Maritime Arbitration in Australia

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Introduction

As an island nation Australia's economy is highly dependent on sea trade. Approximately 12% of world trade by volume either comes into or goes out of Australia by sea. Matters maritime are an integral part of the Australian economy and maritime disputes can have acute effects on it. Therefore there is logic in the resolution of those disputes in appropriate cases being conducted in Australia, and to do so by arbitration.

In Australia, which has been characterised as a nation of shippers or cargo interests and not of shipowners or operators, those Australian interests negotiating contracts for the carriage of their goods with foreign ship interests historically agreed to the inclusion into those contracts of arbitration clauses nominating foreign seats of arbitration.

Now, given the economic growth in, and the movement of capital and commercial activity to, the Asia Pacific region, commercial parties working in this region wish to resolve their disputes where they have arisen, and to do so in a timely and cost effective manner. Therefore arbitration clauses in such contracts now include Australian seats of arbitration, in addition to those of other cities in the region.

There is both a wealth of knowledge and experience in maritime law and in the conduct of maritime arbitration in Australia and in the region to service this wish.

AMTAC

The Australian Maritime and Transport Arbitration Centre (**AMTAC**), which is a Commission of the Australian Centre for International Commercial Arbitration (**ACICA**), provides a structure for the conduct of maritime arbitration disputes in Australia.

AMTAC objectives are to promote and facilitate the conduct in Australia of maritime and transport arbitration and to promote, in Australia and the Asia Pacific region, maritime affairs, maritime scholarship and alternate dispute resolution.

AMTAC works with industry to promote the benefits of conducting maritime arbitrations in Australia in appropriate cases.

To achieve its objectives, AMTAC promotes the use of a model arbitration clause and of the AMTAC Arbitration Rules, the full terms of which can be found at www.amtac.org.au . They are set out in summary in Schedules 1 and 2 below.

1 Chair, Australian Maritime and Transport Arbitration Commission (AMTAC) and Director, Australian Centre for International Commercial Arbitration (ACICA).

Australia as venue for international arbitration

AMTAC and ACICA promote the strengths of Australia as a venue for international arbitration.

Australian cities offer outstanding venues and are considered some of the world's most popular tourist destinations.

Australia possesses commercial courts that are extremely efficient, of the highest integrity, independence and noted for the consistency of their decisions, in addition to being arbitration friendly. Those courts appreciate the independence and significance or arbitral proceedings and are rigorous in enforcing arbitral awards. Participants can engage in proceedings with a high degree of certainty, confident of what to expect from the courts.

Australia's legal profession is held in high regard internationally.

Australia has incorporated both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (**New York Convention**), without reservations, and the UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006 (**Model Law**) into its leading edge lex arbitri, the *International Arbitration Act 1974* (Cth) (**IAA**).

The compelling combination of professional capability, supportive laws, a high quality judiciary and excellent facilities make Australian cities prime neutral venues in which to conduct international arbitrations.

Australian *lex arbitri*

The IAA is the legislative regime governing international commercial arbitration in Australia and its provisions, which reflect pro-arbitration and pro-enforcement policies, apply to all international arbitral proceedings which have an Australian seat and to the recognition and enforcement of foreign awards in Australia.

The features of the IAA are:

i) Regard to objects of IAA

Section 39(2) requires that, when performing functions or exercising powers under the IAA, the Model Law or under an agreement or award to which the IAA applies, or when interpreting the IAA, the Model Law, an agreement or award to which the IAA applies, the court must have regard to the following:

> *'(a) the objects of the Act; and*
>
> *(b) the fact that:*
>
> *(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and*
>
> *(ii) awards are intended to provide certainty and finality.'*

The objects of the IAA, which are set out in Section 2D, include:

'(a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and

(b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and

(c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and

(d) to give effect to Australia's obligations under the (New York) Convention'.

ii) Model Law covers the field

The IAA is the exclusive law governing international arbitration in Australia. Section 21 states that if the Model Law applies to an arbitration, the law of an Australian State or Territory does not apply to that arbitration.

iii) Arbitration agreement

The 'arbitration agreement' has the meaning given in Option 1 of Article 7 of the Model Law and therefore must be in writing, which requirement is met by an electronic communication. It may be concluded orally through conduct or other means, provided that its content is recorded in some form.

Matters which are capable of settlement by arbitration must be ones which fall within the scope of the arbitration agreement and must be arbitrable.

Australian courts have taken a liberal approach in construing such scope (*Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2] (***Comandate***).

Pan entered into a charterparty with Comandate Marine Corp, the owners of the vessel 'Comandate'. The charterparty contained an arbitration clause providing that all disputes arising out of the contract be arbitrated in London and be governed by English law.

Pan commenced proceedings in the Federal Court of Australia, seeking amongst other things, an injunction to restrain Comandate Marine from obtaining an injunction from a foreign court that would prevent Pan filing a claim against it for misrepresentation in contravention of the *Trade Practices Act 1974* (Cth) (**TPA**). The Court at first instance granted the injunction sought by Pan.

Comandate Marine then commenced its own *in rem* proceedings in the Federal Court. In relation to the Pan proceedings, Comandate Marine brought a motion that these proceedings be stayed in accordance with the IAA and that Pan be ordered to arbitrate the issues in the English arbitration which it had commenced.

At first instance Pan resisted the stay on various grounds, including that claims for misleading and deceptive conduct under the TPA did not come within the scope of the arbitration clause.

2 [2008] 1 Lloyd's Rep 119.

The Full Court of the Federal Court of Australia held on this issue that the words 'all disputes arising out of this contract' are flexible enough to encompass disputes with a sufficiently close connection with the formation, the terms and the performance of the contract. It is necessary in each case to assess the connection between the dispute and the contract, including the formation, terms and performance.

Further the Court held that all the TPA claims in this case arose out of the contract, in that they arose out of the formation of the contract. Simply, without the entry into the contract there would have been no act of reliance upon which to base a claim under the TPA.

Thus, the Court concluded that Pan's statement of claim was encompassed by the arbitration clause and that the claims under the TPA did come within the scope of the arbitration clause.

Matters are not arbitrable if they relate to rights which are required to be determined exclusively by the exercise of judicial power, for example criminal prosecutions, insolvency and family law.

iv) Separability and competence-competence

The principles of both separability and competence-competence, as enshrined in Article 16, are recognised as part of the Australian common law.

v) Opt-in and opt-out provisions

There are provisions in the IAA into which parties must expressly opt, if they are to apply, and out of which they must opt, if they are not to apply.

Sections 23C to 23G and Section 24, which relate to confidentiality and consolidation of proceedings respectively, are opt-in provisions. Sections 23, 23A, 23B, 23H, 23J, 23K and 25 to 27, which include provisions relating to issue of subpoenas, evidence, security for costs, interest and costs, are opt-out provisions (Section 22).

vi) Arbitrators

By Article 11(1), unless the parties otherwise agree, persons of any nationality may act as arbitrator in Australian arbitration proceedings.

In accordance with Article 12 an arbitrator is to be impartial and independent and is to possess the qualifications agreed to by the parties and may be challenged if circumstances exist that give rise to justifiable doubts in this regard. Section 18A states that there are such justifiable doubts only if there is a real danger of bias on the part of the arbitrator. The challenge procedure is in accordance with Article 13.

Section 28 provides immunity from liability for anything done or omitted to be done by an arbitrator in good faith in his or her capacity as arbitrator.

vii) Interim measures

By Article 17 a tribunal may grant interim measures at the request of a party unless otherwise agreed by the parties.

Section 18B does not allow a party to make an application for a preliminary order directing another party not to frustrate the purpose of an interim measure requested and a tribunal cannot grant such a preliminary order. Article 17B of the Model Law, by which ex parte orders relating to interim measures are requested by a party and granted by a tribunal, is therefore not applicable in Australia.

In *ENRC Marketing Ag v OJSC 'Magnitogorsk Metallurgical Kombinat'*,[3] the Federal Court of Australia for the first time granted, by way of interim measures, freezing orders pursuant to Article 17 of the Model Law, in support of arbitral proceedings which were seated in a foreign jurisdiction. These orders resulted from an ex parte application of the claimant. The only connection to Australia in those proceedings was the location of assets of the respondent.

viii) Mandatory rules

The mandatory rules in the Model Law, which include Articles 18, 23(1), 24(2), 24(3), 27, 30(2), 31(1), 31(3), 31(4), 32, 33(1), 33(2), 33(4) and 34(5), apply to the conduct of the arbitration.

Article 18 has been modified by Section 18C which states that 'a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if that party is given a reasonable opportunity to present the party's case'.

ix) Court assistance

By Article 27 the tribunal or a party acting with the approval of the tribunal may request assistance of a competent court in taking evidence.

By Section 23, which is an opt-out provision, a party with the permission of the tribunal may apply to a court to issue a subpoena requiring a person to attend for examination before a tribunal or produce to the tribunal specified documents. Also the court may issue a subpoena to a person, who is not a party to the arbitral proceedings, if the court is satisfied that it is reasonable in all the circumstances to issue it.

x) Confidentiality

In Australia the common law recognises that arbitration is a private process but not that it is confidential, there being no implied term in an arbitration agreement imposing an obligation of confidentiality on parties.

Section 23C to Section 23F, which are opt-in provisions, relate to disclosure of confidential information. Section 15(1) provides a definition of 'confidential information'.

xi) Awards

As required by Article 31(1) the award is to be in writing and signed by the arbitrator(s). Where there is more than one arbitrator, the signatures of the majority of all members of the tribunal are sufficient, provided the reason for any omitted signature is stated.

3 [2011] FCA 1371.

Also the award must state its date and place of arbitration in accordance with Article 20(1), the award being deemed to have been made at that place (Article 31(3)).

Unless the parties have otherwise agreed, the award must state the reasons upon which it is based (Article 31(2)).

Whilst there is no Australian precedent on the standard of reasons required in an international award, the High Court of Australia in *Westport Insurance Corp v Gordian Runoff Ltd* [4] has applied the statement of principle of what is required given by Donaldson LJ in *Bremer Handelsgellschaft v Westzucker* (No. 2):[5]

> *'All that is necessary is that the arbitrators should set out what, in their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is'.*

xii) Challenge of awards

An Australian court may only set aside an award under Article 34 if the place of arbitration is within Australia.

Article 34(2) sets out the limited grounds for challenging an award, there being no basis for a challenge based on an error of law or a review of the merits.

One such ground is where a court finds that the award is in conflict with the public policy of Australia (Article 34(2)(b)(ii)). By Section 19 an award is stated to be in such conflict if:

> *'(a) the making of the … award was induced or affected by fraud or corruption; or*
>
> *(b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award'.*

The decision of the Full Court of the Federal Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [6] ***(TCL)*** is particularly relevant when consideration is being given to either the challenge, and/or the refusal of enforcement, of an award in Australia. It raises matters of significant importance for the operation of the IAA, in particular the content of the rules of natural justice for the purpose of Sections 8(7A) and 19 and the method of approach to the applications to challenge, and/or to refuse the enforcement of an award on the grounds that there had been a breach of the rules of natural justice and that therefore the award was contrary to the public policy of Australia.

The Full Court held that:

- an award will not be set aside or denied recognition or enforcement under the Model Law, unless there is demonstrated real unfairness or real practical injustice in how the dispute resolution was conducted or resolved by reference to established principles of natural justice and procedural fairness;

4 [2011] HCA 37.
5 [1981] 2 LLR 130, 132-133.
6 [2014] FCAFC 83.

- there is nothing technical about the rules of natural justice, the underlying premise being that they are not black-letter rules, but rather encapsulate the notion of fairness, which is essentially practical and not an abstract concept;
- the demonstration of real unfairness or real practical injustice will generally be able to be expressed, and demonstrated, with clarity and expedition. It does not involve a contested evaluation of a fact finding process or 'fact interpretation process' or the factual analysis of asserted 'reasoning failure'.

The Full Court has set out in clear terms the matters which should be taken into consideration when an assessment is being made of the merits of an application to an Australian court by the unsuccessful party to challenge, or to resist enforcement of, an award.

In so doing the Full Court has spelt out the proper approach to Sections 8(7A) and 19 of the IAA in relation to natural justice and public policy, highlighting the importance of the fundamental principal of fairness. As observed by the Court, Article 18 of the Model Law which relates to the equal treatment of parties 'expresses a fundamental principle of all arbitration: that it has to be fair'.[7]

Those matters to be taken into consideration include that:

- public policy is limited to and comprises the most basic fundamental notions and principles of morality and justice, conformable with international commercial arbitration;
- no international commercial arbitration award should be set aside as being contrary to Australian public policy unless those fundamental laws of justice and fairness are breached and real unfairness and real practical injustice have been shown to have been suffered by a party in the conduct and disposition of a dispute in an award;
- the IAA places beyond doubt that the rules of natural justice are part of the concept of public policy, and are equated with, and based on, the notion of fairness and that there can be no amendment of the meaning of public policy to incorporate idiosyncratic approaches by courts of different countries; and
- in order to show real unfairness or real practical injustice, a party needs to demonstrate that it has been denied the opportunity to be heard on an important and material issue as revealed by a finding made without material, and to do so without a detailed re-examination of the facts.

xiii) Representation in proceedings

By Section 29 foreign lawyers and non-lawyers can appear in arbitration proceedings in Australia without breaching local laws restricting the right of practice to legal practitioners in Australia.

xiv) Recognition and enforcement of foreign awards

a) Legislative scheme

Sections 8(1) and 8(3) of the IAA provide for the recognition and enforcement of foreign awards as follows:

7 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, [68].

> *'(1)… a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.*
>
> …
>
> *(3)… a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court'.*

A 'foreign award' is defined in Section 3(1) as 'an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies'.

Section 3(1) also provides that 'arbitral award' has the same meaning as in the New York Convention (see sub-articles 1 and 2 of Article I) and that 'arbitration agreement' means an agreement in writing of the kind referred to in sub-articles 1 and 2 of Article II of the New York Convention.

Application for enforcement in Australia of an award, to which the New York Convention does not apply, can be made pursuant to Article 35 of the Model Law and attempts to resist such enforcement will be governed by Article 36 of the Model Law in accordance with Part III of the IAA.

b) Recognition and enforcement

The two parts in Part II of the IAA relating to recognition and enforcement of a New York Convention award are proof of award and of arbitration agreement and grounds for refusal.

Proof of an award requires the production of a duly authenticated original and of the arbitration agreement under which the award purports to have been made or a duly certified copy of each, thereby providing the successful party to that award a prima facie right to its recognition and enforcement (Section 9).

The onus of proving the award and the arbitration agreement is upon the award creditor on a prima facie basis, namely to prove that the award is made by the tribunal granting relief to the award creditor against the award debtor, that the award is made pursuant to the arbitration agreement and that the award creditor and the award debtor are parties to the arbitration agreement (*IMC Aviation Solutions Pty Ltd v Altain Khuder* [8] ***(Altain Khuder)***).

Grounds on which recognition and enforcement may be refused only as set out in Sections 8(5)(a-f) and 8(7), in respect of which there is no residual discretion (Section 8(3A)), these grounds repeating those in Article V of the New York Convention.

The onus of proving the ground(s) against enforcement is upon the party opposing recognition and enforcement, the award debtor. That party needs to establish on the balance of probabilities both the ground(s) within Sections 8(5) and 8(7) and the elements within those ground(s) relied upon. The standard of proof required in a particular case to produce proof on the balance of probabilities will depend upon the nature and seriousness of that sought to be proved.[9]

8 [2011] VSCA 248, [135].
9 Ibid [192].

The Federal Court of Australia has held that Part II of the IAA, which gives effect to the New York Convention, is to be interpreted in light of that Convention (*Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [10] ***(Uganda Telecom)***).

Section 8(8) provides that an Australian court may adjourn enforcement proceedings before it where it is satisfied that an application for the setting aside or suspension of an arbitral award has been made in the country in which, or under the law of which, the award was made, this provision being consistent with Article VI of the New York Convention. The purpose of this Section is to ensure that enforcement of an award does not occur where that award may in time become unenforceable. Sections 8(9) and 8(10) allow a court to order proceedings, which have been adjourned under Section 8(8), to be resumed in certain specified circumstances (*ESCO Corporation v Bradken Resources Pty Ltd* [11] ***(ESCO)***).

c) Public policy

Section 8(7)(b) provides that recognition or enforcement of a foreign award under Part II of the IAA may be refused if the court finds that to enforce the award would be contrary to public policy, this provision reflecting sub-article 2(b) of Article V of the New York Convention.

Section 8(7A) provides:

> *'To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:*
>
> *(a) the making of the award was induced or affected by fraud or corruption; or*
>
> *(b) a breach of the rules of natural justice occurred in connection with the making of the award'.*

In the context of Section 8(7)(b) the public policy which is referred to is the public policy of the country in which an award is sought to be enforced.

See the decision of the Full Court of the Federal Court in *TCL* on the interpretation of 'public policy' and 'rules of natural justice' in paragraph xii) Challenge of awards above.

In *Altain Khuder* the Court of Appeal found that the party resisting enforcement of the award had established that it had been denied natural justice, as the tribunal which made the award did so without giving prior notice to that party that it proposed to make an order against that party. Therefore the Court refused to enforce the award as it would be contrary to public policy.

d) Pro-enforcement approach to foreign awards by Australian courts

Examples of the pro-enforcement approach to foreign awards is evident in the following decisions of the Federal Court of Australia.

In *Uganda Telecom* the Court held, in enforcing a foreign award, that the IAA make it clear that there is no general discretion available to a court to refuse to enforce a foreign award, that the grounds for refusal

10 [2011] FCA 131.
11 [2011] FCA 905.

of enforcement on the basis that such enforcement would be contrary to public policy should be interpreted narrowly,[12] and that it was not against public policy for the court to enforce an award without examining the correctness of the reasons or the result reflected in the award.[13]

In *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)*,[14] the Court enforced a foreign award where the non-existence of assets in Australia were alleged and where there were court proceedings in the national court of the award debtor to set aside the award. Here the Court held that there was no pre-condition to the Court awarding an order in the terms of the relevant award or directing entry of judgment that there are assets within Australia against which execution may be levied.[15]

In *ESCO* the Court adjourned enforcement proceedings in Australia, pending final determination of foreign court proceedings challenging the same award, on the proviso that substantial security was given. The Court noted that there was a wide discretion to adjourn enforcement proceedings pursuant to Section 8(8), which is to be exercised very carefully having due regard to the objects of the IAA and the spirit of the New York Convention.[16]

In *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [17] ***(Norden)***, the Full Court which reversed the decision at first instance, also held that a voyage charterparty was not such a 'sea carriage document', the consequence of each holding was that the two awards were enforceable in Australia.

This decision is a reflection of expansive interpretations by the Full Court of the legislative intent embodied in the application of the Australian Carriage of Goods by Sea Act 1991 (**COGSA**) to contracts of carriage of goods by sea.

Section 11(1) of COGSA is a mandatory choice of law clause, by which all parties when entering into contracts relating to export shipments are taken to have intended to contract in accordance with Australian law. Section 11(2) of COGSA maintains the preservation of the jurisdiction of Australian courts in respect of agreements, wherever made and where evidenced by specified documents relating to both export and import shipments. By Section 11(2) those agreements have no effect so far as they purport to preclude or limit the application of Australian law in respect of export shipments and the application of the jurisdiction of Australian courts in respect of both export and import shipments.

When Section 11(1) was originally introduced in 1991 its operation was limited to 'a bill of lading or similar document of title' and did not apply to a charterparty which was not itself document of title. In 1998 amendments were made to Sections 11(1)(a) and 11(2)(c)(i) by omitting the words 'a bill of lading, or similar document of title' and by substituting the words 'a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia' and 'a sea carriage document relating to the carriage of goods from any place outside Australia to any place in Australia' respectively.

12 *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131, [132].
13 Ibid [126].
14 [2012] FCA 276
15 Ibid [82].
16 *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905, [85].
17 [2013] FCAFC 107.

The words 'sea carriage document' appearing in these amendments are not defined in COGSA. Rather they are defined by way of regulation, with the introduction into COGSA in 1998 of the 'amended Hague Rules' of Schedule 1A. Article 1(1)(g)(iv) of that Schedule defines a 'sea carriage document' to include 'a non-negotiable document (including a consignment note and a document of the kind known as a sea waybill or the kind known as a ship's delivery order) that either contains or evidences a contract of carriage of goods by sea'.

The Full Court of Federal Court of Australia in *Norden* held that the relevant voyage charterparty was not a 'sea carriage document' within Sections 11(1)(a) and 11(2)(b) of COGSA. The case arose out of a claim for demurrage arising from the carriage of a cargo of coal from Dalrymple Bay, Australia to Lianyungang, China on the 'Ocean Baron' under a voyage charterparty. The arbitration clause called for arbitration in London with disputes to be governed by English law. The award creditor in respect of the two awards sought their enforcement in Australia and the Court ruled that they were enforceable.

The significant findings of the Full Court were that Section 11 cannot be read as depriving international arbitration clauses in charterparties made anywhere in the world of force or effect, just because the charter relates to the carriage of goods from overseas to Australia (paragraph 65), and that the purpose of that Section does not extend to protection of charterers or shipowners from the consequences of enforcement of their freely negotiated charterparties subjecting them to the well-recognised and usual mechanism of international arbitration in their chosen venue.[18]

In *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd,*[19] the Full Court, in upholding the first instance decision in the Federal Court enforcing a foreign maritime award in Australia, held, as had the English High Court of Justice previously held, that the judgment debtors had not been denied procedural fairness by the arbitral tribunal, which was found not to have breached the rules of natural justice and which was also found to have given the judgment debtors a reasonable opportunity, in all the circumstances, to present their case.

This decision is also noteworthy as it demonstrates the inappropriateness in general of an enforcement court of a New York Convention country, here the Federal Court of Australia, in reaching a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of the arbitration, here the English High Court of Justice.

In *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited*,[20] the Federal Court in enforcing various foreign awards adopted narrow constructions of the limited grounds for opposing such enforcement which are set out in Section 8.

Possible review of Section 11 of COGSA

Given the importance in the context of international trade by sea, both to and from Australia, of the application of COGSA, AMTAC considers that, having regard to the important issues which the Norden litigation has highlighted, Section 11 should be the subject of a policy review and legislative amendment

18 Ibid [71].
19 [2013] FCAFC 109.
20 [2014] FCA 636.

in order to clarify the scope of the application of COGSA to contracts of carriage by sea relating to both export and import goods.

In addition AMTAC also considers that there are two other matters arising in Section 11 which require review, namely:

(a) in Section 11 (2)(c) there is no reference to documents relating to the carriage of goods by sea between States or between States and the Northern Territory, thereby allowing for a foreign arbitration clause to be included in those carriage documents; and

(b) Section 11 (3) allows for arbitration to be conducted in Australia but remains silent as to whether the arbitration seat is required to be in Australia, noting that in arbitration practice it is possible for the seat of the arbitration to be in a different jurisdiction to that in which the arbitration is being conducted.

AMTAC Arbitration Rules and AMTAC Rocket Docket

The AMTAC Arbitration Rules has the overriding objective to ensure that arbitration remains quick, cost-effective and fair, considering the amounts in dispute and complexity of issues or facts involved in the case. Those Rules include reduced time limits for most procedural steps, restrictions on extensions of time and limited provision for document production. They seek to provide the parties with additional confidence that the arbitrator can hear the case quickly and fairly, with a greater assurance that the award will not be open to challenge due to a failure to accord procedural fairness. A summary of the Rules is set out in Schedule 2 below.

The AMTAC Rocket Docket service provides for an arbitration to be subject to the AMTAC Arbitration Rules in which there is a sole arbitrator, no hearing (the award being determined on the documents alone) and the award being issued within 3 months of the arbitration's commencement, with fixed arbitrator's fees and arbitration costs.

For further information refer to www.amtac.org.au

The future

In order to foster the conduct of maritime arbitration in Australia in the future the following steps need to be undertaken:

- continuing promotion of arbitration clauses which provide for seats of arbitration in Australia,
- encouraging increased adoption of the AMTAC Arbitration Rules which have the express and overriding objective of providing timely, cost effective and fair arbitrations,
- developing greater awareness among those in the Australian maritime industries, and among their shipbroking and legal advisers, of the advantages of conducting arbitration in Australia where, in many instances, the disputes arise and where the parties operate,
- conducting ongoing teaching and refresher training for those currently practising, and for those who wish to practise as arbitrators in this field, so as to ensure that the relevant expertise is continually developed and that appropriate standards of that expertise are maintained.

These next steps need to be pursued energetically and most particularly to ensure that maritime arbitration as conducted in Australia in the future meets the needs of those parties who are seeking a reliable seat of arbitration, an efficient maritime arbitration institution and skilled maritime arbitration practitioners.

Schedule 1

AMTAC Model Arbitration Clause

Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the AMTAC Arbitration Rules. The seat of arbitration shall be Sydney, Australia (or choose another city). The language of the arbitration shall be English (or choose another language). The number of arbitrators shall be one. The arbitration shall be administered by AMTAC.

Schedule 2

Summary of AMTAC Arbitration Rules

Overriding Objective (Article 3)

Provision of arbitration which is:

- quick
- cost effective
- fair

Commencement of Arbitration (Article 5)

When notice of arbitration/registration fee received by AMTAC whichever is later.

Statement of claim to be provided with notice of arbitration.

Statement of Defence (Article 18)

Respondent to provide full statement of defence 28 days after receipt of notice of arbitration.

Composition of Arbitral Tribunal (Article 8)

One arbitrator appointed by AMTAC within 14 days of commencement of arbitration.

Applicable Law (Article 29)

Arbitration shall apply law designated by parties as applicable to substance of dispute.

If no designation, arbitrator shall apply rules of law which arbitrator considers applicable.

Arbitral Proceedings (Article 13)

Parties to be treated equally and to be given a reasonable opportunity of presenting their case.

No hearing unless:

- exceptional circumstances exist, as determined by arbitrator, or
- either arbitrator or parties require hearing to take place.

Any hearing to be no longer than one working day.

Confidentiality (Article 14)

Unless parties otherwise agree in writing, hearings shall take place in private and all matters relating to arbitration to be treated as confidential and not disclosed to third parties without prior written consent.

Periods of Time (Article 22)

Times fixed may be varied by agreement among arbitrator and parties.

Failing agreement arbitrator may vary times fixed:

- to give effect to overriding objective;
- but only in exceptional circumstances and if arbitrator is satisfied that a variation is required in interests of justice;
- on such terms as to costs or otherwise as arbitrator considers reasonable in circumstances;
- to a maximum of 14 days to total time fixed under Rules for actions by each party, and
- to a maximum total period of 30 days for action by arbitrator.

Evidence (Article 23)

No discovery unless arbitrator believes a party has failed to produce a relevant document in which case arbitrator may:

- order for documents production may be made;
- draw an adverse finding if document not produced without good reason.

Interim Measures of Protection (Article 24)

Arbitrator may order interim measures of protection, at request of any party in appropriate circumstances.

Such an order may be ordered in form of an award, or any other form, provided reasons are given, and on such terms as appropriate.

Arbitrator to endeavour to ensure that measures are enforceable.

Time for Final Award (Article 27)

Arbitrator shall make a final award within 4 months of notice of appointment of arbitrator, where no counterclaim, and otherwise within 5 months.