THE INTERNATIONAL ARBITRATION ACT 1974 (CTH) AS A FOUNDATION FOR INTERNATIONAL COMMERCIAL ARBITRATION IN AUSTRALIA

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1- Introduction

International commercial arbitration has become a common means of settling commercial disputes .As a Singaporean judge observed, international arbitration has become a popular form of dispute resolution due to‘ the attractiveness of resolving commercial disputes between international parties according to the manner and law of their choice, by arbitrators of their choice, and unfettered by domestic rules (designed in part, to cater to domestic needs [(1)].’(The flexibility of the arbitration process compared to the judicial process has thus been a major influence favouring the growth of international arbitration .The absence of a right to appeal an arbitral award and the ease of the enforcement of awards have also encouraged the growth of arbitration.[(2)]

[(1)] John Holland Pty Ltd v Toyo Engineering Corp Japan 2 [2001] (SLR 262), .[15]

[(2)] Gavan Griffith and Andrew D Mitchell,‘ Contractual Dispute Resolution in International Trade: The UNCITRAL Arbitration Rules (1) 976and the

This article examines the main elements of the most important international schemes for commercial arbitration with particular attention to their application within Australia . The second part of this article outlines the Australian federal legislation concerning international arbitration .The third and fourth parts discuss arbitration under the UNCITRAL Model Law and the ICSID Convention, the most prominent regimes for international commercial arbitration.

Several limitations to the scope of this article should be noted .It does not deal with the arbitration rules of the various national arbitration centres such as the Australian Centre for International Commercial Arbitration, [3]the American Arbitration Association, [4]and the London Court of International Arbitration.[5]

The conciliation of international business disputes is beyond the scope of this paper [6].It also does not discuss the New York Convention concerning the recognition and enforcement of arbitral awards [7].However, it does examine recognition and enforcement under the Model Law and the ICSID Convention.

UNCITRAL Conciliation Rules 1980 3 (2002) 'Melbourne Journal of International Law.186 ،184

[3] The Centre's website is at http://www.acica.org.au./

[4] The Association's website is at http://www.adr.org./

[5] The Court's website is at http://www.lcia-arbitration.com ./For a commentary, see Peter Turner and Reza Mohtashami, A Guide to the LCIA (Arbitration Rules) forthcoming 2008.

[6] See Eric van Ginkel,' The UNCITRAL Model Law on International Commercial Conciliation 21 (2004) 'Journal of International Arbitration.1

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 330 UNTS 3, Aust TS 1975 No 25.

2-The Commonwealth Act

The Model Law and ICSID are implemented by the Commonwealth *International Arbitration Act*) *1974* hereafter referred to as the' Commonwealth Act .('The Commonwealth law modifies and supplements the application of these international instruments.

The federal Act is supplementary to State laws regarding commercial arbitration [8].These State Acts can apply to international arbitrations [9].If the parties exclude the application of the Model Law to their arbitration, the relevant State Act will apply.[10]

The Commonwealth Act provides that upon the application of a party, a court shall stay proceedings by a party to an arbitration agreement against another party where the proceedings involve the determination of a matter that is capable of settlement by arbitration [11].The duty of the court is mandatory: it must stay the proceedings and refer the parties to arbitration [12].However, the court may not refer to arbitration a claim that is not within the scope of the arbitration agreement.[13]

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[8] House of Representatives Hansard, 3 November 1988, p 2399.

[9] American Diagnostica Inc v Gradipore Ltd 44 (1998) NSWLR 312, .3-322 See also AWB (International) Ltd v Tradesmen International (Pvt [2006] VSCA 210).

[10] Simon Greenburg and Christopher Kee,' Can you seek Security for Costs in International Arbitration in Australia 26 (2005) '؟Australian Bar Review .90 ،89

[11] International Arbitration Act 1974 (Cth) s(72).

[12] Abigroup Contractors Pty Ltd v Transfield Pty Ltd 217 (1998) ALR 435, [1998] ؛[80]-[79]VSC 103 ؛APC Logistics Pty Ltd v CJ Nutracon Pty Ltd [2007]FCA 136, ؛[2] cp Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH 1 [2001] Qd R 461,.[13]

[13] Pan Australia Shipping Pty Ltd v The Ship' Comandate ' No 2 234 (2006) ALR 483, [2006] ؛[119] FCA 1112.

The parties may validly agree that they may not apply for a stay, and the court will enforce that agreement [14].A party may also waive the right to apply for a stay [15].A party does not lose the right to apply for a stay simply because they did not seek a stay in prior interlocutory proceedings.[16]

A court shall not make a stay if it considers that the arbitration agreement is' null and void, inoperative or incapable of being performed [17].'The enforceability of the arbitration agreement is determined in the light of applicable State and federal legislation and the common law.[18]

Several cases have considered whether an arbitration agreement had become unenforceable .For example, the Federal Court held that it was required to refuse a stay where the arbitration agreement had become inoperative due to a subsequent agreement between the parties [19].In another case the Victorian Supreme Court held that the arbitration agreement became inoperative where a party had applied for security for costs on the basis that the dispute would be determined by the courts. That party thereby waived its right to rely on the arbitration agreement, having unequivocally opted for litigation rather than arbitration.[20]

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[14] Abigroup Contractors Pty Ltd v Transfield Pty Ltd 217 (1998) ALR 435, [1998] ؛[109] ،[99]-[98]VSC 103.

[15] La Donna Pty Ltd v Wolford AG 194 (2005) FLR 26, [2005] ؛[21] VSC 359.

[16] Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH 1 [2001] Qd R 461,.[29]

[17] (International Arbitration Act) 1974 Cth s 75.

[18] HIH Casualty & General Insurance Ltd (in liq) v Wallace 204 (2006) FLR 297, [2006] ؛[77] ،[56] ،[54] ،[44] NSWSC 1150.

[19] Bakri Navigation Co Ltd v Owners of Ship' Golden Glory 'Glorious Shipping SA 217 (1991) ALR 152,.169

[20] La Donna Pty Ltd v Wolford AG 194 (2005) FLR 26, ؛[30] ،[27]-[25] [2005]VSC 359.

The Federal Court held that if the parties agree to resort to litigation, a pre-existing arbitration clause will become inoperative as having been abandoned by the parties [21]. Finally, the New South Wales Supreme Court held that if the dispute is settled, the arbitration clause becomes inoperative in relation to that dispute.[22]

It is not clear whether an Australian court has the power to overturn a decision of an arbitrator who has refused to apply a mandatory provision of national law that the parties have purported to exclude by contract [23].An example of such a mandatory national law is the prohibition against misleading and deceptive conduct in the Commonwealth *Trade Practices Act*, [24]which may not be excluded by contract.

The Full Federal Court observed that the federal Parliament had not excluded the *Trade Practices Act* from the operation of the *International Arbitration Act* .By contrast, Parliament did expressly exclude specific provisions of the sea carriage of goods legislation from the operation of the *International Arbitration Act* [25].However, the court also pointed out that the case at hand did not involve any statutory provision prohibiting contracting out of the operation of a particular Act.[26]

[21] Pan Australia Shipping Pty Ltd v The Ship' Comandate ' No 2 234 (2006) ALR 483, [2006] ؛[69] ،[38] FCA 1112.
[22] Shanghai Foreign Trade Corp v Sigma Metallurgical Co Pty Ltd (1996) 133FLR 417,.439
[23] See Peter Megens and Max Bonnell,' The Bakun Dispute: Mandatory National Laws in International Arbitration 81 (2007) 'Australian Law Journal .264 ،259
[24]Trade Practices Act 1974 (Cth) s 52.
[25] Comandate Marine Corp v Pan Australia Shipping Pty Ltd 157 (2006) FCR 45, [2006] ؛[196] FCAFC 192.
[26] Comandate Marine Corp v Pan Australia Shipping Pty Ltd 157 (2006) FCR 45, [2006] ؛[240] FCAFC 192.

3-The UNCITRAL Model Law

Introduction to the Model Law

The Model Law on International Commercial Arbitration(27) was adopted by the United Nations Commission on International Trade Law) UNCITRAL .(The Model Law is not a treaty (28).It is not binding in international law (29).It provides a template for national laws regarding international commercial arbitration (30).It has been implemented in many jurisdictions, including Australia, Canada, (31)Hong Kong, (32)Singapore, (33) New Zealand, (34)India(35) and Ireland.(36)

UNCITRAL has also introduced Arbitration Rules (37).Those Rules may be adopted by agreement between the parties (38).

(27) UNCITRAL Model Law on International Commercial Arbitration, New York, 21 June 1985, 24 ILM 1302) hereafter Model Law .(For a commentary, see Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions (2 nd ed, 2005) . Summaries of judicial decisions concerning the Model Law appear on the UNCITRAL website :http://www.uncitral.org/uncitral/en/case_law.html.

(28) Aust TS 1999 No 38 p 211.

(29) Dell Computer Corp v Union des consommateurs 2007 SCC 34,.[46]

(30) Gavan Griffith and Andrew D Mitchell,' Contractual Dispute Resolution in International Trade: The UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980 3 (2002) '(Melbourne Journal of International Law.185 ،184

(31) By provincial legislation eg International Commercial Arbitration Act) RSA, c I ؛(6.6-International Commercial Arbitration Act) RSBC 1996, c 233 ؛ International Commercial Arbitration Act RSO 1990, c I.9.

(32)(Arbitration Ordinance) cap (341) HK.

(33) (International Arbitration Act) cap (143A) Sing.

(34)(Arbitration Act 1996) NZ) Sch 1.

(35) Arbitration and Conciliation Act 1996 (India).

(36) Arbitration (International Commercial) Act 1998 Ireland.

(37) UNCITRAL Arbitration Rules, 28 April 1976, 15 ILM 701.

(38) The parties may also provide that if there is a conflict between their contract and the UNCITRAL Rules, the contract will prevail. See Ever-

By contrast, the Model Law is a template for national laws .The Rules are also expressed in slightly different terms to those of the Model Law.[39]

Implementation in Australian Law

The Commonwealth Act provides that the Model Law has the force of Australian law [40].The Act provides that the parties may opt out of the Model Law, but they must do so in writing [41].The Commonwealth Act also contains a number of optional provisions [42].The parties may agree in writing that these provisions will apply to the settlement of their dispute [43]. These optional provisions are referred to in the relevant places throughout this article.

Interpretation of the Model Law

There are a large number of foreign judicial decisions interpreting the Model Law, [44]which facilitates commentary upon its provisions .When applying an international commercial law regime, the courts should consider the decisions of foreign courts interpreting the same provisions, so that there will develop a consistent international jurisprudence regarding their

Gotesco Resources and Holdings Inc v Pricesmart Inc 192 F Supp 2d 1040, 4-1043SD Cal 2002.

[39] Pieter Sanders,' Has the Moment Come to Revise the Arbitration Rules of UNCITRAL 20 (2004) '؟Arbitration International.2-260 ،243

[40] International Arbitration Act 1974 Cth (s 16) 1.

[41] International Arbitration Act 1974 (Cth) (s 21).

[42] International Arbitration Act 1974 Cth (Part III, Div 3).

[43] International Arbitration Act 1974 Cth s 22.

[44] Some decisions applying the Model Law are reported in Model Arbitration Law Quarterly Reports .(2004-1995) Numerous decisions are summarised in Henri C Alvarez, David W Rivkin and Neil Kaplan, Model Law Decisions: Cases applying the UNCITRAL Model Law on International Commercial Arbitration (1985-2001.(2003)

application [45].For example, the courts of many nations have treated foreign decisions applying the United Nations Convention on Contracts for the International Sale of Goods as persuasive authority.[46]

Some of the decisions have made express observations about the interpretation of the Model Law. For example, a Canadian court held that the Model Law should receive a 'broad remedial interpretation ،'in line with' the public policy that parties who agree to resolve their differences by arbitration should be held to that bargain [47].'The Singapore High Court observed that party autonomy is a central feature of the Model Law [48].Indeed many of its provisions are expressed to be subject to the contrary agreement of the parties.

The Commonwealth Act contains a specific rule concerning one source of material that may assist in the interpretation of the Model Law .It provides that UNCITRAL documents may be consulted for the purpose of interpreting the Model Law.[49]

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[45] Pan Australia Shipping Pty Ltd v The Ship' Comandate 'No 2 234 (2006) ALR 483, [2006] ؛[81] FCA 1112.

[46] German Bundesgerichtshof, VIII ZR 121/98, 24 March 1999; Franco Ferrari,' Applying the CISG in a Truly Uniform Manner: Tribunale di Vegavano (Italy), 12 July 2000 [2001] 'Uniform Law Review ؛203 Chicago Prime Packers Inc v Northam Food Trading Co 320 F Supp 2d 702, 709 fn 11, 712, 714 (ND Ill 2004).

[47] Xerox Canada Ltd v MPI Technologies Inc 2006 CanLII 41006, ،[44] [48](Ont SC).

[48] ABC Co v XYZ Co Ltd 3 [2003] SLR 546, [2003] ؛[2] SGHC 107.

[49] International Arbitration Act 1974 (Cth) (s 17)1.

Definition of International Commercial Arbitration

Because of difficulties in arriving at a satisfactory definition, the Model Law does not define the word 'commercial [50].'However, a footnote in the Model Law states that the word' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.'[51]

An arbitration is an international arbitration if the parties to the arbitration agreement had their places of business in different states at the time the agreement was made [52].An arbitration may also be an international one even if both parties have their places of business in the same state .There are four such situations .Firstly, if the place of arbitration is in a different State .Secondly, if a substantial part of the obligations under the parties 'commercial relationship are to be carried out in a different state [53].Thirdly, if the subject matter of the parties 'dispute is' most closely connected 'with a different state .Finally, if the arbitration agreement expressly provides that its subject matter concerns more than one country.[54]

Under the Model Law the question of which disputes are arbitrable is determined by national law [55].An award may be set aside if the court determines that under domestic law the

[50] 16 (1985) Yearbook of the United Nations Commission on International Trade Law.108
[51] Model Law Footnote to Art 1(1).
[52] Model Law Art 1(3)(a).
[53] Eg Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd 1 [1992]HKLR 40,.49 ،44
[54] Model Law Art 1(3)(b).
[55] Comandate Marine Corp v Pan Australia Shipping Pty Ltd 157 (2006) FCR 45, [2006] ؛[200] ،[198] FCAFC 192.

subject-matter of the dispute cannot be settled by arbitration.(56)

Non-intervention by the Courts

The Model Law provides that as regards the matters that it regulates, no court shall intervene except as provided for by the Model Law itself (57).For example, a Singaporean court held that because the Model Law did not empower a court to grant an interlocutory injunction in relation to a challenge to an arbitrator or an application to set aside an award, the court did not have power to grant that relief.(58)

The tone of the wording of this provision suggests that judicial intervention should be exceptional. However, the UNCITRAL commentary on the draft suggests that this provision simply requires that judicial intervention be authorised by the Model Law. The provision' does not itself take a stand on what is the proper role of courts (59).' Furthermore, this provision restricts judicial intervention only in relation to matters governed by the Model Law .It does not limit judicial intervention concerning matters that are not governed by the Model Law.(60)

Arbitration Agreements

An arbitration agreement is defined as an agreement by which the parties agree that disputes within their legal relationship will be submitted to arbitration .The agreement

(56) Model Law Art 34(a)(b)(i).
(57) Model Law Art 5.
(58) Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush [2004] 2SLR 14,.[23]
(59) 16 (1985) Yearbook of the United Nations Commission on International Trade Law.112
(60) General Distributors Ltd v Casata Ltd 2 [2006] NZLR 721, [2006] ؛[41] NZSC 8.

may be a contractual provision or a separate agreement [61].A Hong Kong court held that a clause providing that disputes 'shall 'be settled by arbitration did not allow the parties an alternative means of settlement through litigation in the courts [62].An arbitration clause will not be construed as permitting litigation unless the availability of that alternative means of settlement is clearly stated.[63]

The agreement must be written. An agreement is written if it appears in a document signed by the parties, or if it appears in an exchange of written communications, or if the agreement is alleged in a statement of claim but not denied by the defence [64].A Hong Kong court held that an arbitration clause could be incorporated into a contract between the parties by reference to a clause contained in a contract between different parties.[65]

Referral to Arbitration

Where an action relating to the subject matter covered by the arbitration agreement is brought before a court, the court must refer the matter to arbitration if a party makes that request no later than when they make their first submission regarding the substance of the dispute [66].If the agreement is valid, the court must refer the matter to arbitration.[67]

[61] Model Law Art 7(1).
[62] Grandeur Electrical Co Ltd v Cheung Kee Fung Cheung Construction Co Ltd 3 [2006] HKLRD 535,.[24] ،[21]
[63] Grandeur Electrical Co Ltd v Cheung Kee Fung Cheung Construction Co Ltd 3 [2006] HKLRD 535,.[26]
[64] Model Law Art 7(2).
[65] Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd 1 [1995] HKLR 300,.307 ،305
[66] Model Law Art 8(1).
[67] Paquito Lima Buton v Rainbow Joy Shipping Ltd Inc [2007] HKCA 68, .[55]

However, the court need not refer the matter to arbitration if it considers that the arbitration agreement is' null and void, inoperative or incapable of being performed [68].'A Hong Kong decision held that an arbitration clause was not inoperative or incapable of being performed where the clause provided for arbitration according to the rules of an arbitration organisation that did not exist .The court held that the parties intended that their disputes would be settled by arbitration, and that the arbitration would be held under the law of the place of arbitration.[69]

The Model Law provides that it is not inconsistent with an arbitration agreement for a party to request interim measures of protection from a court, either prior to or during the arbitration process [70].This provision allows a court to grant interim measures in support of an arbitration [71].It is not itself a source of jurisdiction to order interim measures [72].The court's power to order such measures derives from its domestic law [73].Finally, a subpoena is not an interim measure of protection.[74]

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[68] Model Law Art 8(1 .(The Commonwealth Act contains a similar provision. See International Arbitration Act 1974) Cth) s 7(5).
[69] Lucky-Goldstar International (HK) Ltd v Ng Moo Kee 2 [1993] HKLRD 73,.76
[70] Model Law Art 9.
[71] Front Carriers Ltd v Atlantic & Orient Shipping Corp 3 [2006] SLR 854, [2006] ؛[16]SGHC 127.
[72] Swift-Fortune Ltd v Magnifica Marine SA [2006] SGCA 42,.[33] ،[31]
[73] Front Carriers Ltd v Atlantic & Orient Shipping Corp 3 [2006] SLR 854, [2006] ؛[21] ،[17]SGHC 127 ؛Swift-Fortune Ltd v Magnifica Marine SA [2006]SGCA 42,.[33]
[74] Vibroflotation AG v Express Builders Co Ltd 1 [1995] HKLR 239,.242

Formation of the Tribunal

The parties may agree upon the number of arbitrators [75]. If the parties do not agree, there shall be three arbitrators [76]. The parties may agree upon the process of appointment of the arbitrators [77].If they do not reach agreement regarding the process, in the case of a three arbitrator panel, each party shall appoint one, and the two arbitrators shall appoint the third.[78]

Challenges to Arbitrators

A person who is approached as a prospective arbitrator must disclose any circumstances that might create' justifiable doubts 'concerning their independence or impartiality. An arbitrator is under a continuing duty to disclose any such circumstances that arise during the proceedings.[79]

A challenge to an arbitrator may be made only on the grounds of justifiable doubts regarding their independence or impartiality or because they do not have the qualifications that were agreed between the parties [80].The parties may agree upon the procedures for a challenge to an arbitrator [81].In the absence of an agreement upon the procedure, a party may make a written challenge within 15 days of becoming aware that the tribunal has been formed or becoming aware of the disqualifying circumstances .The tribunal decides whether to uphold or reject the challenge, unless the arbitrator withdraws or the other party accepts the challenge.[82]

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[75] Model Law Art 10(1).
[76] Model Law Art 10(2).
[77] Model Law Art 11(2).
[78] Model Law Art 11(3).
[79] Model Law Art 12(1).
[80] Model Law Art 12(2).
[81] Model Law Art 13(1).
[82] Model Law Art 13(2).

If the challenge to an arbitrator does not succeed, the challenger may request the competent court to decide upon the challenge [83].The Commonwealth Act provides that the Supreme Court of the State and Territory that is the place of the arbitration is the competent court [84].The arbitration proceedings may continue and conclude while the court deliberates upon the challenge .The court's decision is not subject to appeal.[85]

Jurisdiction

The tribunal may rule upon its own jurisdiction [86].The tribunal thus has a' Kompetenz-Kompetenz [87].'An arbitration clause contained within a contract is not rendered invalid by the invalidity of the remainder of the contract. The arbitration clause may thus be valid notwithstanding the invalidity of the remainder of the contract [88].The arbitration clause will be invalid if the defect is such as to render void the entirety of the contract, including that clause.[89]

If the tribunal decides as a preliminary matter that it does have jurisdiction, a party may request the competent court to determine the matter [90].The Commonwealth Act provides that

[83] Model Law Art 13(3).
[84] International Arbitration Act) 1974 Cth (s 1 .8See Model Law Art 6.
[85] Model Law Art 13(3).
[86] Model Law Art 16(1).
[87] 16 (1985) Yearbook of the United Nations Commission on International Trade Law ؛121 Dell Computer Corp v Union des consommateurs 2007 SCC 34,.[74]
[88] Model Law Art 16(1).
[89] 16 (1985) Yearbook of the United Nations Commission on International Trade Law.121
[90] Model Law Art 16(3).

the Supreme Court of the State and Territory that is the place of the arbitration is the competent court.(91)

A Canadian court held that in so doing the court applies a deferential standard in reviewing the decision of the arbitral tribunal' :one of reasonableness, deference and respect (92).'A Hong Kong court held that a ruling by the tribunal was in substance a preliminary decision on jurisdiction, not a decision on the merits, despite its self-description as an' interim award.'(93)

The court's decision is not subject to appeal and the tribunal may continue its proceedings while the court determines the matter (94).While the Model Law provides for an appeal to the competent court where the tribunal decides that it does have jurisdiction, it does not provide for an appeal to the court where the tribunal decides that it does not have jurisdiction.(95)

Place of Arbitration

The parties may agree upon the place of arbitration. If they do not agree, the tribunal will determine the place of arbitration, considering' the circumstances of the case, including the convenience of the parties (96).'Where the parties have agreed upon the place of arbitration, that place does not alter even though the tribunal conducts all of the hearings in

(91) International Arbitration Act) 1974 Cth s 18 .See Model Law Art (6).
(92) ACE Bermuda Insurance Ltd v Allianz Insurance Co of Canada (2005) 390AR 342, 2005 ؛[53] ABQB 975 .See also Yugraneft Corp v Rexx Management Corp 2007 ABQB 450,.[53]
(93) Incorporated Owners of Tak Tai Building v Leung Yau Building Ltd 2 [2005]HKLRD D2 [2005] ؛HKEC 349,.[18]-[17]
(94) Model Law Art 16(3).
(95) PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA 1 [2007] SLR 597, [2006] ؛[68] ،[45] SGCA 41.
(96) Model Law Art 20(1).

another location .The place of arbitration must be distinguished from the‘ venue of hearing.’[97]

Procedure

The parties must be treated equally and each must be given a‘ full opportunity ’to make their case [98].Naturally, that does not shield a party from its own strategic mistakes in the proceedings [99].The parties are free to agree upon the procedural rules applying to the tribunal [100].If the parties do not agree, the tribunal shall conduct itself in a manner that it considers appropriate, though this power is limited by the other restrictions imposed by the Model Law [101].The tribunal thus has‘ considerable latitude ’in deciding upon procedural rules.[102]

The claimant must submit a statement of claim and the respondent must submit a defence, each within the time limits agreed by the parties or as determined by the tribunal [103].The parties may amend or supplement the statement of claim or defence during the proceedings. However, the tribunal may refuse to allow them to do so if it considers it inappropriate in view of the delay involved.[104]

[97] PT Garuda Indonesia v Borgen Air 1 [2002] SLR 393, ،[36] ،[24]-[23] .[38]
[98] Model Law Art 18.
[99] Corporacion Transnacional de Inversiones v STET International (1999) 45OR (3d) 183, ؛204 affd (2000) 49 OR (3rd) 414.
[100] Model Law Art 19(1).
[101] Model Law Art 19(2).
[102] Jardine Lloyd Thompson Canada Inc v Western Oil Sands Inc (2006) 380AR 121, 264 ؛[28] DLR (4th) 358 2006 ؛ABCA 18.
[103] Model Law Art 23(1).
[104] Model Law Art 23(2).

If the claimant does not file its statement of claim, the proceedings will be terminated. If the respondent does not file a defence, the proceedings shall continue and the failure will not be treated as an admission of the claimant's case .If a party does not appear at the hearing or offer evidence, the tribunal may render an award on the material before it. The defaulting party may show sufficient cause why it did not submit these documents or failed to appear or offer evidence.(105)

Under the optional provisions of the Commonwealth Act, arbitral tribunals may jointly consolidate two or more arbitral proceedings on the ground that they involve a common question of law or fact or the relief claimed in the proceedings relates to the same transaction or transactions.(106)

Oral Hearings

The tribunal may decide whether to hear oral argument or evidence, or whether to decide the matter on written materials alone (107).If a party asks that oral hearings be held, the tribunal shall hold them unless the parties agreed that no oral proceedings would be held.(108)

The Commonwealth Act provides that a party may represent themselves at oral hearings before the tribunal. A party may also be represented by a legal practitioner from any jurisdiction or by any other person they may choose.(109)

(105) Model Law Art 25.
(106) International Arbitration Act 1974 Cth s (24).
(107) Model Law Art 24(1).
(108) Model Law Art 24(1).
(109) International Arbitration Act 1974 (Cth) s 29 (1),(2).

Evidence

The tribunal may appoint experts to report to it regarding specialist matters. The tribunal may require a party to provide information to the expert, or to permit the inspection of property by the expert [110].If a party requests, the expert shall appear at an oral hearing so that they may be questioned about their evidence.[111]

The tribunal may request the assistance of a competent court in taking evidence. The court may assist as permitted by its jurisdiction and subject to its rules concerning the taking of evidence [112].Under this procedure the assisting court may take discovery evidence from third parties [113].The grant of a subpoena also falls within this procedure for judicial assistance.[114]

All of the information communicated to the tribunal by a party must be given to the other party. The tribunal is required to give to the parties any expert reports and evidentiary documents that it may rely upon in reaching its decision [115]. The evidentiary material that must be disclosed by the tribunal is that which was created by third parties, not the research materials prepared by the tribunal in the process of making its decision.[116]

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[110] Model Law Art 26(1).
[111] Model Law Art 26(2).
[112] Model Law Art 27.
[113] Jardine Lloyd Thompson Canada Inc v Western Oil Sands Inc (2006) 380AR 121, 264 ؛[44] ،[41]-[39] DLR (4th) 358 2006 ؛ABCA 18.
[114] Vibroflotation AG v Express Builders Co Ltd 1 [1995] HKLR 239,.242
[115] Model Law Art 24(3).
[116] Methanex Motunui Ltd v Spellman 3 [2004] NZLR 454,-[153] ،[148] .[156]

Interim Measures

The tribunal may order a party to undertake interim measures of protection regarding the subject matter of the dispute [117].A failure by a party to take those interim measures may be taken into account in awarding damages under the final award [118].The tribunal may also require the provision of security in relation to these interim measures.[119]

Applicable Law

The tribunal will decide the substance of the dispute in accordance with the rules of law chosen by the parties .The choice of a particular legal system will be construed as the choice of its substantive law, not its rules relating to the conflict of laws, unless there is an express stipulation to the contrary [120].If the parties do not chose the applicable conflict of laws rules, the tribunal will apply the law determined by the conflicts rules that it regards as applicable.[121]

The tribunal must decide in accordance with the terms of the specific contract, and must take into account relevant trade usages [122].Unless the parties have expressly provided that it may do so, the tribunal may not decide the dispute *ex aequo et bono*) on the basis of what is fair and right (or as *amiable compositeur*) friendly arbiter [123].(However, such a procedure is permissible where the parties so agree.[124]

[117] Model Law Art 17.
[118] 16 (1985) Yearbook of the United Nations Commission on International Trade Law.124
[119] Model Law Art 17.
[120] Model Law Art 28(1).
[121] Model Law Art 28(2).
[122] Model Law Art 28(4).
[123] Model Law Art 28(3).
[124] 16 (1985) Yearbook of the United Nations Commission on International Trade Law.133

The award must be made in written form [125].It must be supported by written reasons, unless the parties have agreed otherwise.[126]

Issue of the Award

The issue of a final award ends the arbitral proceedings [127].The tribunal may also terminate the proceedings if the claimant withdraws their claim, if the parties so agree or if the tribunal considers that continuance is 'unnecessary or impossible.'[128]

The tribunal may issue a correction or interpretation of its award [129].It may also make an additional award regarding matters raised in the proceedings but not determined in the award [130].For example, where the tribunal was required to determine costs, but omitted to do so, a party could require the tribunal to award costs under an additional award [131].In providing for the issuance of an additional award, the drafters of the Model Law intended to prevent an award being invalid for an omission.[132]

Interest and Costs

The optional provisions of the Commonwealth Act provide for the payment of interest and the award of costs. Unless there is a contrary agreement between the parties, where a tribunal orders the payment of money, it may order the

[125] Model Law Art 31(1).
[126] Model Law Art 31(2).
[127] Model Law Art 32(1).
[128] Model Law Art 32(2.
[129] Model Law Art 33(1).
[130] Model Law Art 33(3).
[131] General Distributors Ltd v Casata Ltd 2 [2006] NZLR 721, ،[43] ،[12] [2006] ؛[147] ،[143] ،[71] ،[46]NZSC 8.
[132] General Distributors Ltd v Casata Ltd 2 [2006] NZLR 721, ،[34] ،[11] [2006] ؛[143]NZSC 8.

payment of interest at a' reasonable rate 'from the date when the cause of action arose until the date of the award [133].The tribunal may also order the payment of interest upon unpaid moneys under the award beginning from the date of the award.[134]

In the absence of a contrary agreement between the parties, the award of the costs of the arbitration are at the tribunal's discretion) [135].The Model Law itself makes no provision for costs, which were left for determination according to domestic law.([136]

Setting Aside an Award

Only a party to the dispute may apply to set aside an award [137].An application to set aside an award must be made within three months of the date when the applicant received the award [138].The Model Law does not provide for any extension of this three month period [139].However, it has been held that the amendment of an application to add a further ground after the three month period had elapsed was a procedural matter which was not regulated by the Model Law.[140]

The parties may not contractually restrict their right to apply to set aside an award on the grounds set out in the Model Law [141].A court may only set aside an award under the

[133] International Arbitration Act (Cth) s 25.
[134] International Arbitration Act 1974 (Cth) s 26.
[135] International Arbitration Act 1974 Cth (s 27 (1).
[136] General Distributors Ltd v Casata Ltd 2 [2006] NZLR 721, ؛[124] ،[40] [2006]NZSC 8.
[137] Methanex Motunui Ltd v Spellman 3 [2004] NZLR 454, [88].
[138] Model Law Art 34(3).
[139] ABC Co v XYZ Co Ltd 3 [2003] SLR 546, [2003] ؛[9] SGHC 107.
[140] ABC Co v XYZ Co Ltd 3 [2003] SLR 546, [2003] ؛[11] ،[4] SGHC 107.
[141] Methanex Motunui Ltd v Spellman 3 [2004] NZLR 454 [111]-[108] .

procedure established by the Model Law [142].The Commonwealth Act provides that the Supreme Court of the State and Territory that is the place of arbitration is the competent court for these purposes [143].A court may only intervene if the court is situated within the place of arbitration.[144]

Tribunal decisions are to be accorded' broad deference and respect 'and there is a' powerful presumption 'that the tribunal operated within the limits of its powers [145].The court may not set aside an award for an error of fact or law [146].An application to set aside an award is not an appeal on the merits.[147]

The court may only set aside an award in seven circumstances [148].The first five circumstances are dependent upon proof by the applicant [149].The last two are based upon a finding by the court.[150]

Firstly, the applicant may show that a party to the arbitration agreement was under an incapacity [151].Secondly, the arbitration agreement was invalid under the law that was chosen by the parties, or if no law was indicated in the

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[142] Model Law Art 34(1).
[143] International Arbitration Act) 1974 Cth (s 18 .See Model Law Art 6.
[144] PT Garuda Indonesia v Borgen Air 1 [2002] SLR 393, .[21] See Model Law Arts 1(2), 20.
[145] Corporacion Transnacional de Inversiones v STET International (1999) 45OR (3d) 183, ؛204 ،192 ،191 affd (2000) 49 OR (3rd) 414.
[146] Corporacion Transnacional de Inversiones v STET International (1999) 45OR (3d) 183, ؛192 affd (2000) 49 OR (3rd) 414 ؛Xerox Canada Ltd v MPI Technologies Inc 2006 CanLII 41006 , [144] Ont SC.
[147] Government of the Republic of the Philippines v Philippine International Air Terminals Co Inc [2006] SGHC 206, [38].
[148] Model Law Art 34(2).
[149] Model Law Art 34(2)(a).
[150] Model Law Art 34(2)(b).
[151] Model Law Art 34(2)(a)(i).

contract, under the law of the State where the application was made.(152)

Thirdly, the applicant did not receive proper notice of the arbitral proceedings or of an arbitrator's appointment, or the applicant was unable to present their case for some other reason (153).Fourthly, the award deals with matters beyond the scope of the submission to arbitration (154).This ground reflects the basic principle that an arbitral tribunal may determine only those matters that are referred to it for settlement (155).If those matters beyond jurisdiction may be severed from the matters within jurisdiction, only part of the award will be invalid.(156)

Fifthly, the composition of the tribunal or its procedure was not in accordance with the agreement between the parties, except where the agreement was contrary to a mandatory provision of the Model Law (157).Alternatively, where there was no relevant agreement between the parties, the composition of the tribunal or its procedure was not in accordance with the Model Law (158).Sixthly, if the court determines that under domestic law the subject-matter of the dispute cannot be settled by arbitration.(159)

Seventhly, the court may set aside the award if it finds that the award conflicts with the public policy of this state (160). An obvious example of where an award conflicts with the

(152) Model Law Art 34(2)(a)(i).
(153) Model Law Art 34(2)(a)(ii).
(154) Model Law Art 34(2)(a)(iii).
(155) PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA 1 [2007] SLR 597, [2006] ؛[37] SGCA 41.
(156) Model Law Art 34(2)(a)(iii).
(157) Model Law Art)(2)34 a)(iv).
(158) Model Law Art 34(2)(a)(iv).
(159) Model Law Art 34(2)(b)(i).
(160) Model Law Art 34(2)(b)(ii).

public policy of most nations would be where the award was tainted by corruption or fraud.(161)

The public policy is that of the state in which the set aside application is made .As a result, the formulations of the applicable standards vary from nation to nation .For example, a Canadian court held that if an arbitral tribunal operating under the Model Law breaches' the principles of fundamental justice 'the award will be invalid (162).In Canada that standard is an important constitutional limitation upon the powers of government.(163)

Another Canadian decision held that to be set aside on this ground the award' must fundamentally offend the most basic and explicit principles of justice and fairness 'of the jurisdiction' or evidence intolerable ignorance or corruption (164).'On appeal the court did not find it necessary to determine the validity of this test (165).The appellate court held that the procedure adopted by the tribunal' did not offend our principles of justice and fairness in a fundamental way.'(166)

The Singapore Court of Appeal held that this ground has a 'narrow 'operation .An award will be set aside where its enforcement would"' shock the conscience] … "or is" [clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public " ،…or where it violates the forum's most basic notion of

(161) Yugraneft Corp v Rexx Management Corp 2007 ABQB 450[80] .
(162) Xerox Canada Ltd v MPI Technologies Inc 2006 CanLII 41006, [110] Ont SC.
(163) Canadian Charter of Rights and Freedoms 1982 s 7.
(164) Corporacion Transnacional de Inversiones v STET International (1999) 45OR (3d) 183 , 193 .
(165) Corporacion Transnacional de Inversiones v STET International (2000) 49OR (3rd) 414[2] .
(166) Corporacion Transnacional de Inversiones v STET International (2000) 49OR (3rd) 414[3] .

morality and justice [167].'A New Zealand decision held that an award should be set aside if its enforcement would' shock the conscience 'or abuse the integrity of the court's process.[168]

This ground has a procedural as well as a substantive aspect .In Canada the most serious procedural irregularities can constitute a infringement of public policy [169].Obviously, the continuation of the arbitration following the withdrawal of a party does not constitute a procedural irregularity, since it is specifically authorised by the Model Law.[170]

Sometimes the legislature may provide specific elaboration about what falls within this ground. For example, the Commonwealth Act provides that an award conflicts with Australian public policy if its making was' induced or affected by fraud or corruption 'or it was made in breach of natural justice. This provision is expressed to be for the avoidance of doubt [171].The New Zealand legislation expressly provides that a breach of natural justice in the making of the award is contrary to public policy.[172]

If a party so requests, the court may suspend its proceedings to allow the tribunal to reconvene so that it may take action that would remove any ground for setting aside the

[167] PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA 1 [2007] SLR 597, [2006] ؛[59] SGCA 41.
[168] Downer-Hill Joint Venture v Government of Fiji 1 [2005] NZLR 554, [80] .
[169] Corporacion Transnacional de Inversiones v STET International (1999) 45OR (3d) 183, ؛194 affd (2000) 49 OR (3rd) 414.
[170] Corporacion Transnacional de Inversiones v STET International (2000) 49OR (3rd) 414, .[7] See Model Law Art 25(c).
[171] International Arbitration Act 1974 (Cth) (s 19).
[172] Methanex Motunui Ltd v Spellman 3 [2004] NZLR 454,.[111] ،[101]

award [173].This power to suspend proceedings is not limited to procedural flaws.[174]

Recognition and Enforcement of Awards

The issue of recognition of an award commonly' arise]s [when a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings [175]'.Enforcement goes further than recognition, in that the court is asked to' ensure that] the award [is carried out by using such legal sanctions as are available.'[176]

The Model Law provides that an arbitral award will be recognised as binding and will be enforced by the competent court, irrespective of the nation in which the award was rendered [177].With one exception, the grounds for refusing to recognise or enforce an award are the same as the grounds for setting aside an award [178].There is an additional ground for refusing recognition or enforcement' :the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made [179].'The Model Law itself does not contain an express time limitation upon enforcement of an award, but awards may be subject to domestic limitation periods.[180]

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[173] Model Law Art 34(4).
[174] United Mexican States v Metalclad Corp 95 (2001) BCLR (3d) 169, ؛[15] 2001BCSC 1529.
[175] Yugraneft Corp v Rexx Management Corp 2007 ABQB 450,.[51]
[176] Yugraneft Corp v Rexx Management Corp 2007 ABQB 450,.[51]
[177] Model Law Art 35(1).
[178] Model Law Art 36(1).
[179] Model Law Art 36(1)(a)(v).
[180] Yugraneft Corp v Rexx Management Corp 2007 ABQB 450,-[71] ،[52] .[72]

Chapter VIII of the Model Law deals with the recognition and enforcement of arbitral awards. The Commonwealth Act provides that where both Part II of the Act and Chapter VIII of the Model Law would apply to an award, only Part II of the Act will apply [181].That Part of the Act gives effect to the New York Convention [182].Under the optional provisions of the Commonwealth Act, the parties may agree that the provisions of the Model Law relating to the recognition and enforcement of arbitral awards apply to orders for interim measures of protection and the giving of security in relation to such interim measures.[183]

Miscellaneous

If a party is aware of a non-compliance with the Model Law or the arbitration agreement but fails to object' without undue delay 'during the arbitration, they waive their right to object [184].The Commonwealth Act provides that an arbitrator is not liable in negligence for their acts or omissions in that capacity, but is liable for fraud.[185]

[181] International Arbitration Act 1974 Cth (s 20).
[182] Above n 4.
[183] International Arbitration Act 1974 Cth (s 23).
[184] Model Law Art 4.
[185] International Arbitration Act 1974 Cth (s 28).

4- The ICSID Convention[(186)]

Australian Implementation

Australia ratified the ICSID Convention on 2 May [(187)].1991 The Commonwealth Act provides that the substantive provisions of the Convention have the force of Australian law [(188)].These provisions deal with the jurisdiction of ICSID, conciliation, arbitration, replacement and disqualification of arbitrators, costs, and the place of arbitration.

Scheme of the Convention

The large number of published ICSID awards[(189)] provide useful illustrations of the scope and operation of the provisions of the Convention .While there is no formal doctrine of precedent in ICSID arbitrations, [(190)]in practice ICSID tribunals pay close attention to previous tribunal decisions.

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(186) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965, 575 UNTS 159, (Aust TS 1991 No 23) hereafter ICSID .For commentaries on the Convention, see K V S K Nathan, ICSID Convention: The Law of the International Centre for Settlement of Investment Disputes ؛(2000) Christoph Schreuer, The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ؛(2001) Lucy Reed, Jan Paulsson and Nigel Blackaby, Guide to ICSID Arbitration .(2004) ICSID has also adopted two sets of Rules. See Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings) hereafter Institution Rules ؛(Rules of Procedure for Arbitration Proceedings hereafter Arbitration Rules.

(187) 1639 UNTS 409.

(188) International Arbitration Act 1974 Cth (s) 32 Chapters II to VII.

(189) ICSID decisions are reported in ICSID Reports (-1993) and ICSID Review-Foreign Investment Law Journal .(-1986) Many recent decisions are available on the ICSID website at http://www.worldbank.org/icsid.

(190) Malaysian Historical Salvors Sdn Bhd v Government of Malaysia Jurisdiction 10 ،(May 2007),.[56]

The Centre

The Convention establishes the International Centre for Settlement of Investment Disputes) hereafter' the Centre 'or 'ICSID [191].('The Centre provides facilities for international commercial arbitration of investment disputes [192].There is a Panel of Arbitrators, to which each Contracting State may designate four members [193].The Chairman of the Administrative Council may designate ten members, each of whom must have a different nationality [194].Legal qualifications are an important qualification for membership of the Panel [195]. In designating members of the Panel, the Chairman is required to ensure that it includes members from the major legal systems of the world.[196]

Consent to Arbitration

The ICSID arbitration system is based upon the consent of the parties [197].A Contracting State does not consent to arbitration simply by ratifying the Convention [198].The State gives its consent to arbitration through a contract, its domestic legislation or a treaty [199].So far as treaties are concerned, Australia is not a party to any multilateral investment treaties. Australian bilateral investment treaties provide for ICSID

[191] ICSID Art 1(1).
[192] ICSID Art 1(2).
[193] ICSID Arts 12, 13(1).
[194] ICSID Art 13(2).
[195] ICSID Art 14(1).
[196] ICSID Art 14(2).
[197] Autopista Concesionada de Venezuela CA v Bolivarian Republic of Venezuela) Jurisdiction 27 ،(September 2001, 6 ICSID Rep 419, 16 ؛[94] ICSID Rev-FILJ 469.
[198] ICSID Preamble.
[199] Tradex Hellas SA v Republic of Albania) Jurisdiction 24 ،(December 1996, 5 ICSID Rep 47 14 ؛ICSID Rev-FILJ 161, ؛7-186 Lucy Reed, Jan Paulsson and Nigel Blackaby, Guide to ICSID Arbitration (2004) 22 .

arbitration of disputes between a Party and an investor from the other Party.(200)

Jurisdiction

The arbitral role of the Centre is subject to the jurisdictional limitations prescribed by the Convention .If these limitations are not satisfied, ICSID will not assume jurisdiction over the dispute, even if the parties have agreed to ICSID arbitration.(201)

The Centre has jurisdiction over any legal dispute' arising directly out of an investment 'between a Contracting State and a national of a different Contracting State .The parties must

(200) Agreements on the Promotion and Protection of Investments : Argentina, 23 August 1995, Aust TS 1997 No 4, Art 13(3) a ؛Chile, 9 July 1996, Aust TS 1999 No 37, Art 11(2) ؛China, 11 July 1988, Aust TS 1988 No 14, Art 12(4 ؛(Czech Republic, 30 September 1993, Aust TS 1994 No 18, Art 11(3)(a) ؛Egypt, 3 May 2001, Aust TS 2002 No 1 ،9Art 13(2)(b) ؛ Hungary, 15 August 1991, Aust TS 1992 No 19, Art 12(3)(a) ؛India, 26 February 1999, Aust TS 2000 No 14, Art 12(3)(a) ؛Indonesia, 17 November 1992, Aust TS 1993 No 19, Art 11(2)(b) ؛Laos, 6 April 1994, Aust TS 1995 No 9, Art 12(2)(b) ؛Lithuania, 24 November 1998, Aust TS 2002 No 7, Art 13(2)(b) ؛Pakistan, 7 February 1998, Aust TS 1998 No 23, Art 13(2)(b) ؛ Mexico, 23 August 2005, Aust TS 2007 No 20, Art 13(4)(a) ؛(Papua New Guinea, 3 September 1990, Aust TS 1991 No 38, Art 14)(2) b ؛Peru, 7 December 1995, Aust TS 1997 No 8, Art 13(2)(b) ؛Philippines, 25 January 1995, Aust TS 1995 No 28, Art 13(2)(b) ؛Poland, 7 May 1991, Aust TS 1992 No 10, Art 13(3)(a) ؛Romania, 21 June 1 ،993Aust TS 1994 No 10, Art 9(2)(b) ؛Sri Lanka, 12 November 2002, Aust TS 2007 No 22, Art 13(2)(b) ؛ Turkey, 16 June 2005, [2003] ATNIF 9, Art 13(2)(a) ؛Uruguay, 3 September 2001, Aust TS 2003 No 10, Art 13(2)(b) ؛Vietnam, 5 March 1991, Aust TS 1991 No 36, Art 12(2)(b) .These treaties are available at http://www.austlii.edu.au/au/other/dfat/treaties ./As at 9 May 2007 India, Laos, Mexico, Poland and Vietnam were not yet parties to the ICSID Convention.

(201) Lucy Reed, Jan Paulsson and Nigel Blackaby, Guide to ICSID Arbitration .14 (2004)

have given their written consent to ICSID arbitration [202].The Centre thus has jurisdiction over disputes between States and private parties) or government-owned corporations [203].(However, the Centre has no jurisdiction over disputes between private parties or between States, [204]or disputes between a State and its own nationals.[205]

'Legal Dispute'

The Convention does not include a definition of' legal dispute .'A' legal dispute 'is a disagreement about legal rights or obligations, not over' moral, political, economic or purely commercial claims.'[206]

'Investment'

The Convention also does not define' investment .'The definition of' investment 'will be determined with the consent of the parties, such as by a definition included in a bilateral investment treaty [207].The word' investment 'has a broad meaning [208].However, the discretion of the parties in defining

[202] ICSID Art 25(1).
[203] Ceskoslovenska Obchodni Banka AS v (Slovak Republic) Jurisdiction 24 ، May 1999, 5 ICSID Rep 335, 14 ؛[17]-[16] ICSID Rev-FILJ 251.
[204] Ceskoslovenska Obchodni Banka AS v (Slovak Republic) Jurisdiction 24 ، May 1999, 5 ICSID Rep 335, 14 ؛[16] ICSID Rev-FILJ 251 ؛Maffezini v (Kingdom of Spain) Jurisdiction 25 ،January 2000, 5 ICSID Rep 396, ؛[74] 124ILR 9.
[205] Christoph Schreuer, The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.290 (2001)
[206] Fedax NV v (Republic of Venezuela) Jurisdiction 11 ،July 1997, 5 ICSID Rep 186, 37 ؛[15] ILM 1378.
[207] Fedax NV v (Republic of Venezuela) Jurisdiction 11 ،July 1997, 5 ICSID Rep 186, 37 ؛[31] ،[21] ILM 1378 ؛Joy Mining Machinery Ltd v (Arab Republic of Egypt) Jurisdiction 6 ،August 2004, 44 ILM 73, 19 ؛[42] ICSID Rev-FILJ 486.
[208] Ceskoslovenska Obchodni Banka AS v (Slovak Republic) Jurisdiction 24 ، May 1999, 5 ICSID Rep 335, 14 ؛[64] ICSID Rev-FILJ 251 ؛Tokios Tokelès v

an investment is not unlimited [209].An arbitral tribunal identified the following characteristics of an investment' :a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and … a significant contribution to the host State's development [210].'For example, a loan or the purchase of bonds may constitute an investment under the Convention [211].The dispute must arise directly out of the investment, but it is not necessary that there be a direct investment.[212]

'National of a Contracting State'

The term' national of a Contracting State 'is defined as any natural person who had the nationality of a Contracting State other than the State which is party to the dispute . However, it does not include a person of the nationality of the State which is party to the dispute .The term also means any juridical person of the nationality of a Contracting State other than the State which is party to the dispute.[213]

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(Ukraine) Jurisdiction 29 ،April 2004, 11 ICSID Rep 313, 20 ؛[73] ICSID Rev-FILJ 205.

[209] Autopista Concesionada de Venezuela CA v Bolivarian Republic of Venezuela) Jurisdiction 27 ،(September 200 6 ،1ICSID Rep 419, ؛[99] ،[97] 16ICSID Rev-FILJ 469 ؛Joy Mining Machinery Ltd v (Arab Republic of Egypt) Jurisdiction 6 ،August 2004, 44 ILM 73, 19 ؛[50]-[49] ICSID Rev-FILJ 486.

[210] Joy Mining Machinery Ltd v (Arab Republic of Egypt) Jurisdiction 6 ، August 2004, 44 ILM 73, 19 ؛[53] ICSID Rev-FILJ 486. For somewhat different definitions, see Consorzio Groupement LESI-Dipenta v (People's Democratic Republic of Algeria) Award 10 ،January 2005, ؛[13] Saipem SpA v (People's Republic of Bangladesh) Jurisdiction 21 ،March 2007,.[99]

[211] Fedax NV v (Republic of Venezuela) Jurisdiction 11 ،July 1997, 5 ICSID Rep 186, 37 ؛[29] ILM 1378.

[212] Fedax NV v (Republic of Venezuela) Jurisdiction 11 ،July 1997, 5 ICSID Rep 186, 37 ؛[27] ،[24] ILM 1378. See similarly, Ceskoslovenska Obchodni Banka AS v (Slovak Republic) Jurisdiction 24 ،May 1999, 5 ICSID Rep 335, 14 ؛[72]-[71]ICSID Rev-FILJ 251.

[213] ICSID Art 25 (2) .

'National of a Contracting State 'also means any juridical person of the nationality of the State party to the dispute but which the parties have agreed should be treated as a national of another Contracting State due to its foreign control [214].For example, if a British company controlled an Australian subsidiary that undertook work on behalf of the Australian federal government, the parties could agree that the Australian subsidiary would be treated as a British company.[215]

The Convention allows the parties a broad measure of discretion in agreeing that a body should be treated as a national of another Contracting State due to its foreign control [216].This treatment is dependent upon agreement between the parties .The corporation will not be so treated unless the parties have agreed to that effect.[217]

Constituent Subdivisions and Agencies

If the national government designates a constituent subdivision or agency by a notification to the Centre, an ICSID arbitration claim may be brought directly against that subdivision or agency rather than the national government itself [218].If a constituent subdivision is not designated by the federal government, ICSID has no jurisdiction over arbitral proceedings brought against that subdivision.[219]

[214] ICSID Art 25(2).
[215] Lucy Reed, Jan Paulsson and Nigel Blackaby, Guide to ICSID Arbitration .17 (2004)
[216] Tokios Tokelès v (Ukraine) Jurisdiction 29 ،April 2004, 11 ICSID Rep 313, 20 ؛[26]-[25] ICSID Rev-FILJ 205 ؛Aguas del Tunari SA v (Republic of Bolivia) Jurisdiction 21 ،October 2005, 20 ICSID Rev-FILJ 450,.[283]
[217] Tokios Tokelès v (Ukraine) Jurisdiction 29 ،April 2004, 11 ICSID Rep 313, 20 ؛[50] ،[45]-[44] ICSID Rev-FILJ 205.
[218] ICSID Art 25(1).
[219] Cable Television of Nevis Ltd v Federation of St Kitts and Nevis Award ، 13 (January 1997), 5 ICSID Rep 106, 13 ؛[2.33] ،[2.28] ،[2.22] ICSID Rev-FILJ 327.

All Australian states and territories other than Western Australia have been designated in this manner [220].Over a period of 15 years, the Western Australian government opposed designation of the state [221].Since ratification of the Convention the Commonwealth government has not sought the state government's agreement to designation.[222]

Failure to designate a constituent subdivision does not prevent a claim being brought in relation to the conduct of that State government .The national government bears international responsibility for breaches of a bilateral investment treaty by a State government [223].A claim may thus be brought against the national government itself regarding actions taken by a State government.[224]

The consent to arbitration of a constituent subdivision or agency must be approved by the Contracting State, except where that State has informed the Centre that approval is not necessary.[225]

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[220] See Ross P Buckley,' Some Jurisdictional Difficulties with Australia's Ratification of the ICSID Convention 2 (1993) 'no 1 Asia Pacific Law Review .92

[221] House of Representatives Hansard, 28 September 1993, p 1280 ؛id, 21 February 1994, p 967.

[222] House of Representatives Hansard, 15 October 1992, p 2355 ؛id, 28 September 1993, p 1280; 1 December 1995, p 4505; 9 September 1996, p 3797; 14 May 1997, p 3667; 22 November 1999, p 12352; 27 September 2001, p 31823.

[223] Metalclad Corp v (United Mexican States) Award 30 ،August 2000, 5 ICSID Rep 212, 119 ؛[73] ILR 615 ؛Compañía de Aguas del Aconquija SA v (Argentine Republic) Annulment 3 ،July 2002, 6 ICSID Rep 340, 125 ؛[96] ILR 58 ؛ADF Group Inc v (United States of America) Award 9 ،January 2003, 6 ICSID Rep 470, 18 ؛[166] ICSID Rev-FILJ 193 ؛Azurix Corp v (Argentine Republic) Award 14 ،July 2006,.[50]

[224] Compañía de Aguas del Aconquija SA v (Argentine Republic) Award 21 ، November 2000, 5 ICSID Rep 299, 125 ؛[51] ILR 1 ؛Compañia de Aguas del Aconquija SA v (Argentine Republic) Annulment 3 ،July 2002, 6 ICSID Rep 340, 125 ؛[75] ILR 58.

[225] ICSID Art 25.(3)

Exclusion of Other Remedies

Consent to ICSID arbitration is deemed to be consent to arbitration to the exclusion of other remedies, unless the consent states otherwise [226].The ICSID arbitration process is thus exclusive of other remedies such as the domestic judicial process [227].An investor is also precluded from seeking both ICSID arbitration and diplomatic protection.[228]

A Contracting State may not bring an international claim in respect of an investment dispute to which one of its nationals has consented to submit to ICSID arbitration, unless the other State does not comply with the award issued in the arbitration [229].The exclusion of such diplomatic measures is necessary for the introduction of a system of arbitration between an investor and a Contracting State [230].The prohibition upon diplomatic protection does not proscribe efforts to settle the dispute.[231]

Exhaustion of Local Remedies

A Contracting State may require that local remedies be exhausted prior to resort to international arbitration [232].The State must impose that requirement in the instrument by

[226] ICSID Art 26.
[227] Ceskoslovenska Obchodni Banka AS v (Slovak Republic) Jurisdiction 1 ، December 2000, 5 ICSID Rep 358, 15 ؛[35] ICSID Rev-FILJ 530.
[228] Banro American Resources Inc v (Democratic Republic of the Congo) Award 1 ،September 2000, 17 ICSID Rev-FILJ 382, ؛[23] ،[20] Tokios Tokeles v (Ukraine) Procedural Order No 3 18 ،January 2005, 11 ICSID Rep 35.[21] ،2
[229] ICSID Art 27(1).
[230] Banro American Resources Inc v (Democratic Republic of the Congo) Award 1 ،September 2000, 17 ICSID Rev-FILJ 382,.[21] ،[15]
[231] Autopista Concesionada de Venezuela CA v (Bolivarian Republic of Venezuela) Jurisdiction 27 ،September 2001, 6 ICSID Rep 419, 16 ؛[138] ICSID Rev-FILJ 469.
[232] ICSID Art 26.

which it has given its consent to arbitration, such as a bilateral investment treaty or national statute. If the State does not impose that requirement as part of its consent, a claimant will not need to exhaust domestic remedies [233].If the State did not impose that requirement as part of its consent, the State cannot later impose such a requirement once an investor has availed itself of the right to bring an arbitration claim.[234]

Types of Dispute

A Contracting State may notify the Centre of the type of disputes that it would and would not consider submitting for arbitration at the Centre [235].A Contracting State or a national of a Contracting State may request arbitration of a dispute [236]. The Secretary-General must register the request unless it is manifestly beyond the Centre's jurisdiction.[237]

Formation of the Tribunal

An arbitral tribunal consists of an odd number of arbitrators as agreed between the parties [238].The majority of the arbitrators shall have nationalities different from those of the parties. However, this rule does not apply if all arbitrators have been appointed by agreement between the parties [239]. An arbitrator may not be appointed as a member of the tribunal if they have been previously involved as a conciliator or arbitrator in the dispute.[240]

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[233] Maffezini v Kingdom of Spain) Jurisdiction 25 ،(January 2000, 5 ICSID Rep 396, 124 ؛[22] ILR 9.
[234] Generation Ukraine Inc v (Ukraine) Award 16 ،September 2003, 10 ICSID Rep 236, 44 ؛[13.5] ILM 404.
[235] ICSID Art 25(4).
[236] ICSID Art 36(1) .Various requirements for the contents of the request are set out in Institution Rules r 1.
[237] ICSID Art 36(2) .(See also Institution Rules r 6.
[238] ICSID Art 37(2).
[239] ICSID Art 39.
[240] Arbitration Rules r 1(3).

Disqualification of Arbitrators

A party may seek the disqualification of an arbitrator on the ground that the arbitrator manifestly does not possess the qualifications for the position [241].A party may also seek disqualification on the ground that the arbitrator was ineligible for appointment [242].The other members of the tribunal decide whether the member should be disqualified.[243]

Competence and Applicable Law

The tribunal is the' judge of its own competence [244]'.The tribunal may determine a challenge to its jurisdiction either as a preliminary matter or in the main award.[245]

The tribunal applies the rules of law that have been agreed between the parties .That agreement may be written or oral [246].If the parties have not agreed upon the applicable law, the tribunal shall apply the law of the Contracting State that is party to the dispute, including its rules of private international law. The tribunal shall also apply public international law that is applicable to the dispute.[247]

The tribunal cannot make a decision of *non liquet*) it is not clear (based on the law's silence or obscurity [248].However, if the parties agree the tribunal may decide the matter *ex aequo et bono*) on the basis of what is fair and right.([249]

[241] ICSID Art 57 .See also ICSID Art 14(1) ؛Arbitration Rules r 9.
[242] ICSID Art 57 .See Arts 37-40.
[243] ICSID Art 58.
[244] ICSID Art 41(1).
[245] ICSID Art 41(2).
[246] Compañía del Desarrollo de Santa Elena SA v (Costa Rica) Award 17 ، February 2000, 5 ICSID Rep 157, 39 ؛[63] ILM 317.
[247] ICSID Art 42(1).
[248] ICSID Art 42(2).
[249] ICSID Art 42(3).

Representation

The Commonwealth Act provides that a party to ICSID proceedings may represent themselves .A party may also be represented by a legal practitioner from any jurisdiction or by any other person of their choice.(250)

The non-appearance of a party before the tribunal is not an admission of the other party's case (251).If a party does not appear, the tribunal shall grant a period of grace to that party before making an award, unless it is satisfied that the party will not appear.(252)

The tribunal may allow a non-party to make a written submission as an *amicus curiae* .In deciding whether to permit the filing of an amicus submission, the tribunal must have regard to the extent to which the non-party would assist the determination of the dispute by bringing some knowledge or perspective that differs from that of the parties and whether the non-party has a' significant interest 'in the arbitration proceeding. The amicus submission must not' disrupt proceedings or unduly burden or unfairly prejudice either party.'(253)

Evidence

A claimant has the onus of proving the facts that support their claim (254).The tribunal may ask the parties to produce documents and other evidence (255).It has a' substantial measure of discretion 'in ordering the parties to produce

(250) International Arbitration Act) 1974 Cth (s 37(1).
(251) ICSID Art 45(1).
(252) ICSID Art 45(2) .See also Arbitration Rules r 42(2).
(253) Arbitration Rules r 37(2).
(254) Salini Costruttori SPA v(Hashemite Kingdom of Jordan) Award 31 ، January 2006,[73]-[70] .
(255) ICSID Art 43 .See also Arbitration Rules r 34(2)(a).

evidence [256].The parties are under a duty to cooperate with the tribunal in producing evidence that has been requested by the tribunal [257].The arbitrators may also inspect the scene of the dispute [258].The tribunal shall decide upon the admissibility of evidence and its probative value.[259]

Provisional Measures

The tribunal may' recommend 'provisional measures that should be taken to preserve the rights of a party to the dispute [260].While the Convention uses the word' recommend ,' these measures are compulsory.[261]

An ICSID tribunal has described provisional measures as 'an extraordinary measure which should not be granted lightly [262].'Such measures are subject to the requirements of necessity and urgency. They will be ordered when they are necessary to preserve a party's rights and where the need for intervention is urgent.[263]

Provisional measures may relate to both substantive and procedural rights [264].For example, the tribunal may issue

[256] Aguas del Tunari SA v (Republic of Bolivia) Jurisdiction 21 ،October 2005, 20 ICSID Rev-FILJ 450,[25] .
[257] Arbitration Rules r 34(3).
[258] ICSID Art 43 .See also Arbitration Rules r 37(1).
[259] Arbitration Rules r 34(1).
[260] ICSID Art 47 .See also Arbitration Rules r 39.
[261] Maffezini v (Kingdom of Spain) Procedural Order No 2 28 ،October 1999, 5 ICSID Rep 393, 124 ؛[9] ILR ؛6 Tokios Tokelés v (Ukraine) Provisional Measures 1 ،July 2003, 11 ICSID Rep 310,[4] .
[262] Maffezini v (Kingdom of Spain) Procedural Order No 2 28 ،October 1999, 5 ICSID Rep 393, 124 ؛[10] ILR6 .
[263] Tokios Tokeles v (Ukraine) Procedural Order No 3 18 ،January 2005, 11 ICSID Rep 352,[8] .
[264] Biwater Gauff (Tanzania) Ltd v (United Republic of Tanzania) Procedural Order No 1 31 ،(March 2006,[71] .

provisional measures relating to the preservation of evidence.(265)

Other Claims

If requested by a party, the tribunal shall determine incidental, additional or counter-claims that arise directly out of the subject matter of the dispute, provided that those claims are within the scope of the consent of the parties to arbitration (266).In exceptional circumstances the tribunal may reopen proceedings before it has given its award, based upon 'decisive 'new evidence or a' vital need 'for further detail about particular matters.(267)

The Award

The award must be given in writing (268).The members of the tribunal may issue individual concurring or dissenting opinions (269).The full text of the award will be published only with the consent of the parties (270).However, ICSID may publish extracts from the tribunal's legal reasoning (271).The tribunal decides by a majority of the votes of all members of the panel.(272)

At the request of a party the tribunal may issue an interpretation of the meaning or scope of the award (273).The request must relate to a dispute between the parties regarding

(265) Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania) Procedural Order No 1 31 ،(March 2006,[92] .
(266) ICSID Art 46 .See also Arbitration Rules r 40.
(267) Arbitration Rules r 38(2).
(268) ICSID Art 48(2) .Various requirements for the contents of the award are set out in Arbitration Rules r 47(1).
(269) Arbitration Rules r 47(2).
(270) ICSID Art 48(5).
(271) Arbitration Rules r 48(4).
(272) ICSID Art 48(1 .(See also Arbitration Rules r 16(1).
(273) ICSID Art 50(1).

the‘ meaning or scope ’of the operative part of the award [274]. It must also have a‘ practical ’effect upon the enforcement of the award.[275]

Revision or Rectification of the Award

Either party may request that the tribunal revise its award [276].The application must be based on a fact that would ‘decisively affect the award .’The tribunal and the applicant must have been unaware of that fact when the award was rendered. The applicant's unawareness of that fact must not have been due to its own negligence [277].An application for revision must be brought within three years of the date of the making of the award. The application must also be brought within 90 days of the date when the fact was discovered [278]. The tribunal may stay enforcement of its award while it considers the request for revision. There is an automatic provisional stay where the applicant requests a stay.[279]

The tribunal is empowered to rectify a clerical or arithmetical error in an award, upon the application of a party [280].This power does not permit revision of the tribunal's ‘substantive findings ’or a reconsideration on the merits of the decision.[281]

[274] Wena Hotels Ltd v (Arab Republic of Egypt) Interpretation 31 ،October 2005,[82]-[81] .
[275] Wena Hotels Ltd v (Arab Republic of Egypt) Interpretation 31 ،October 2005,[87] .
[276] See also Arbitration Rules rr 50-51.
[277] ICSID Art 51(1).
[278] ICSID Art 51(2).
[279] ICSID Art 51().
[280] ICSID Art 49(2) .(See also Arbitration Rules r 49.
[281] Compañia de Aguas del Aconquija SA v (Argentine Republic) Supplementation and Rectification 28 ،May 2003, 8 ICSID Rep 490, ؛[25] 19ICSID-Rev FILJ 139.

Annulment of the Award

Either party may request that the award be annulled [282]. An application for annulment is not an appeal [283].An annulment committee may not substitute its own interpretation of the law or facts for that of the Tribunal.[284]

The Chairman of the Administrative Council of ICSID appoints a committee to determine an application for annulment .The committee's members are chosen from the Panel of Arbitrators.[285]

There are numerous exclusionary rules concerning membership of the committee, intended to ensure the impartiality of its members. Members of the committee may not have sat on the challenged Tribunal decision. They may not have the same nationality as a member of the Tribunal or either party to the dispute. They must not have been designated to the Panel by either the State against whom the claim is brought or the State whose national has brought the claim. Finally, they may not have acted as conciliator in the dispute.[286]

An application for annulment may be based on one or more of five grounds. These grounds are the improper constitution of the Tribunal, a manifest excess of power by the Tribunal, the corruption of one of its members, a` serious

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[282] See also Arbitration Rules rr 50-52.

[283] Wena Hotels Ltd v (Arab Republic of Egypt) Annulment 28 ،January 2002, 6 ICSID Rep 129, 41 ؛[22] ،[18] ILM 933 ؛Repsol YPF Ecuador SA v (Empresa Estatal Petróleos del Ecuador) Annulment 8 ،January 2007, ،[38] ؛[86]CMS Gas Transmission Co v (Argentina) Annulment 25 ،September 2007,[44]-[43] .

[284] CMS Gas Transmission Co v (Argentina) Annulment 25 ،September 2007,[158] ،[136] .

[285] ICSID Art 52(3).

[286] ICSID Art 52(3).

departure from a fundamental rule of procedure ،'and a failure to state the reasons for the award [287].The application may only be based upon these grounds and no others.[288]

Some elaboration may be given about several of these grounds. The manifest excess of power must be' self-evident rather than the product of elaborate interpretations one way or the other [289].'For example, there may be a manifest excess of power where the tribunal was' asked to adjudicate on one of two possible boundary lines submitted by the parties [but] chooses a third line [290].'Another example is where the Tribunal completely fails to apply the proper law.[291]

An example of a fundamental rule of procedure is' the right to be heard before an independent and impartial tribunal [292].'The violation must be a' serious 'one. A violation is' serious 'if it influenced the Tribunal to hand down a decision that was' substantially different 'from what it would have decided if it had applied the rule.[293]

[287] ICSID Art 52(1).
[288] Wena Hotels Ltd v (Arab Republic of Egypt) Annulment 28 ،January 2002, 6 ICSID Rep 129, 41 ؛[18]-[17] ILM 933 ؛CMS Gas Transmission Co v (Argentina) Annulment 25 ،September 2007,[43] .
[289] Wena Hotels Ltd v (Arab Republic of Egypt) Annulment 28 ،January 2002, 6 ICSID Rep 129, 41 ؛[22] ILM 933.
[290] Wena Hotels Ltd v (Arab Republic of Egypt) Annulment 28 ،January 2002, 6 ICSID Rep 129, 41 ؛[25] ILM 933.
[291] Wena Hotels Ltd v (Arab Republic of Egypt) Annulment 28 ،January 2002, 6 ICSID Rep 129, 41 ؛[22] ILM 933 ؛CMS Gas Transmission Co v (Argentina) Annulment 25 ،September 2007,[51]-[49] .
[292] Wena Hotels Ltd v (Arab Republic of Egypt) Annulment 28 ،January 2002, 6 ICSID Rep 129, 41 ؛[57] ILM 933.
[293] Wena Hotels Ltd v (Arab Republic of Egypt) Annulment 28 ،January 2002, 6 ICSID Rep 129, 41 ؛[58] ILM 933.

The duty to give reasons means that the tribunal must provide reasons that show its reasoning on matters of fact and law .This duty is violated if the reasons given are' contradictory or frivolous [294].'However, in general the adequacy of the reasons given is not considered by an annulment committee.[295]

Once again there are time limits for the making of such an application .An application for annulment based upon grounds other than corruption must be brought within 120 days of the date of the making of the award .An application based upon corruption must be brought within three years of the date of the making of the award. The application must also be brought within 120 days of the date when the corruption was discovered.[296]

The Committee may stay enforcement of its award while it considers the request for revision. There is an automatic provisional stay where the applicant requests a stay [297].Before granting a stay, the Committee may require that the requesting party post a bank guarantee for its full amount, [298]

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[294] Wena Hotels Ltd v (Arab Republic of Egypt) Annulment 28 ،January 2002, 6 ICSID Rep 129, 41 ؛[78]-[77] ILM 933.

[295] Wena Hotels Ltd v (Arab Republic of Egypt) Annulment 28 ،January 2002, 6 ICSID Rep 129, 41 ؛[78]-[77] ILM 933 ؛Compañia de Aguas del Aconquija SA v (Argentine Republic) Annulment 3 ،July 2002, 6 ICSID Rep 340, 125 ؛[64] ILR 58 ؛CMS Gas Transmission Co v (Argentina) Annulment ، 25September 2007,[54] .

[296] ICSID Art 52(2).

[297] ICSID Art 52(5) .See also Arbitration Rules r 54.

[298] Mitchell v (Democratic Republic of the Congo) Stay of Enforcement 30 ، November 2004, 20 ICSID Rev-FILJ 587, ؛[33] MTD Equity Sdn Bhd v (Republic of Chile) Stay of Execution 1 ،June 2005, ؛[29] Repsol YPF Ecuador SA v (Empresa Estatal Petróleos Del Ecuador) Procedural Order No 1 22 ،December 2005, 20 ICSID Rev-FILJ 629, ؛[9]-[8] CMS Gas Transmission Co v (Argentine Republic) Stay of Enforcement 1 ،September 2006,[38] ،[36] .

to prevent the use of a stay application as a means to delay enforcement of the award.

If the award is annulled the dispute will be submitted to a new tribunal if either party so requests [299].The parts of the original award that were not annulled are *res judicata* between the parties.[300]

Recognition and Enforcement

An award binds the parties and may not be appealed except as provided by the Convention [301].All Contracting States shall recognise ICSID awards as binding[302] and must enforce the pecuniary obligations of an award as if it was a final judgment of one of their own courts.[303]

The Commonwealth Act designates the Supreme Court of each State and Territory as the competent court for the recognition and enforcement of an award [304].The Supreme Court may enforce an award as if it had been made under the law of that State or Territory.[305]

The enforcement provision of the Convention do not affect the operation of the foreign state immunity laws of the State in which enforcement is sought [306].However, if a Contracting State does not comply with the award it may be subject to various counter-measures [307].In a case of non-

[299] ICSID Art 52(6) .See also Arbitration Rules r 55.
[300] Amco Asia Corp v(Republic of Indonesia) Jurisdiction 10 ،May 1988, 1 ICSID Rep 543, 89 ؛[29]-[28] ILR 552.
[301] ICSID Art 53(1) ؛International Arbitration Act 1974 Cth (s 33).
[302] ICSID Art 53(1).
[303] ICSID Art 54(1).
[304] International Arbitration Act) 1974 Cth (s 35(1).
[305] International Arbitration Act) 1974 Cth (s 35(2).
[306] ICSID Art 55.
[307] Mitchell v (Democratic Republic of the Congo) Stay of Enforcement 30 ، November 2004, 20 ICSID Rev-FILJ 587,[41] .

compliance the other State is not precluded from undertaking diplomatic protection on behalf of its national [308].The other State may also bring the dispute before the International Court of Justice.[309]

Costs and Interest

There has been no consistent practice regarding the award of costs in ICSID proceedings [310].The tribunal assesses the costs of the proceedings as part of the Award. These costs comprise the expenses of the parties relating to the proceedings, the fees and expenses of the tribunal and the charges for the use of the Centre [311].The tribunal has the power to order the payment of compound interest as part of the award.[312]

5- Conclusion

The Commonwealth Act has given the UNCITRAL Model Law and the ICSID Convention the force of Australian law .The widespread adoption of these international instruments has made them a strong foundation for international commercial arbitration in Australia.

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[308] ICSID Art 27.
[309] ICSID Art 27.
[310] Compañía de Aguas del Aconquija SA v (Argentine Republic) Award 21 ، November 2000, 5 ICSID Rep 299, [94 125 ؛[ILR 1 ؛Salini Costruttori SPA v (Hashemite Kingdom of Jordan) Award 31 ،January 2006,[102] .
[311] ICSID Art 61(2) .See also Arbitration Rules rr 28, 34(4).
[312] Compañía del Desarrollo de Santa Elena SA v (Costa Rica) Award 17 ، February 2000, 5 ICSID Rep 157, 39 ؛[103] ،[98]-[97] ILM 317.