration Act 1974* (Cth) applies. So here we see that by focusing on domestic arbitration, the State and Territory Acts complement the international coverage of the Commonwealth Act.

One of the hallmark features of procedure in commercial arbitration is party autonomy – the right of the parties to themselves choose how their disputes will be resolved. We’ll come back to this in the next topic of tonight’s seminar, when we discuss arbitration institutions and their rules. But for now, in relation to Australia’s arbitration legislation, what we can take away is that these Acts provide what has been called in the literature an ‘emergency kit’
for arbitral procedure. They set out enough default rules for how an arbitration is to be conducted so that even if the parties do not adopt their own procedural rules, an arbitration would still be able to effectively be conducted, and could effectively proceed through to its conclusion. So we can see that the provisions of these Acts address essential procedural issues such as:

- The requirements for a valid arbitration agreement;
- How the arbitrators are to be appointed;
- The powers of arbitrators with respect to interim measures;
- How the proceedings are to be conducted; and
- The issuing of the tribunal’s award.

Australia’s international and domestic arbitration legislation has been amended over time, to take account of emerging best practice in arbitration law. To take one example, the International Arbitration Act 1974 (Cth) was originally based on the 1985 version of the Model Law. Amendments in 2010 then incorporated the Model Law’s 2006 revisions as well as a range of other supplementary provisions. To take another example, the State and Territory Acts were initially based on their own unique domestic commercial arbitration regimes, before being aligned with the Model Law through new uniform legislation enacted across the Australian States and Territories from 2010 onwards – starting with the

13 Art. 7 Model Law; Commercial Arbitration Act 2011 (Vic) s 7.
16 Arts. 18 – 27 Model Law; Commercial Arbitration Act 2011 (Vic) ss 18 – 27J.
17 Arts. 28 – 33 Model Law; Commercial Arbitration Act 2011 (Vic) ss 28 – 33F.
18 International Arbitration Amendment Act 2010 (Cth).
19 See, eg, Commercial Arbitration Act 1984 (Vic).
Commercial Arbitration Act 2010 (NSW), and followed by the Commercial Arbitration Act 2011 (Vic) shortly after. And most recently, the International Arbitration Act 1974 (Cth) has been further amended over the course of the last year. These amendments have addressed a timing issue that was uncertain in relation to the previous 2010 amendments, and also provide that international arbitrations are now confidential by default. That wasn’t previously the case. At common law, arbitrations were considered private but not necessarily confidential. Following the 2010 amendments to the International Arbitration Act 1974 (Cth), a confidentiality regime was applied on an opt-in basis. Following these most recent amendments, arbitrations are now confidential as a default position, unless parties opt-out of the Act’s confidentiality regime.

As one final matter on Australia’s arbitration legislation, before moving on to the topic of Australia’s institutions and arbitration rules, the key principle in identifying when one set of arbitration laws (and not another) apply is the principle of territoriality. Arbitrations are said to have a ‘seat’ – a legal term describing the jurisdiction in which an arbitration is legally grounded. It is this jurisdiction whose laws give an arbitration its legitimacy and its very existence. A particular arbitration Act will apply to an arbitration where that arbitration has its seat in the relevant jurisdiction. In other words, an international commercial arbitration seated in Australia is governed by the International Arbitration Act 1974 (Cth), because that is the relevant arbitration law in Australia. Similarly, a domestic commercial arbitration seated in Victoria is governed by the Commercial Arbitration Act 2011 (Vic), because that

---

20 International Arbitration Act 1974 (Cth) s 21(2). See also Civil Law and Justice Amendment Act 2015 (Cth).
21 International Arbitration Act 1974 (Cth) ss 22(2) & 23C. See also Civil Law and Justice (Omnibus Amendments) Act 2015 (Cth).
24 Art. 1(2) Model Law.
25 Commercial Arbitration Act 2011 (Vic) s 1(2).
is the law governing domestic arbitration in force in Victoria. *Redfern and Hunter* explains this point by way of an analogy with traffic law, using the example of an English motorist taking their car to France – ‘she has chosen to go to France – and the applicability of French law then follows automatically’.

## IV THE LEGAL FRAMEWORK – INSTITUTIONS AND RULES

Turning then to the role of institutions and rules in the legal framework for arbitration in Australia. Arbitration legislation is mainly made up of non-mandatory or default rules. It is only those provisions of an arbitration Act that are absolutely fundamental to the arbitral process – such as the due process requirements that parties be treated equally and given an opportunity to present their cases – that are mandatory and that are unable to be excluded. Other provisions are subject to the parties’ own agreement, and where the parties have made a relevant agreement on a point of procedure, their agreement prevails over the default rules in an arbitration Act.

This autonomy of the parties to shape the procedure of an arbitration is part of arbitration’s procedural flexibility. Procedural flexibility is hallmark feature of arbitration. As explained in *Redfern and Hunter*, ‘[t]he only certainty is that the parties’ counsel should not bring with them the rulebooks from their home courts: the rules of civil procedure that govern proceedings in national courts have no place in arbitration unless the parties expressly agree

27 See, eg, Art. 18 Model Law.
29 See, eg, Art. 19(1) Model Law.
to adopt them’. The 2015 empirical study carried out by the School of International Arbitration at Queen Mary University of London has confirmed that procedural flexibility is one of the key attractions of arbitration.

Parties can take advantage of this flexibility by choosing to have their arbitrations administered by an institution, and also by adopting arbitration rules. Arbitration rules are procedural rules that govern the conduct of an arbitration, not unlike the procedural laws that we have just addressed. When parties adopt arbitration rules, they are (at law) building upon the legal framework that is already set out in that legislation. Adopting a set of procedural rules constitutes the parties making their own agreement on arbitral procedure for the issues that are covered in those rules. Those rules will then take precedence for those issues over the default provisions that are set out in the relevant arbitration law.

Arbitration rules can be developed for ad hoc arbitration, where there is no supervising institution. An example of arbitration rules for ad hoc arbitration are the UNCITRAL Arbitration Rules 2010. UNCITRAL is an organ of the United Nations, but does not itself administer arbitrations – rather, the UNCITRAL Arbitration Rules 2010 are offered by UNCITRAL for the parties’ own use in ad hoc arbitration. Abitration rules can also be developed by arbitral institutions, for use in arbitrations administered by those institutions. We call this type of arbitration institutional arbitration, as compared to ad hoc arbitration. Where an institution administers an arbitration, it performs certain administrative and support functions in relation to that arbitration.

---

33 See, eg, Arts. 19(1) & 2(e) Model Law.
In Australia, we have two institutions that are worth particular mention today. First, of course, we have arbitration conducted through the Resolution Institute.\(^{34}\) As those here this evening may know, the Resolution Institute incorporates the bodies previously known as LEADR and IAMA (the Institute of Arbitrators and Mediators Australia). IAMA had developed the *IAMA Arbitration Rules 2014*, and these rules are now carried forward by the Resolution Institute in its current form.

In addition, we have the Australian Centre for International Commercial Arbitration, or ACICA.\(^{35}\) ACICA administers arbitrations in accordance with the *ACICA Arbitration Rules 2016*, and also in cases of fast-track arbitration, the *ACICA Expedited Arbitration Rules 2016*.

Where an institution – such as the Resolution Institute or ACICA – administers an arbitration, that institution will provide certain administrative support and will also perform some supporting functions in relation to the arbitration itself.\(^{36}\) For example, if a party seeks to challenge the appointment of an arbitrator for apparent bias based on an alleged lack of independence, or partiality, under the default provisions of the *Model Law* a court will decide that challenge.\(^{37}\) We will have more to say on the role of the courts in a moment. However, in arbitrations conducted under the *IAMA Arbitration Rules 2014*, the *ACICA Arbitration Rules 2016*, or the *ACICA Expedited Arbitration Rules 2016*, the institutions undertake this role.\(^{38}\) Another function that is played by the institution under the *IAMA Arbitration Rules*

---

\(^{34}\) See generally Resolution Institute, *Resolving a Dispute – Arbitration* (2016) <http://www.resolution.institute/dispute‐resolution/arbitration>.


\(^{37}\) Arts. 6 & 13(3) *Model Law; Commercial Arbitration Act 2011* (Vic) s 13(4).

2014, by way of further example, is facilitating the scrutiny of a draft arbitral award through a process of peer review, if that procedure has been agreed to by the parties.\textsuperscript{39}

Though the Resolution Institute and ACICA are two institutions based in Australia, they are not the only institutions which can (and do) administer arbitrations here. Foreign institutions can also administer arbitrations in Australia. It is not necessary that an arbitral institution be ‘headquartered’ in the seat of arbitration in order for it to be chosen by the parties.\textsuperscript{40} A good way to think about this is that arbitration laws and arbitration rules from around the world can mix-and-match. Taking just one example of a foreign institution administering arbitrations in Australia, the International Chamber of Commerce (being one of the world’s most highly regarded institutions) is headquartered in Paris. However, its annual statistical bulletins indicate that some (if not many) ICC arbitrations each year are seated in Australia – there were three such arbitrations in 2014.\textsuperscript{41} These arbitrations would operate under the *International Arbitration Act 1974* (Cth), using the *ICC Arbitration Rules 2012* as the parties’ chosen procedural rules, in exactly the same way as the *Act* can operate in conjunction with the *IAMA Arbitration Rules 2014*, the *ACICA Arbitration Rules 2016*, or the *ACICA Expedited Arbitration Rules 2016*.

\textsuperscript{39} Art. 34(7) *IAMA Arbitration Rules 2014*.
\textsuperscript{40} Gary Born, *International Commercial Arbitration* (Kluwer, 2\textsuperscript{nd} ed, 2014) 174.
So far in assessing the legal framework for arbitration in Australia, we have looked to arbitration legislation, and the roles of arbitral institutions and arbitration rules. The final element of the legal framework for arbitration in Australia that we will consider this evening is the role of the courts. While arbitration is a dispute resolution procedure that takes place outside of the Australian courts, courts still play an essential role in supporting the arbitral process.42

In both international arbitration and in domestic arbitration, the role of the courts is limited. Where parties enter into an arbitration agreement they are held to their agreement to arbitrate disputes instead of resorting to the courts.43 Arbitration agreements are said to have both positive and negative effects. The positive effect of an arbitration agreement is that the parties gain the right to arbitrate their disputes, while the negative effect of an arbitration agreement is that the parties lose the right to resort to national courts.44 The courts will therefore not interfere with the role of arbitrators in resolving the merits of the dispute – ascertaining the facts, applying the law to the facts, and then resolving the dispute. In fact, according to law, the courts can only intervene in an arbitration when specifically permitted to do so by the relevant arbitration legislation. This is set out in Art. 5 Model Law for international arbitration, and in the Commercial Arbitration Act 2011 (Vic) s 5 for domestic arbitration.

---

43 Art. 8(1) Model Law; Commercial Arbitration Act 2011 (Vic) s 8(1).
The courts play an important role in supervising arbitrations seated within their jurisdiction. In this respect, the courts undertake certain functions to support the arbitral process, as set out in the relevant arbitration legislation. To return to the example of arbitrator challenges that we mentioned earlier this evening, where a challenge is made to an arbitrator’s appointment on the basis of apparent bias in an *ad hoc* arbitration, it would be a court at the seat of arbitration that would decide upon that challenge.\(^4\) In the case of international commercial arbitration in Australia, that court is the Supreme Court of the relevant State or Territory where the arbitration is seated, or the Federal Court of Australia in any case.\(^4\) In the case of domestic commercial arbitration in Victoria, that court is the Supreme Court of Victoria.\(^4\)

To provide another example of court support in the case of domestic arbitration, where a party applies to the Court with the permission of the arbitral tribunal,\(^4\) the Supreme Court of Victoria may issue a subpoena requiring the attendance of a person before the arbitral tribunal and / or the production of documents in the arbitration.\(^4\)

Since arbitrators do not themselves exercise judicial power – that would be an infringement of the exclusive vesting of judicial power in Chapter III courts under the *Commonwealth Constitution*\(^5\) – arbitrators cannot enforce their own awards. Another aspect of the courts’ essential involvement in arbitration is their role in the enforcement of arbitral awards. A well-known and recent Victorian example is the enforcement litigation involving Formula One driver Giedo van der Garde, and the Sauber Formula One team.\(^5\) This litigation related

\(^4\) Arts. 6 & 13(3) *Model Law; Commercial Arbitration Act 2011 (Vic)* s 13(4).
\(^4\) *International Arbitration Act 1974 (Cth)* s 18(3).
\(^4\) *Commercial Arbitration Act 2011 (Vic)* s 6(1).
\(^4\) *Commercial Arbitration Act 2011 (Vic)* s 27A(2).
\(^4\) *Commercial Arbitration Act 2011 (Vic)* s 27A(1).
to an arbitral award rendered in a contractual dispute between van der Garde and the team in relation to his replacement as a Sauber driver. Arbitral proceedings were urgently conducted in Switzerland ahead of the 2015 Formula One season, and led to an award issued on 2 March 2015 ordering that Sauber take no action to deprive van der Garde from participation as a Sauber driver in the 2015 Formula One season. This award was rendered at a time when the 2015 Australian Grand Prix was imminent. An enforcement action was heard by the Supreme Court of Victoria on Monday 9 March 2015, and was resolved in favour of enforcement on Wednesday 11 March 2015.\(^{52}\) An appeal to the Victorian Court of Appeal was then heard on the morning of Thursday 12 March 2015, and was dismissed (affirming the enforcement of the award) that very same day.\(^{53}\)

We mentioned earlier on that procedural flexibility is a key advantage of arbitration. Another is the ready enforceability of arbitral awards. This was also empirically confirmed by the 2015 study of the School of International Arbitration at Queen Mary University of London.\(^{54}\) In the international sphere, there is an international convention – the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (commonly known as the *New York Convention*) – which provides for the ready enforceability of arbitral awards around most of the world. The *New York Convention* currently has 156 member States.\(^{55}\) Australia is a signatory to the *New York Convention*, and it is given effect in Australian law under the provisions contained in Part II of the *International Arbitration Act 1974* (Cth). So it is the provisions of the *New York Convention* (as reflected in Australia’s arbitration legislation) that Australian courts apply when called upon to enforce a foreign arbitral award.

\(^{52}\) *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792.


Similarly, where an arbitral award rendered in Australia is sought to be enforced overseas, it is very likely the provisions of the *New York Convention* that will provide the legal framework for that enforcement issue.

The *New York Convention* is said to have a pro-enforcement bias. This means that, as a general principle, courts should err on the side of enforcing awards rather than refusing their enforcement. In Australia, this overarching policy of supporting arbitration is actually set out in the statutory objects section of the *International Arbitration Act 1974* (Cth), and that legislation also specifically instructs courts to take those objects into account when exercising functions under the *Act*. The courts of some countries, over time, have been better at embracing this principle than others. In the case of Australia, our courts have emphasised their willingness to embrace the enforcement of foreign arbitral awards. An important aspect of the enforcement role of the courts under the *New York Convention* is that they do not pass second judgment on the merits of the case – courts do not take into account whether, on their view, arbitrators made an error of fact or an error of law. To return to the Formula One litigation we mentioned a little earlier, this was emphasised by both the Supreme Court of Victoria as well as the Court of Appeal. As explained in the *Redfern and Hunter* text, ‘[i]f the tribunal has jurisdiction, the correct procedures are followed, and the correct formalities are observed, the award – good, bad, or indifferent – is final and binding on the parties’.

---

57 *International Arbitration Act 1974* (Cth) s 2D.
59 See, eg, *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, 436 [126].
The requirement for enforcement under Art. III *New York Convention* is that signatory States must enforce arbitral awards.63 The conditions laid out under Art. IV *New York Convention* are only that the award (or a duly certified copy) and the arbitration agreement (or a duly certified copy) are provided to the court.64 The only defences to enforcement relate to fundamental procedural matters – again, not the merits of the case. These are set out in Art. V *New York Convention*.65 The list of defences under this provision is exhaustive,66 and is comprised of the following defences:

- The parties to the arbitration agreement were under an incapacity, or the arbitration agreement was not valid under its governing law.67
- The unsuccessful party was not given proper notice of the appointment of the arbitrators, was not given proper notice of the arbitral proceedings, or was otherwise unable to present their case.68 This reflects the importance of due process in arbitration.
- The arbitrators decided on issues going beyond their mandate.69 This reflects the importance of the parties’ voluntary submission to arbitration.
- The appointment of the arbitrators or the arbitral proceedings did not take place in accordance with the parties’ agreement, or the default procedural laws that otherwise apply.70 This reflects the importance of the parties’ own autonomy in shaping the arbitral procedure.

---

63 In Australia – see *International Arbitration Act 1974* (Cth) s 8(1).
64 In Australia – see *International Arbitration Act 1974* (Cth) s 9(1).
65 In Australia – see *International Arbitration Act 1974* (Cth) ss 8(3A) – (7A).
66 See Art. V(1) *New York Convention* – ‘only if’; Art. V(2) *New York Convention* – ‘also be refused if’.
67 Art. V(1)(a) *New York Convention*.
68 Art. V(1)(b) *New York Convention*.
69 Art. V(1)(c) *New York Convention*.
70 Art. V(1)(d) *New York Convention*. 
• The award isn’t yet binding on the parties, or has been set aside by a court in the seat of arbitration.71

• The issue in dispute was not one that is capable of being settled by arbitration.72 An example of an inarbitrable subject-matter might be the criminal and administrative liabilities arising out of corruption and bribery.73

• Enforcement of the award would be contrary to the public policy of the country where that enforcement is sought.74 While this ground appears broad on its face, public policy is generally given a very limited scope, and once again does not extend to the arbitrators’ decision on the merits of the case.75

A pertinent example of the narrow reach of these defences is given by the *Uganda Telecom* decision of Justice Foster in the Federal Court of Australia.76 One of the objections raised in that case was an alleged error of the arbitrator in the calculation of damages; in essence, an alleged error of law. On this issue, his Honour remarked that ‘[t]his is quintessentially the type of complaint which ought not be allowed to be raised as a reason for refusing to enforce a foreign award’.77

In the case of domestic arbitration, the *Commercial Arbitration Act 2011* (Vic) establishes a regime for the court enforcement of arbitral awards that is broadly similar to that under the *New York Convention*.78 In particular, the grounds for refusing enforcement under the *Commercial Arbitration Act 2011* (Vic) s 36(1) mirror the grounds set out in the *New York Convention*.78

---

71 Art. V(1)(e) *New York Convention*.
72 Art. V(2)(a) *New York Convention*.
74 Art. V(2)(b) *New York Convention*.
76 *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415.
77 *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, 439 [133].
Convention. The key difference is found in the Commercial Arbitration Act 2011 (Vic) s 34A – which provides for a limited capacity to appeal an arbitral award to the Supreme Court of Victoria on a question of law, if the parties have agreed to allow this kind of appeal, and if the Court grants leave.⁷⁹ Domestic arbitration typically implicates greater court involvement than international commercial arbitration, and this is one example of this being the case in Australia, though the right to appeal on a question of law is quite strictly limited by the dual requirements for both party agreement and also leave of the Court.

In addition to the role of the courts in the enforcement of arbitral awards, courts also play a role in supervising arbitral awards through applications for annulment. Here, the role of the courts is different to that undertaken in the enforcement context. An enforcement court might be required to consider an indirect challenge to an award when a defence to enforcement is raised – by way of contrast, annulment proceedings (otherwise referred to as setting-aside proceedings) are affirmatively brought by the party against whom an award has been rendered. Annulment applications are heard by the courts in the seat of arbitration. In international commercial arbitration, annulment is provided for in Art. 34 Model Law, while in domestic arbitration equivalent procedures are established under the Commercial Arbitration Act 2011 (Vic) s 34. In both international and domestic arbitration, putting aside the issue of appeals on a point of law under the Commercial Arbitration Act 2011 (Vic) s 34A, annulment is identified as the sole means of direct recourse against an award.⁸⁰ Though annulment proceedings are distinct from enforcement proceedings, the grounds for annulment are the same as those contained in the Art. V New York Convention defences to the enforcement of an arbitral award.⁸¹

⁷⁹ Commercial Arbitration Act 2011 (Vic) s 34A(1).
⁸⁰ Art. 34(1) Model Law; Commercial Arbitration Act 2011 (Vic) s 34(1).
⁸¹ Art. 34(2) Model Law; Commercial Arbitration Act 2011 (Vic) s 34(2).
Before leaving the role of the courts, one particularly interesting issue that has arisen in Australia in recent years relates to the duty of arbitrators to provide reasons for their awards. In international commercial arbitration, and in domestic arbitration, arbitrators have a duty to render a reasoned award.  

Under Australian law, a failure to adequately reason a judicial decision is considered an error of law. In the *Westport Insurance* case of 2011, the High Court addressed the issue of the adequacy of arbitrators’ reasons in the context of the old (pre-2010) domestic arbitration Acts. In that case, the High Court confirmed that a failure to properly reason an arbitral award also constitutes an error of law. However, though this decision is in principle relevant to the new domestic arbitration Acts, its relevance will be limited in practice through the dual requirements that parties agree to allow appeals on points of law, and that leave of the Supreme Court is granted. Under the old legislation, it was not necessary for there to be party agreement in all cases – the parties could agree to exclude appeals on points of law, but otherwise an appeal required either (but not both) of the agreement of the parties or the leave of the Supreme Court.

---

82 Art. 31(2) *Model Law; Commercial Arbitration Act 2011* (Vic) s 31(3).
83 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 259 (Kirby P), 269 (Mahoney JA) & 277 – 278 (McHugh JA).
84 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239.
85 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239, 266 [36].
87 *Commercial Arbitration Act 1984* (Vic) s 40(1).
88 *Commercial Arbitration Act 1984* (Vic) ss 38(2) & (4).
VI CONCLUSION – SUMMARY AND QUESTIONS

So to bring all that we’ve discussed today back to the big-picture message that we identified at the outset – while arbitration is a means of resolving disputes outside of the courts, it is still a process very much grounded in law. Arbitration, as a dispute resolution procedure, has a legal framework supporting it and underpinning it. This evening’s seminar has taken us (briefly) as far back as 1791, but focusing on contemporary Australian arbitration law, we’ve seen that legislation, arbitration institutions and their rules, and the role of the courts are important parts of this legal framework in Australia. Having an understanding of this legal framework is essential in understanding how and why arbitration works in Australia.

It is probably fair to say that arbitration is still as much the ‘new black’ today, as it was when Professors Garnett and Nottage used that term to describe arbitration five years ago.89 Fashion moves fast, and fashions come and go – though there is good reason to believe that the interest we are seeing in Australian arbitration at the present time is here to stay. Thank you very much to the Resolution Institute for having me here for this evening’s seminar, and thank you all for your attention today.