IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No S178 of 2012

BETWEEN:

TCL AIR CONDITIONER (ZHONGSHAN) CO LTD

Plaintiff

AND

THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA

First Defendant

CASTEL ELECTRONICS PTY LTD

Second Defendant

JOINT SUBMISSIONS AS AMICI CURIAE BY

AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION LIMITED ("ACICA")

INSTITUTE OF ARBITRATORS AND MEDIATORS AUSTRALIA LIMITED ("IAMA")

CHARTERED INSTITUTE OF ARBITRATORS (AUSTRALIA) LIMITED ("CIArb AUSTRALIA"

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Pursuant to Rule 44.04 of the High Court Rules

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PART I: CERTIFICATION

1 These submissions are in a form suitable for publication on the Internet.

PART II: BASIS FOR INTERVENTION AND PARTIES

2 The following parties seek leave to appear as amici curiae:

(a) the Australian Centre for International Commercial Arbitration Limited ("ACICA");

(b) the Institute of Arbitrators and Mediators Australia Limited ("IAMA"); and

(c) the Chartered Institute of Arbitrators (Australia) Limited ("CIArb Australia").

3 In seeking leave to appear as amici curiae, ACICA, IAMA and CIArb Australia ("the Joint Interveners") are doing so in support of, and to uphold the framework for, international arbitration including the enforcement of arbitral awards in Australia.

PART III: REASONS FOR GRANT OF LEAVE

4 The reasons why leave to intervene as amici curiae should be granted to the Joint Interveners are set out in the affidavit of Douglas Samuel Jones (in particular at paragraphs 37-41) and the supplementary affidavits of Alexander John Wakefield and Rowena Catherine McNally.

5 In short, as the peak arbitral bodies in Australia, the Joint Interveners are in a position significantly to assist the Court on relevant matters of vital importance to international arbitration in Australia,[1] just as they did and were permitted to do in *Westpoint Insurance Corporation v Gordian Runoff Ltd*.[2] The subject matter of the proceeding otherwise has the potential to substantially affect the interests of ACICA.[3]

PART IV: APPLICABLE LEGISLATION

6 The Joint Interveners adopt paragraph 93 of the Plaintiff's submissions.

PART V: STATEMENT OF ISSUES

7 These submissions expound the essential contractual nature of private commercial arbitration and the practical operation of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), the central purpose of which is to ensure that private agreements to arbitrate are enforced according to their terms.

8 The Joint Interveners' primary contention is that the provisions of the Model Law, as implemented by the *International Arbitration Act 1974* (Cth) ("IAA"), far from compromising the judicial power, gives to the courts the classically judicial function of upholding parties' contractual bargains not only to arbitrate their dispute but also and most importantly, for present purposes, to be bound by the resulting award, subject to series of statutory exceptions and safeguards designed to ensure: (1) the procedural fairness of the parties' agreed arbitral process; (2) that the arbitral tribunal acts within the jurisdictional mandate conferred by the parties; and (3) that the courts do not lend their aid to an award that compromises their own institutional integrity and processes, and the public policy of the State.

9 So understood, there is no inconsistency whatsoever with Ch III of the *Constitution*. At the stage of enforcement of an award, the relevant "matter", for constitutional purposes, concerns *not* the parties' underlying dispute which, *ex hypothesi*, will have been quelled by the making of the award but, rather, a dispute generated by the unsuccessful party's *ex hypothesi* refusal to

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1 *Roadshow Films Pty Ltd v iiNet* (2011) 284 ALR 222.

2 (2011) 244 CLR 239

3 In the United States and the United Kingdom, peak arbitral bodies have been granted leave to intervene or appear as amicus curiae in respect of decisions of significance to arbitration: see, for example, *Stolt-Nielsen SA v Animalfeeds International Corp* 559 US__ (2010) and *Hall Street Associates v Mattel Incorporated* 552 US 576 (2008) and *Hashwani v Jivraj* [2011] UKSC 40.

honour the award and thereby abide by the parties' contractual agreement to do so. That dispute arises under a contract the law treats as separate and separable [from the parties' underlying commercial agreement], as courts of high authority have recognized.[4] This underscores the reason why there is no occasion for merits review at the time of enforcement.

10 It is also relevant that there is no constitutional impediment to the enforcement or recognition of foreign judgments either at common law or under the *Foreign Judgments Act 1991* (Cth), a judicial process that does not involve merits review or the correction of error. The position with respect to arbitral awards is in fact *a fortiori* because the enforcement of the arbitral award accords with the parties' promise to abide by the result, and Chapter III courts are
10 engaged principally to hold the parties to that promise. This is orthodox, not heterodox.

A. The Essentially Contractual Nature of Private Commercial Arbitration

11 There are many different types of arbitration. Private commercial arbitration, with which the current case is concerned, is the most common. It involves the parties agreeing to arbitrate certain disputes they might have and in doing so they either specify the ground rules for that arbitration or expressly adopt some other recognised system of arbitral rules. These arbitrations invariably seek to settle the parties' dispute by the application of some pre-existing system of law (domestic, foreign or international) to the facts as found.

12 This type of arbitration should be distinguished from mandatory arbitrations where the State itself unilaterally decides that some disputes must be submitted to arbitration under various
20 statutory regimes. That type of arbitration is concerned with the enforcement of some public right derived from statute.[5] Such a dispute resolution process is of a public, statutory kind subject to supervisory judicial review on ordinary principles of administrative and constitutional law.[6]

13 By way of contrast, voluntary consent by contractual agreement between the parties is at the heart of private commercial arbitration.[7] The agreement between the parties is the most direct and immediate source of the arbitral tribunal's authority to adjudicate.

14 The consensual basis of private commercial arbitration is widely recognised. It was emphasised recently by Lord Hoffman in *Fiona Trust & Holding Corporation v Privalov*[8] and by the United States Supreme Court in *Stolt-Nielsen SA v Animalfeeds International*
30 *Corporation*.[9] As has been explained:

> The principal characteristic of arbitration is that it is chosen by the parties by concluding an agreement to arbitrate. This is considered the foundation stone of international commercial arbitration, as it records the consent of the parties to arbitration—a consent which is indispensable to any process of dispute resolution outside national courts. Such processes depend for their very existence upon the agreement of the parties.[10]

15 Because private commercial arbitration is derived from a valid agreement of the parties, it is based on a binding and enforceable promise upheld by courts of law. That promise to settle any future disputes by private arbitration necessarily carries with it an interdependent (or

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4 See, for example, *Prima Paint Corporation v Flood & Conklin Mfg.*, 388 US 395 (1967) at 402; *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at [17]; *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [218]-[229]. Redfern and Hunter on *International Commercial Arbitration* (5th ed, 2009, OUP) p.117 state:

> "Another method of analysing this position [separability] is that there are in fact two separate contracts. The primary or main contract concerns the commercial obligations of the parties; the secondary or collateral contract contains the obligation to resolve any disputes arising from the commercial relationship by arbitration. This secondary contract may never come into operation; but if it does, it will form the basis for the appointment of an arbitral tribunal and for the resolution of any dispute arising out of the main contract."

5 An example is *In re Poyser and Mills' Arbitration* [1964] 2 QB 467.

6 See *Chase Oyster Bar Pty Limited v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 398.

7 Redfern and Hunter on *International Commercial Arbitration* (5th ed, 2009, OUP) p 15.

8 [2007] 4 All ER 951 at [5].

9 559 US ___(2010) at 20.

10 Steingruber, *Consent in International Arbitration* (2012, OUP), p 13.

implied) promise by the parties to abide by the award given within jurisdiction by the arbitrator.[11] *Mickovski v Financial Ombudsman Service Ltd* is a recent example of this basic principle.[12]

16 Where a party declines to abide by its promise to abide by the award it is in breach of the parties' agreement and this gives rise to an independent cause of action for enforcement of the award at common law distinct from the original cause of action for breach of contract which gave rise to, and was the subject matter of, the submission to arbitration.[13] An arbitration agreement is in essence enforceable because of the contractual promises embodied in the arbitration agreement to pay the amount of any award.[14]

17 In principle, the position is analogous to the treatment by courts of other contractual promises between the parties that determine any dispute between them. Expert determinations are an example. The power of a court to enforce expert determinations is characterised as a power derived from the underlying contract. The guiding principle is that the parties who have made a contract should be held to their bargain.[15] In including a clause in their agreement providing for a decision by the expert, the parties agree to accept his or her honest and impartial decision and to be bound by it.[16]

18 Similarly, an anti-suit injunction may be ordered in equity's auxiliary jurisdiction to restrain a breach of contract where the bringing of proceedings is in breach of a particular contractual term or terms, which may include an exclusive jurisdiction clause or a clause providing for arbitration.[17] The grant of an anti-suit injunction in this context gives effect to the principle that parties be held to their agreement to arbitrate.[18]

19 The common thread in all cases is the policy of the law to facilitate and uphold contractual obligations, [19] recognizing the importance to commerce that those expectations engendered by contractual bargains are met,[20] especially in a time of growing international trade.[21] Consequently, a court will restrain a plaintiff from instituting a curial proceeding in breach of the agreement with the defendant that any dispute between them will otherwise be determined in some other way (e.g., by mediation).[22]

20 The policy of the law to uphold contractual bargains is also reflected in the principles that have been developed relating to uncertainty and incompleteness. The law in this area not only reflects the courts' disinclination to hold agreements void for uncertainty,[23] it also recognises the significance of arbitration and other dispute resolution machinery in filling in areas of contractual uncertainty in certain cases.[24]

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11 *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd* (1927) 43 TLR 941. *Brali v Hyundai Corporation* (1988) 15 NSWLR 734 at 743E-F. See Briggs, *Agreements on Jurisdiction and Choice of Law* (2008, OUP), at [12.37]-[12.39].

12 *Mickovski v Financial Ombudsman Service Limited & Anor* [2012] VSCA 185 at [35]-[36].

13 *Agromet Motoimport Ltd v Maulden Engineering* [1985] 2 All ER 436 at 442-444.

14 *National Ability SA v Tina Oils and Chemicals Ltd* [2010] 2 All ER 899 at 904 [14].

15 *Metropolitan Tunnel and Public Works Limited v London Electric Railway Co* [1926] Ch 371 at 389.

16 *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335 per McHugh JA.

17 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *Aggeliki Charis Compania Maritama SA v Pagnan SpA (The Angelic Grace)* [1994] 1 Lloyd's Rep 168 at 168, 179, 182.

18 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603 at 637.

19 *Baltic Shipping v Dillon* (1991) 22 NSWLR 1 at 9 per Gleeson CJ. See also *Global Partners Fund Ltd v Babcock & Brown Ltd (in Liq)* (2010) 79 ACSR 383 at [67], [84], [88]-[89], [101], [102].

20 *Vroon BV v Foster's Brewing Group Ltd* [1994] VR 32 at 67-68.

21 *Equuscorp Pty Ltd v Glengallan Investments* (2004) 218 CLR 471 at [35].

22 *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114 at 126; *Webb v Confederation of Australia Motor Sports Limited* [2002] NSWSC 1075 at [17]-[18]. See also "Jurisdiction & Arbitration Agreements in Transnational Contracts" (1996) 10 JCL 53 at 54-58. As to mediation, see *Hooper v Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194.

23 *Upper Hunter Country District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429.

24 *Godecke v Kirwan* (1973) 129 CLR 629 at 645.

21 Moreover, the common law long ago discarded the "grandiloquent phrases of the eighteenth century condemning ousting of the jurisdiction of courts"[25] in concluding in *Scott v Avery*,[26] and to similar effect in *Dobbs v National Bank of Australasia Ltd*,[27] that an arbitration clause did not infringe public policy.

22 Finally, as made clear in *Dobbs*, it should be emphasised that, in respecting the parties' bargain to have a third party determine any dispute, the common law permitted the parties to empower the arbitrator to do so *conclusively* in respect of the parties' rights and obligations.[28]

23 In summary, the fundamental reason why common law courts have historically enforced arbitration agreements and given effect to arbitral awards consequent upon such arbitration agreements,[29] and continue to do so, is because the parties, by their own free will and voluntary agreement, bargain to have certain matters referred for the determination of a third person, and make an interdependent promise to be bound by that determination.

B. The Origins and Purpose of the Model Law

24 An arbitration agreement is an agreement of imperfect obligation for two practical reasons. First, if an agreement to arbitrate is broken, an award of damages is unlikely to be a practical remedy given the difficulty of quantifying loss and specific performance is equally impracticable.[30] Second, the efficacy of an agreement to arbitrate largely depends upon its international operation. Otherwise a party could simply evade the agreement to arbitrate by commencing litigation in another country.[31] This led to the establishment of international machinery to facilitate the practical enforcement of agreements to arbitrate. The most significant event in the evolution of international arbitration in this respect occurred with the ratification of the *New York Convention on the Recognition and Enforcement of Foreign Awards of 1958* ("the Convention"),[32] as discussed further below at paragraphs 42-46.

25 The Convention facilitated the enforcement of the contractual promise to resolve disputes by arbitration, and the ancillary promise to abide by the award, by two fundamental steps:

(a) *first*, by Article II(3), the entry into of the arbitration agreement is facilitated and enforced by the States the parties to the Convention agreeing to recognise an arbitration agreement by requiring that court of a State party, when seized of an action in respect of which the parties have made an arbitration agreement, refer the parties to arbitration, unless the court finds that their arbitration agreement is null and void, inoperative or incapable of being performed; and

(b) *second*, by Articles III, IV, V and VI, the outcome of the arbitral process, the award, is affirmed and enhanced by the contracting States agreeing to recognise foreign arbitral awards as binding and enforceable through a simplified and internationally uniform procedure subject to specified exceptions.

26 The IAA was enacted in 1974, underpinned by the external affairs, trade and commerce and corporations powers, in furtherance of Australia's public international law obligations upon ratifying the Convention. From inception it included Part II concerning the recognition and enforcement of foreign awards in accordance with the Article V of the Convention. Part II of the IAA also contained from enactment section 7(2) requiring the Court to stay proceedings in

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25 See Windeyer J in *Felton v Mulligan* (1971) 124 CLR 367 at 385 and referred to with approval by Toohey and Gummow JJ in *PMT Partners v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 321.

26 (1856) 10 ER 1121.

27 (1935) 53 CLR 643 at 652-654.

28 *Dobbs*, *id*, pp 653-654.

29 As Lord Mansfield observed in *Robinson v Bland* (1760) 97 ER 717.

30 Briggs, *id*, at [12.52]-[12.59].

31 Redfern & Hunter, *id*, pp 20-21; Born, *International Commercial Arbitration* (2009, Kluwer Law International), p 1004.

32 Carter & Fellas, *International Commercial Arbitration in New York* (2010, OUP), page xxvi.

relation to defined arbitration agreements (with or without conditions).[33] This implemented Article II(1) of the Convention.

27 It was against this background that United Nations Commission on International Trade Law ("UNCITRAL") adopted the Model Law in 1985 as a model national arbitral law in respect of arbitrations with an international character. The Model Law was given the force of law in Australia by the *International Arbitration Amendment Act of 1988* (Cth), and deliberately replicated the two fundamental features of the Convention referred to above in Articles 8, 35 and 36.

28 A fundamental objective of the Model Law, therefore, is to lay down statutory machinery that facilitates the practical enforcement of those contractual promises at the core of private commercial arbitration. Consistent with this aim, a salient feature of the Model Law is that the arbitral process is to be conducted in accordance with the parties' wishes as set out in the arbitration agreement. Significantly, this includes the parties' contractual choice as to procedure (Art. 19), selection of arbitrator(s) and composition of the arbitral tribunal (Art. 11), the place of arbitration (Art. 20), and the substantive law to be applied (Art. 28).

29 The Model Law therefore establishes a statutory framework that is structured around and dependent on the parties' consensual agreement. Its evident purpose is to reinforce and enhance, rather than detract and limit, the nature of arbitration as fundamentally a matter of the parties' private agreement.[34]

30 The Model Law and the Convention, also, need to be placed into a wider context.

C. The Global Architecture of International Arbitration

31 Australia's system of arbitration under the IAA is part of an interconnected global system of dispute resolution. This framework is of paramount importance to the international economic system.[35] It is in and against this wider context that parties make contractual bargains to settle their disputes by arbitration. International commercial arbitration agreements are not reached in an institutional or enforcement vacuum.

32 The constitutional architecture of global international arbitration comprises five intertwined, yet separate, elements: (1) effective arbitration clauses; (2) efficient procedural rules; (3) experienced arbitral institutions, (4) national laws that facilitate arbitration; and (5) international treaties that assure the recognition of agreements to arbitrate and the enforcement of foreign arbitral awards.[36]

33 The first element has been explained. The arbitration agreement is the bedrock of arbitration and is, logically, its first element. Without properly drafted and effective arbitration clauses that are recognised by courts of law as binding and enforceable, the global arbitration system falls down at inception.

34 The second element is efficient procedural rules. They are a series of rules which the parties may adopt in their arbitration agreement, in whole or in part, consistently with the consensual basis of arbitration. They largely concern aspects of arbitral procedure governing the conduct and organisation of the arbitral proceeding. The United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules of 1976, as revised in 2010 ("the UAR"), are frequently used. The ACICA Rules are another prominent example. Procedural rules are

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33 Its constitutional validity was upheld in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1.

34 To similar effect, see *AT& T Mobility LLC v Concepcion*, 563 US__(2011) on the operation of the United States federal arbitral regime.

35 Allsop (Foreword) in Holmes and Brown, *The International Arbitration Act 1974: A* Commentary (2011, LexisNexis); Spigelman, (Foreword) in Nottage and Garnett, *International Arbitration in Australia* (2010, Federation Press), at vi. See also Sir Anthony Mason AC, "The Rule of Law and International Economic Transactions" in *Globalisation and the Rule of Law*, Spencer Zifcak (ed), Routledge, 2005, pp. 121-139.

36 Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards" in *The Internationalization of International Arbitration* (ed(s) Hunter, Marriott & Veeder, 1995) 109.

different from, and should not be confused with, a national law on arbitration such as the Model Law.[37] The two may overlap, and are complementary, but different.

35 The third element is described as "experienced arbitral institutions". This includes bodies such as ACICA responsible for administering and facilitating international arbitrations and drafting model arbitration clauses and procedural rules for selection by parties in their agreements.

36 In terms of the fourth element, the Model Law is recognised as "a benchmark for any modern law of arbitration"[38] intended to unify and harmonise the law between nations in this field.[39] The body responsible for its drafting and promulgation bespeaks its international significance in an increasingly economically interdependent world. UNCITRAL is a body of the United Nations established by the United Nations General Assembly by its resolution 2205 (XXI) of 17 December 1966 with the mandate of progressing the harmonisation and unification of the law of international trade in recognition of the importance of co-operation by member States in relation to international trade in maintaining peace and security.[40] Its membership is drawn from among member States of the United Nations across so as to ensure that the various geographical regions and principal economic and legal systems of the world are represented. The current 60 member States include 14 African States, 14 Asian States, 8 Eastern European States, 10 Latin American and Caribbean States and 14 Western European and other States.

37 The Model Law offers a system of national law governing a particular class of arbitrations—international commercial arbitrations—which nation states are free to adopt as their supervisory law (or curial law) for that class of arbitrations. If adopted, the Model Law thus becomes the controlling *lex arbitri* (and a mandatory law) for international commercial arbitrations where the juridical seat is the adopting State.[41] An important component of the *lex arbitri* is the supervisory jurisdiction of its courts over the arbitral process including the scope for challenges to the arbitral award.[42] Hence, in addition to its core function in facilitating the parties' agreement to arbitrate, the Model Law defines the relationship between the courts of the arbitral situs and the arbitration by delineating the proper role of those courts in supporting and supervising the arbitral process.

38 Article 6 specifies those matters in which the involvement of the courts of the State is envisioned. Article 34 lists the "only" grounds upon which a court can set aside an award. It embodies the Model Law's underlying philosophy of minimal court interference with the finality of an arbitral award.[43]

39 Other provisions of the Model Law regulating court supervision of the arbitral process include those addressing issues of appointment, challenge and termination of the mandate of an arbitrator (Articles 11, 13 and 14) and jurisdiction of the arbitral tribunal (Article 16).

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37 Section 21 of the IAA was recently amended to address the anomalous decision in *Australian Granites Limited v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Qd R 461 which erroneously conflated procedural rules with the lex arbitri in interpreting s 21. That decision was held to be plainly wrong in *Cargill International v Peabody Australia Mining Ltd* [2010] NSWC 887 and distinguished and largely discredited in *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219.

38 Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (2004, 4th ed), Preface. See also Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2010, 3rd ed, Sweet & Maxwell), Preface.

39 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2010) 287 ALR 297 at [6].

40 General Assembly Resolution 2205 (XXI).

41 *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127, 130 per Steyn J. See also *Dicey, Morris & Collins on the Conflict of Laws* (2006, 14th ed, Sweet & Maxwell), pp 715, 722-724.

42 Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (2004, 4th ed), p 95. See also *C v D* [2008] 1 Lloyd's Rep 239, affirming *C v D* [2007] EWHC 1541.

43 The rational justification for this approach was recently explained by the Singapore Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR 86 at [59]-[62]. The UNCITRAL commentary to the Model Law states that "protecting the arbitral process from unpredictable or disruptive court interference is essential to the parties who choose arbitration (in particular foreign parties)." See also *Tjany Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR 732 at [29].

40 A second group of provisions comprises court assistance in (i) the taking of evidence (Article 27); (ii) the granting of interim measures (Article 9); (iii) the recognition and enforcement of arbitral awards (Articles 35 and 36); and (iv) the right to a stay in respect of a claim brought before a court in which the matter is the subject of a valid arbitration agreement (Article 8).

41 Australia was one of the first countries to adopt the Model Law as its national arbitral law in 1988. It has since between adopted in over 60 countries and is now recognised as an integral part of "a coherent international system" for dealing with the settlement of disputes by international commercial arbitration.[44] The words of the resolution of the General Assembly of the United Nations on 11 December 1985 (40/72) requesting the Secretary-General to transmit the Model Law to Member States for due consideration encapsulate its importance to international commerce:

> *Recognizing* the value of arbitration as a method of settling disputes arising in international commercial relations. *Convinced* that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious economic relations...*Convinced* that the Model Law, together with the [New York Convention] significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.

42 The fifth element, the Convention, is the centrepiece of this international system of dispute resolution. It is the unifying strand of the international system. Its antecedents can be traced to the *Geneva Convention on the Execution of Foreign Arbitral Awards of 1927* ("Geneva Convention"). Whilst an important step forward, the Geneva Convention was perceived as inadequate. Its field of application was limited, it imposed a heavy burden on the party seeking enforcement and the condition that the award be "final" resulted in the so-called "double exequatur" problem. After the Second World War, momentum gathered for a more satisfactory and complete international framework for arbitration. This culminated in the Convention which expanded the field of application (the limitation in the Geneva Convention that required parties be subject to the jurisdiction of the Contracting States was removed), shifted the burden to the party against whom enforcement is sought and resolved the "double exequatur" problem by providing an award must be "binding" on the parties.[45]

43 147 countries have now ratified the Convention. It is the pre-eminent international legal instrument of global commerce, a fact underlined by the design of the Model Law around its essential terms.[46] Its two core features are as stated at paragraph 25 above.

44 Article V of the Convention is the genesis of the grounds of judicial review specified in Articles 34 and 36 of the Model Law.[47] Those grounds of review deliberately mirror Article V of the Convention. This symmetry of review at the seat of the arbitration and at the place of enforcement is important.[48] A central feature of the Model Law and the Convention is that neither makes provision for revisiting of the merits at the enforcement or setting aside stages of the arbitral process. Finality of international arbitral awards is viewed as paramount.

45 The fourth paragraph of the General Assembly Resolution of the United Nations adopting the Model Law recognises that the Model Law sits together with the Convention and the UAR, as

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44 The Honourable JJ Spigelman AC, "Transaction Costs and International Litigation", address to the 16th InterPacific Bar Association Conference, Sydney, 2 May 2006. See also Collier & Lowe, *The Settlement of Disputes in International Law* (1999, OUP), Chapter 3.

45 Albert van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Interpretation* (1981. Kluwer), pp 6-10.

46 Collier & Lowe, *The Settlement of Disputes in International Law* (1999, OUP), p 266.

47 Sorieul, "The Influence of the New York Convention on the UNCITRAL Model Law on International Commercial Arbitration" (2008) 2 *Dispute Resolution International* 27 at 34-38.

48 See Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History* (1995), p 915. The aim of the Convention and the Model Law is to provide a single standard of curial review. Primacy is given to review at the seat of the arbitration and any subsequent inconsistent outcome on enforcement, as well as forum shopping, is discouraged by a uniform standard of review at the enforcement stage.

a model form of procedural rules, as part of a "unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations".

46 The leading commentary on the provisions and debates leading up to the adoption of the Model Law concludes that this paragraph of the General Assembly Resolution indicates that the Model Law is intended to operate as an "interrelated legal framework" for international arbitration together with the UAR and Convention.[49]

47 The UAR is an example of efficient procedural rules, the Model Law is the national law that facilitates arbitration and the Convention is the international treaty supporting enforcement of foreign arbitral awards.[50] They are discrete spokes of an interconnected wheel.[51] These instruments, and particularly the New York Convention, establish a constitutional framework for the conduct of international commercial arbitrations around the world.[52]

48 Moreover, the subject matter demands such a framework because international arbitration does not stay within national borders and any given State's jurisdiction is limited to its own territory.[53]

49 Reciprocity is the bedrock of this international system. Each ratifying nation has accepted that it is in its interests to behave in this manner, in order to receive for its citizens and corporations the benefits of other nations behaving in the same manner.[54]

50 Importantly, parties understand the benefits of this system in bargaining to have their cross-border disputes settled by the finality and certainty that it affords. The observations in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* aptly summarise the significance of the relationship between the nature of arbitration and this international system:

> The New York Convention and the Model Law deal with one of the most important aspects of international commerce – the resolution of disputes between commercial parties in an international or multinational context, where those parties, in the formation of their contract or legal relationship, have, by their own bargain, chosen arbitration as their agreed method of dispute resolution. The chosen arbitral method or forum may or may not be the optimally preferred method or forum for each party; but it is the contractually bargained method or forum, often between parties who come from very different legal systems. An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce...The recognition of the importance of international commercial arbitration to the smooth working of international commerce and of the importance of enforcement of the bilateral bargain of commercial parties in their agreement to submit their disputes to arbitration was reflected in both the New York Convention and the Model Law.[55]

51 These wider considerations of vital importance to international commerce are also recognised by Section 2D of the IAA.

52 In seeking to impugn the validity of the IAA, the Plaintiff's attack on the essential structure of the Model Law also, therefore, invites a constitutional conclusion that would have the consequence of disrupting an international dispute resolution infrastructure of wider importance.

53 The Joint Interveners respectfully submit that such a conclusion is not dictated by Ch III of the *Constitution* upon a proper understanding of the nature of arbitration and the involvement of the Court in the arbitral process.

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49 Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History* (1995), pp 6-9.

50 See also Caron. Pellonpaa & Caplan, *The UNCITRAL Rules: A Commentary* (2006, OUP), pp 1-2.

51 See also Lew, Mistelis & Kroll, *Comparative International Commercial Arbitration* (2003, Kluwer International), pp 28-29 referring to an interconnected "regulatory web".

52 Born, *International Commercial Arbitration* (2009, Kluwer), p 4.

53 Redfern & Hunter (*id*), p 6.

54 Spigelman, (Foreword) in Nottage and Garnett, *International Arbitration in Australia* (2010, Federation Press) at page v.

55 (2006) 157 FCR 45 at 94-96 [192]-[193].

D. The Plaintiff's "Introductory Points"

54 Once the nature of arbitration is properly understood, in the context of the wider system of international dispute resolution, it is submitted that each of the introductory points made by the Plaintiff is either inaccurate, misconceived or incomplete in some material respect.

(1) ***The primary source of arbitral authority is private agreement***

55 The fact that the Model Law facilitates the efficacy of the parties' private agreement confirms the predominantly private character of arbitration. The agreement between the parties remains the fountain from which all the key integers of the arbitral process spring. It is the direct and immediate source of the arbitral tribunal's authority, as recognised in *Construction, Forestry Mining and Energy Union v Australian Industrial Relations Commission*:

> Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.[56]

56 This Court's observations in *Westport v Gordian*,[57] relied upon by the Plaintiff, should not be exaggerated or taken out of context. As a general proposition, it may be accepted that the performance of the arbitral function is not *purely* a private matter of contract. The Model Law establishes a framework for facilitating the parties' agreement to arbitrate their differences and provides for the limited involvement of the courts to safeguard the procedural integrity, and enhance the effectiveness, of the arbitral process. In that limited sense, an aspect of public power is invoked. But the dominant feature of the arbitral process remains the private agreement of the parties. The co-operative engagement of the courts of law at various stages of the arbitral process does not transform an otherwise essentially private, consensual process into the overall performance of a function resembling public power.

57 Furthermore, the observations in *Westport* were made in the context of a very different legislative regime concerned with domestic, not international, arbitrations. The Court there referred to various statutory provisions of the *Commercial Arbitration Act 1984* (NSW) that have no direct analogue in the Model Law and the legislative context was otherwise one in which the provision of reasons was seen as important to the legislative scheme of judicial review for errors of law. The Model Law does not include reviewability for errors of law of the kind contained in s 38 of that NSW Act. The grounds on which an award can be set aside under Article 34 of the Model Law relate primarily to ensuring the process of arbitration is fair and in conformity with the parties' agreement. They are not directed at the substantive outcome or the wider development of the body of commercial law.[58]

58 Nor does any requirement in Article 31(2) of the Model Law of a statement of reasons for the award suggest to the contrary. Consistently with party autonomy, that requirement may be waived by the contrary agreement of the parties, which may be inferred from the fact that the type of arbitration envisioned does not usually result in an award with reasons.[59] The content of this requirement is otherwise to be measured by the function reasons is intended to serve. There are significant theoretical and practical differences between the arbitral process and the judicial process.[60] Arbitrators' decisions are not an exercise of public power because the

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56 (2001) 203 CLR 645 at 658 [31].

57 (2011) 244 CLR 239 at [261 20] – "... it is going too far to conclude that performance of the arbitral function is purely matter of private contract, in which the parties have given up their rights to engage judicial power, and is wholly divorced from the exercise of public authority." See also *Shoalhaven v Firedam* (2011) 244 CLR 305 at 319 [40].

58 *Sui Southern Gas Co Ltd v Habribullah Coastal Power Co (Pte) Ltd* [2010] 3 SCR 1 at 8 [20]-[21]. 12 [37].

59 Holtzmann and Neuhaus, *id*, p 838.

60 Keane, "Judicial Support for Arbitration in Australia" (2010) 34 *Australian Bar Review* 1 at 4.

arbitral process is private and the award is generally confidential.[61] Unlike judgments, arbitral awards have no, or very limited, role to play in the development of the law through the accumulation of precedents. As such, the requirement to state reasons is not to be equated with any judicial obligation to give reasons.[62] Rather, the requirement for a statement of reasons, if not otherwise displaced by the parties, serves the more confined function of providing the parties, as a basic principle of justice, with a succinct explanation of the how the decision contained in the award was arrived at. This is consistent with the parties' reasonable commercial expectations arising from their agreement to arbitrate, rather than reflecting some kind of linkage with public power.

59 Finally, it is wrong to conclude that the enforcement of an award under Article 35 of the Model Law is not, in substance, done in recognition of the contractual promises that underpin the award. To conclude otherwise on the basis of some technical and detached reading of the Federal Court Rules totally ignores the entire context and purpose of the Model Law.

(2) ***The critical indicium of judicial power is absent***

60 It is also wrong to characterise the arbitral function as having the hallmarks of "judicial power" in the Ch III sense.

61 Fundamentally, arbitration does not involve any exercise of "sovereign" power. Judicial power is an attribute of sovereignty.[63] A court exercising judicial power asserts the power of the polity.[64] Arbitration is a self-consciously private form of alternative dispute resolution,[65] the predominant characteristic of which is that it is chosen by the parties to the arbitration agreement. The source of the authority to arbitrate is derived from private agreement.[66]

62 Properly analysed, a powerful, if not determinative, indicator of judicial power is whether the binding determination directly *arises from* a compulsory and coercive exercise of sovereign power.[67] In other words, it is the attribute of coercion by the State (and hence involuntariness by the citizen) that is a *necessary* element for the exercise of judicial power.[68] In private arbitrations based on the consent of the parties, the sovereign power that is engaged is not a power of coercion. It is a power of a permissive, secondary and facilitative kind. It is permissive in the sense that it does not mandate arbitration of disputes but permits parties, if they so choose, to invoke a private system of justice largely outside of the State's coercive processes for resolving disputes. It is secondary in that it is engaged only upon an anterior agreement by the parties to elect this mode of private adjudication. And it is facilitative in that is provides a supportive framework for the assistance by the State—through the judicial arm and the legislature in enacting an arbitral law—of that private process chosen by the parties.

63 Moreover, the fact that the arbitration may be concerned with the adjudication of contractual rights does not convert the function into a public exercise of judicial power. This submission overlooks a more fundamental and anterior point: when the courts recognise the arbitration agreement, by stay or otherwise, and the resulting award, on an application for setting aside at the arbitral situs or an application for recognition and enforcement, they are performing a classically judicial task by giving effect to the parties' contractual bargain. The nature of that bargain is that the parties' have agreed to have their contractual rights conclusively determined by a third person.

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61 Sections 23C-23G of the IAA. The default position remains that international arbitrations seated in Australia are private but not inherently confidential. See *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10.

62 *Westport* (*id*) at 270-271[53], 302-303 [169].

63 *Waterside Workers* (id) at 441.

64 *BHP Billiton Ltd v Schultz* (2004]) 221 CLR 400 at [157]; see also See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 573 [108].

65 Steingruber, *id*, p 15.

66 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at 658 [31]. See also *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110-111 [43].

67 See, for example, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434at 441-442, 452-453.

68 *Volt Information Sciences, Inc. v Board of Trustees*, 489 US 468 (1989), 478-479.

(3) ***Third-party rights are adequately protected by the IAA***

64 In several parts of its submissions the Plaintiff refers to the potential impact of arbitral proceedings on interests of third parties. This submission is misdirected for several reasons.

65 *First*, an arbitral tribunal does not, and cannot, make a binding determination of the rights of a third party to the arbitration agreement because consent is the central precept of arbitration.

66 *Secondly*, the logical corollary is that an award has no *res judicata* (or issue estoppel) effect on a third party. An award can neither confer rights nor impose obligations directly upon a person who is not a party to the arbitration agreement. For example, the award of an arbitral tribunal in the main arbitration between an employer and a contractor under a building contract does not have the effect of res judicata in respect of the claim for an indemnity by the contractor against its sub-contractor in a subsequent arbitration.[69] It is also noted, contrary to the suggestion of the Plaintiff (at [51]), that there is no basis for thinking that in a claim for contribution by B from C that C would be bound by an award addressing the question of A's liability to B.

67 *Thirdly*, it is similarly a basic principle of arbitral law, since consent by private agreement is the foundation stone, that no third party can be compelled to join arbitral proceedings without its consent and the consent of the parties to the proceeding.[70] The optional provision for consolidation of arbitral proceedings in s 24 of the IAA is consistent with this principle.

68 *Fourthly*, those provisions of the Model Law and/or the IAA providing for the obtaining of third party evidence in certain circumstances reflect the fact that the arbitral tribunal's authority does not extend to third parties but that in certain circumstances it may be appropriate to obtain evidence from third parties to determine the rights *of the parties* to the arbitration. Thus, it is in large part because a court will protect the interests of the third party that this function is conferred upon a court. Article 27 of the Model Law provides that either the arbitral tribunal or a party with the approval of the arbitral tribunal may request the courts to provide assistance in taking evidence. Article 27, whilst empowering courts of the State to assist in the taking of evidence, recognises that it must take the courts of each State as it finds them according to their own powers and procedures.[71] It is, therefore, capable of extending to third parties when those powers and procedures so provide but in accordance with the exercise of usual discretion relating to the appropriateness of the particular request for information having regard to the interests of the third-party and the circumstances. Those cases concerned with obtaining third-party evidence in the energy price determination context are illustrative.[72] Section 23 of the IAA is entirely consistent with these principles. It contains four important statutory safeguards.[73] First, the party may only approach the court with the permission of the arbitral tribunal. Second, the court may only issue a subpoena "for the purposes of the arbitral proceedings". Third, before issuing a subpoena to a person who is not a party to the arbitral proceedings, the court must be satisfied it is "reasonable in all the circumstances". Fourth, a person must not be compelled to answer any question or produce any documents which that person could not be compelled to answer or produce "in a proceeding before a court".

69 *Fifthly*, the interests of third parties are otherwise safeguarded by the supervening doctrine of arbitrability, as embodied by the reference in s 7(2) of the IAA and Articles 8, 34 and 36 of the Model Law to matters "capable of settlement by arbitration". It is a recognised principle of arbitrability that disputes which affect the rights of third parties or where third parties are

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69 Redfern & Hunter,*id*, p 564.

70 *The Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd* [2001] UKPC 34 at [45]-[46].

71 See Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History* (1995), pp 734-737, 749. There is an analogy with the principle in *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 559-560. See also *Mansfield v Director of Public Prosecutions* (2006) 226 CLR 486 at [7].

72 See, for example, *AGL Wholesale Gas v Origin Energy* (2009) 1 Qd R 305; *Santos Ltd v Pipelines Authority* (1996) 66 SASR 37.

73 Revised Explanatory Memorandum to the *International Arbitration Amendment Bill* 2010 (Cth) at [138].

necessary parties, may be non-arbitrable.[74] The underlying principle is that matters in dispute which engage third party rights or interests cannot be determined within the limitations of a private contractual process founded on party consent.[75] It is for this reason that disputes relating to insolvency that affect the wider body of creditors are usually considered not to be arbitrable by reference to the consensual limitations of arbitration.[76] The Plaintiff fails to recognise (at [51]) on this issue that whether the determination of the arbitration will affect the interests of the general body of creditors and contributories is an informing touchstone for concluding the matter is not arbitrable.[77] Similarly, the consensual nature of arbitration imposes limitations on the remedies that may ordered by an arbitrator.

10 70 *Finally*, none of the authorities referred to by the Plaintiff provide support for the tentative propositions advanced in relation to third parties. *Tanning v O'Brien* is not authority for the proposition that an arbitration affecting the interests of the general body of creditors and creditors is necessarily arbitrable. Rather, the Court there held that only aspects of a dispute relating to the underlying debt between the company (as the party the liquidator was claiming through or under pursuant to s 7(4) of the IAA) and the creditor were arbitrable. The Court contrasted this matter with a rejection of the debt by the liquidator on additional statutory grounds available to the liquidator designed, inter alia, to take into account the interests of third party creditors also.[78] Significantly, it was not the liquidator's rejection of the proof of the debt that was referred to arbitration but the dispute between the parties to the agreement.[79]

20 71 *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* and *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* concerned an obscure and criticised NSW statutory provision.[80] *Bitumen* itself is inconclusive as to whether an award may ground a right of contribution under the statute but any action for contribution otherwise requires an independent determination by the Court that the third party tortfeasor is liable in respect of the same damage.[81] It is also a matter for the Court to determine what amount of contribution, if any, is just and equitable.[82] *James Hardie* is likewise silent as to the effect of any award on third parties but, significantly, it was there observed that the amount of liability ascertained is not determinative of the amount recoverable on a statutory action from other tortfeasors.[83]

72 As to equitable relief, the references (at footnote 24 of the Plaintiff's submissions) to
30 *Government Insurance Office of NSW v Atkinson-Leighton Joint Venture* and *Electra Air Conditioning BV v Seeley International Pty Ltd* are merely authority for the proposition that the parties may expressly (as in *Electra Air Conditioning*) or impliedly (as in *Government Insurance Office*) empower the arbitrator to order equitable relief.[84] However, whether it is an appropriate remedy and can be effectively granted in the circumstances of a particular case,[85] will relevantly take into account whether third party rights may be affected and insofar as the arbitrator were to miscarry in this regard it may be open to the third party to assert that it is not bound by that award.[86]

(4) ***The IAA/Model Law provides for significant curial involvement and oversight at each stage of the arbitral process***

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74 *Allergan Pharmaceuticals Inc v Bausch* (1985) ATPR 40-636 at 47-173-47-174.
75 *Fulham Football Club (1987) Ltd v Richards* [2012] 1 All ER 414 at [40].
76 Steingruber, *id*, p 51.
77 *Fulham Football Club (1987) Ltd v Richards* [2012] 1 All ER 414 at [40].
78 (1990) 169 CLR 332 at 343-344 (Brennan and Dawson JJ), 352 (Deane and Gaudron JJ) and 354 (Toohey J). A similar approach is taken in Singapore. See *Larsen Oil and Gas Pte v Petropod Ltd* [2011] 3 SLR 414 at [45]-[46].
79 (1990) 169 CLR 332 at 353.
80 (1998) 196 CLR 53 at 59-61 [7]-[12].
81 See *Alexander v Perpetual Trustee WA Ltd* (2004) 216 CLR 109.
82 (1955) 92 CLR 200 at 212-213.
83 (1998) 196 CLR 53 at 66 [28].
84 See also *AED Oil Ltd v Puffin FPSO Ltd (No 2)*(2010) 265 ALR 415 at [20]-[26].
85 Redfern and Hunter (*id*), p 531.
86 *Miller v Jackson* [1977] QB 966 at 988 (Cumming Bruce LJ); *Patrick Stevedores v MUA* (1998) 195 CLR 1 at 41-43 ([65]-[66]) (Brennan CJ, McHugh, Gummow Kirby and Hayne JJ).

73 It also bears emphasis that the degree of judicial involvement in and oversight of the arbitral process is significant and includes at least the following situations.

74 *First*, the courts are involved in the determination of important of questions of law as to the validity of the arbitration agreement.[87] This involves questions as to capacity, contract formation, the presence of any vitiating factors such as fraud, duress, undue influence, misrepresentation, and unconscionability denying the validity of the agreement, the overriding effect of any mandatory laws of the forum,[88] issues relating to waiver, reliance and estoppel[89] or whether the arbitration agreement is void for uncertainty. There may also be questions as to whether the formal writing requirements of the Model Law and Convention have been met.[90]

10 75 *Secondly*, there may be questions as to whether there is in fact an agreement to "arbitrate".[91]

76 *Thirdly*, if a valid arbitration agreement exists, issues such as the parties to it and the parties' obligations thereunder are often determined by the courts in accordance with the proper law of the arbitration agreement. Disputes in this area can be significant and complex.[92]

77 *Fourthly*, the courts are frequently asked to adjudicate over disputes as to the proper scope of the arbitration agreement; that is, what claims can properly be determined within the scope of that agreement.[93] Disputes in this area can also be difficult and complex.

78 *Fifthly*, there is often a controversy requiring judicial resolution as to what is the proper law of the arbitration agreement and/or the underlying contract if the arbitration agreement forms part of a wider contract.[94]

20 79 *Sixthly*, the courts are often called upon to decide questions of whether a stay under the IAA/Model Law or an anti-suit injunction should be ordered.[95] Difficult questions of arbitrability often arise at this stage.[96]

80 *Seventhly*, questions of preliminary jurisdiction often arise under Article 16 of the Model Law, including any of the preceding matters, the scope of the separability principle, whether the substantive contract is void or voidable and whether any jurisdiction may have been created by estoppel. Importantly, Article 16(3) of the Model Law reflects the basic constitutional principle that any decision by a tribunal as to its jurisdiction is reviewable by a court.[97]

81 *Eighthly*, the Model Law co-operatively engages the support and assistance of the courts at various stages throughout the arbitral process. It does so because there are certain areas where

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87 In terms of the statutory language in s 7 of the IAA whether the arbitration is "null and void. inoperative or incapable of being performed". For example, *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763.

88 For example, *HIH Casualty & General Insurance Ltd (in liq) v Wallace* (2006) 68 NSWLR 603 at 619-620 where the effect of the operation of the Insurance Act 1902 (NSW) made the arbitration agreement inoperative.

89 See, for example, *Zhang Shanghai Wool and Jute Textile Co Ltd* (2006) 201 FLR 178.

90 See, for example, *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.

91 *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 CLR 507; *PMT Partners Pty Ltd (in Liq) v Australian National Parks & Wildlife Service* (1995) 184 CLR 301.

92 See Redfern & Hunter (*id*), pp 95-105.

93 See, for example, *Rinehart v Welker* [2012] NSWCA 95 interpreting "under this deed". The Courts have generally taken the view that the scope of arbitration agreements should not be interpreted narrowly. See *Fiona Trust and Holding Corporation v Privalov* [2007] 4 All ER 951 at 958 [12]-[13]; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165; *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 87-88 [164]-[165].

94 See, Davies, Bell and Brereton, *Nygh's Conflict of Laws in Australia* (2010, 8th ed), p 795-797. A recent example is *Sulamerica Cia Nacional de Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638 where the English Court of Appeal held that English law governed an agreement to arbitrate in a contract to arbitrate disputes, even though the parties had agreed that the laws of Brazil governed the underlying contract.

95 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

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

97 See *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 at 812 [28], 834-835 [98]-[104] and 851 [161]-[162]. Insofar as section 16(3) purports to prevent any appeal from a court at first instance to this Court, it may be of no effect by reason of section 73(ii) of the *Constitution* and, if that were so, it would plainly be severable: *BHP Billiton v Schultz* (2004) 221 CLR 400 at [127], referring to a similar proscription of appeals in state cross-vesting legislation.

the oversight of the Court is appropriate (such as matters relating to the independence and impartiality of the arbitrator) or where it may be necessary and appropriate to apply to a Court for assistance (such as the taking of evidence or interim measures). The Court's support of the arbitral process in this respect is entirely consistent with its support in other areas of the law such as the support in the administration of assets or trust, the powers and duties of receivers, the conduct of examinations by liquidators, the issuing of letters of request for the taking of evidence in foreign proceedings and questions of preliminary discovery.

82 *Ninthly*, a key point at which the courts may become involved is after an award is rendered when the losing party applies to the courts at the seat of the arbitration to have it set aside on any of the grounds set out in Article 34 of the Model Law. These grounds of review replicate Article V of the Convention.

83 *Tenthly*, the grounds of review in Article 34 are replicated again in Article 36 as the basis upon which an award may be denied recognition and enforcement. Several points should be noted about the grounds set out in Articles 34 and 36 of the Model Law. *First*, those grounds are the only grounds of review and the symmetry between the grounds of review at the setting aside and enforcement stages is a key component of the international system. *Secondly*, to examine those grounds of review is to reinforce the contractual nature of arbitration. Article 34(2)(a)(i), (iii) and (iv) and Article 36(1)(a)(i), (iii) and (v) are all directed at the essential nature of arbitration, the validity of the underlying agreement, the scope of agreement and conformity of the tribunal and the arbitral process to the parties' agreement. *Thirdly*, they do not contemplate any review of the merits of the arbitral tribunal's decision on matters of law or fact. Finality in this regard is the policy choice of the international community in disputes of this kind, and the choice of parties who agree to resolve their dispute by arbitration. *Fourthly*, Articles 34 (2)(a)(ii) and 36(1)(a)(ii) emphasise the underlying procedural fairness[98] and "the fundamental structural integrity "[99] of the arbitral process.[100] Finally, in relation to the public policy ground of review, the observations of Foster J in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* are apposite:

> The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.[101]

E. No Substantial Impairment of Institutional Integrity

84 Even if the constitutional criterion for invalidity posited by the Plaintiff be accepted (a matter that presumably will be addressed by other interveners), any suggestion that Articles 5,6, 35 and 36 of the Model Law substantially impair the institutional integrity of Ch III Courts should begin with a proper appreciation of the nature of the function performed by a court in enforcement proceedings under Articles 35-36 of the Model Law.[102] At the outset, it should be emphasised that it is only when the losing party does not agree to honour or abide by the

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98 See, for example, *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2011] 4 HKRD 188 at [108] and *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 at 131-132.

99 *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701 at [30].

100 The explanation for Article 36(1)(v) is that the international system of arbitration attaches primacy to the seat of arbitration in matters of review relating to the award. Accordingly, if the award has been set aside by the courts at the seat of the arbitration it may be refused recognition and enforcement by the courts in the enforcement jurisdiction. Similarly, if an application has been made to set aside the award at the seat, the courts in the enforcement jurisdiction may adjourn their decision under Article 36(b)(2) until the courts at the seat have made their determination.These provisions are replicated in s 8 of the IAA and were considered in *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905.

101 (2011) 277 ALR 415 at [126].

102 It is noted that recognition is necessary for enforcement but distinct. Speaking generally, a court will recognise an award when it is final and binding. That will not be the case if the award is subject to challenge at the arbitral situs under Article 34 of the Model Law. See *Astro Nusantara International BV and Ors b PT Ayunda Prima Mitra and Ors* [2012] SGHC 212.

award that the need for any curial enforcement arises. In the clear majority of cases, parties to international commercial arbitration agreements honour them and abide by the award given.[103]

85 Against the background of the historical of the enforcement of awards at common law, the jurisdiction of the Court is invoked to recognise and enforce an award if certain statutory conditions are met. As the Victorian Court of Appeal made clear in *IMC Aviation Solutions v Altain Khuder LLC*,[104] this is a process that involves application of the usual rules of procedure, evidence and onus of proof. It is a meaningful judicial process. Furthermore, it is subject to the statutory requirements of the IAA including ensuring that the award was made within jurisdiction, that the hearing was fair one and that enforcing the contract is not contrary to public policy.

86 Importantly, the Court is engaged in an independent exercise of judicial power of a quite different kind to quelling the underlying controversy between the parties. That controversy has been determined, in accordance with the parties' contractual bargain, by the arbitral tribunal. The justiciable controversy or "matter" before the Court on enforcement is whether the Court should uphold the parties' separate and separable contractual bargain to arbitrate and abide by the outcome of the arbitration having regard to the need to satisfy the Court, in the usual way, that the prima facie statutory pre-conditions for enforcement have been met and that none of the grounds for refusing recognition and enforcement have been demonstrated. The Court is not asked to review the merits of the underlying controversy or opine on the reasons for the award. And in that respect there is no basis for thinking the Court is lending its imprimatur to the underlying decision (and its reasons) quelling the primary controversy between the parties. Rather, the Court's inquiry is directed at satisfying itself that the circumstances in which the award was reached justify it holding the parties to their contractual bargain to arbitrate and abide by the award, a bargain which, as has been noted in paragraph 9 above, the law regards as separate to or separable from the principal commercial agreement between the parties.

Jurisdictional Errors

87 The Plaintiff's contention that Articles 5, 6, 8, 35 and 35 of the Model Law, as applied by s 16 of the IAA, are invalid because they substantially undermine the institutional integrity of the enforcing courts, otherwise appears to rely heavily on the absence of any reviewability for errors of law. Reliance is placed in this respect on the Court's decision in *Kirk v Industrial Relations Commission of NSW*.[105] There are several difficulties with this reasoning.

88 *First*, it overlooks the one stable historical fact about arbitrations: the common law has long recognised contractual bargains to arbitrate and enforced the promise to abide by any resulting awards inherent in the agreement to arbitrate without any requirement of reviewability for errors of law.[106]

89 *Secondly*, it applies public law notions of judicial review and associated public law remedies to private commercial arbitrations.[107] It appears in this regard to confuse private arbitrations with mandatory arbitrations where judicial review and *certiorari* are available. There is a clean theoretical distinction between the review of decisions made by executive bodies and inferior tribunals established by the State, and exercising a statutory powers and functions, on the one hand, and private decisions made by arbitrators pursuant to contractual agreement of the parties, on the other hand. The two should not be equated.

90 The nature of the public law remedy of *certiorari* is to quash exercises of public power, that is, judicial power exercised by courts and executive power exercised by executive bodies and

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103 See the statistical report jointly prepared by PWC and Queen Mary University of London available at http://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf.

104 (2011) 282 ALR 717.

105 (2010) 239 CLR 531 at 580-581 [98].

106 *Dobbs* (id). See also *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 at 581-582, 585-586, 590.

107 The application of public law standards of judicial review to private arbitral tribunals was called into question in *Lesotho Highlands Development Authority v Impregilio SpA* [2006] 1 AC 221 at 233-234 [25].

inferior tribunals.[108] An arbitrator appointed under a contract is not exercising governmental, executive or judicial power. The fact that the arbitral award is given a legal consequence by the enabling machinery of the Model Law does not alter the character of the source of power exercised.[109] To the extent there is an analogy to be drawn, the decision of an arbitral tribunal is more akin to those decisions of a private body under a private alternative dispute resolution mechanism established by contract that have traditionally been viewed as insusceptible to judicial review.[110] By voluntarily opting for arbitration, the parties must be taken to have acknowledged and agreed to limited recourse to the national courts of law.[111]

91 *Thirdly*, it presupposes that any reviewability of arbitral awards for errors of law as may have existed at 1900 is fixed and immutable. Importantly, arbitration must now be seen in light of wider international developments, especially the Convention and the Model Law. No doubt Parliament could have provided for review of errors of law but it would impose a surprising degree of rigidity to conclude the choice made by Parliament in adopting the Model Law in furtherance of a wider system of global dispute resolution for international trade fell outside the range of permissible legislative choices.

92 There is a jurisdictional error if a decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he lacks the power to do.[112] It thus becomes necessary to identify the source of the decision-maker's functions and powers. The *source* of the arbitrator's power in a contractual arbitration arises from the parties' contractual agreement. An arbitrator derives his or her powers from the parties' agreement to forgo the coercive legal processes of the State and submit their differences to private dispute resolution.[113] More accurately, therefore, to speak of "jurisdictional error" in the arbitral context is to speak of the arbitral tribunal exceeding the limits of the function and powers conferred on it by the arbitration agreement. Consistently with the consensual and contractual basis of arbitration, it is when then the arbitrator travels beyond the remit granted by the parties' agreement that it may be apt to speak of jurisdictional error.[114] And it is to jurisdictional error in this sense that Article 34(2)(a)(iii) and Article 36(1)(a)(iii) of the Model Law are directed when they speak of an award that deals with a difference not contemplated by the submission to arbitration or contains a decision on a matter beyond the scope of the submission to the arbitration agreement.

93 It may be doubted whether an arbitrator who applies the clearly wrong applicable law (in the sense chosen by the parties under Article 28 of the Model Law) makes a decision within the scope of the submission to arbitration. The parties' agreement to arbitrate typically will include their selection of the applicable law to be applied to resolve any dispute. It is noted in this respect that some U.S. courts have held that "manifest disregard" of the applicable law by the arbitrator is a basis for setting aside an award.[115] The precise status of this principle in U.S. law remains unclear but in *Stolt-Nielsen* a majority of the U.S. Supreme Court vacated the arbitral tribunal's award on the basis that the arbitral panel had "exceeded their powers" by deciding the arbitration based on a policy judgment, and not on applicable law.[116]

94 To be sure, considerable caution would need to be adopted before concluding that in a very limited set of circumstances an award may be set aside or refused enforcement where the arbitrator clearly applied a system of law other than the system of law designated by the parties in their arbitration agreement. There is a clear distinction in this respect between

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108 *Craig v South Australia* (1995) 184 CLR 163 at 174-175; see too *Chase Oyster Bar Pty Limited v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [5]-[6] as to the distinction between private and a statutory arbitration.

109 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [52]-[65].

110 See *Mickovski v Financial Ombudsman Service Limited & Anor* [2012] VSCA 185.

111 *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR 86 at [59]-[62].

112 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163].

113 *AT&T Technologies Inc v Communication Workers*,465 US 643 at 648-649 (1986).

114 See *Mexico Inc v Cargill* (2011) ONCA 622 (Ontario Court of Appeal) at [48]-[50].

115 See, for example, *Edstrom Industries v Companion Life Insurance Co*, 516 F.3d 546 (7th Cir. 2008). Whether this requires knowledge of the applicable law and willful disregard of that applicable law is unclear.

116 *Id*, at 10-12.

disregard of the applicable rules of law chosen by the parties and erroneous *application* of those rules.[117] Incorrect application of the correct system of law is not an excess of power for the purposes of Article 36(1)(a)(iii) of the Model Law, which, as with Article V(1)(c) of the Convention from which it is directly derived, is not to be construed so as to lead to a re-examination of the merits of the award.[118] Considerable deference, therefore, should be afforded to arbitrators in their *bona fide* interpretation of choice of law clauses and the scope of their mandate under the arbitration agreement.[119] The essential point, however, is that any suggestion an arbitrator may ignore applicable law immune from any "judicial supervision and restraint" simply goes too far.

95 The Plaintiff also embraces a novel extension of the Court's jurisprudence on the "decisional independence" of Ch III courts by wrongly conflating private and confidential decisions made by an arbitral body in accordance with the parties' agreement with decisions made by an executive body implementing government policy in accordance with the political process. Plainly, the notion of decisional or institutional independence is principally directed at independence in reality and appearance from the political arms of government. Central to the reasoning in *Kable*,[120] *Totani*[121] and *Wainohu*[122] was that the courts were enlisted or co-opted *by the executive arm of government* to perform a function that gave the appearance of assimilation with the executive in implementing and ratifying a decision of the executive to deprive particular individuals of liberty. There is no foundation for any analogy here with the role of the Court in enforcing a private arbitral award underpinned by an agreement to arbitrate and abide by any resulting award. Such a process is far removed from those decisions that have invalidated legislation for compromising the institutional independence of the courts.

96 Nor should any contrast to the position in England and Wales be exaggerated. The grounds for review on questions of law in s 69 of the *Arbitration Act 1996* (UK) are very limited.[123] First, the parties may contract out of any right of appeal. Secondly, the right of appeal on a question of law only extends to questions of English law.[124] This is very significant because many arbitrations seated in London are, of course, governed by foreign law (e.g., New York law). Furthermore, it is a salient feature of international arbitrations, including those seated in Australia, that the controlling substantive law is often the law of another State. And as a basic principle of private international law, it is also important to keep in mind that proof of foreign law is a question of fact.[125] Thirdly, the right of appeal is only available with leave if a number of additional hurdles are established, including that the tribunal was "obviously wrong", the question is one of "general public importance" and it is otherwise "just and proper" in the circumstances for the Court to determine the question.

Implications for Enforcement of Foreign Judgments

97 If the logic of the Plaintiff's contention were sound, it would also have wider and quite stark implications for the operation of the *Foreign Judgments Act* 1991 (Cth)("FJ Act")[126] and

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117 See, *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] SGHC 166. See also *Lesotho Highlands Development Authority v Impregilio SpA* [2006] 1 AC 221.

118 *Lesotho Highlands Development Authority v Impregilio SpA* [2006] 1 AC 221 at 236 [30].

119 Difficult questions of choice of law, of course, arise where there has been no express choice of law and under Article 28(2) the arbitral tribunal is required to apply the law determined by the conflict of laws rules which it considers applicable. Born, *id.* p 2211-2219.

120 (1996) 189 CLR 51 at 98-99, 106-108, 116-122, 133-134.

121 (2010) 242 CLR 1 at 52, 66, 88-89, 157, 172.

122 (2011) 243 CLR 181 at 208, 213, 226-227. See also *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at 76-77, 86. 122; *Momcilovic v The Queen & Ors* (2011) 245 CLR 1 at 66-68, 93, 225-228.

123 As emphasised in *Lesotho*, *id*, a major purpose of that statute was to substantially reduce the extent of intervention by the courts in the arbitral process. Finality of arbitral awards is the fundamental policy of the statute.

124 Section 82(1) of the *Arbitration Act 1996* (UK). Thus, in *Egmatra AG v Marco Trading Corp* [1999] 1 Lloyd's Rep. 862, no appeal lay in relation to an arbitration which was governed by Swiss law. See also *Schwebel v Schwebel* [2011] 2 All ER (Comm) 1048.

125 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [115].

126 Section 3(1) of the FJ Act includes an "award" as a foreign judgment in certain circumstances.

common law principles of recognition and enforcement of foreign judgments as the content of the rules of the common law must conform with any supervening constitutional norms.[127]

98 As Gummow J observed in *Totani*, the enforcement of an arbitral award is similar to the enforcement of foreign judgments by a court because in each case enforcement is dependent upon some anterior decision or determination not made in the exercise of federal judicial power.[128] Moreover, the FJ Act and common law principles follow essentially the same structure of the Model Law: it is not open to the defendant to challenge the merits of the foreign decision by alleging that the foreign court made a mistake as to the facts or the law.[129]

99 From the standpoint of the function performed by the Court on enforcement and attendant Ch III permissibility, it is difficult to identify any relevant difference between the enforcement of awards in the international context and enforcement of foreign judgments. The three basic defences to enforcement of a foreign judgment are fraud, breach of natural justice and contrariety to public policy, all of which, speaking generally, are to be understood similarly to the use of those concepts in the IAA/Model Law. In particular, public policy is interpreted narrowly and does not invite any re-examination of the merits of the foreign judgment.[130] Finally, subject to the specified statutory exceptions in s 7(2)(a), the effect of the FJ Act, like the IAA and Model Law, is to lay down statutory machinery that simplifies enforcement arrangements from the common law.[131] In this respect the FJ Act arguably goes further than the IAA in establishing a system of registration of foreign judgments.

Rationale for Separation of Judicial Power

100 The Model Law and IAA are also consistent with the fundamental values that underpin Ch III.

101 The fundamental purpose of the confinement of judicial power to Ch III courts is to ensure basic procedural fairness to the parties by an independent and impartial tribunal acting in accordance with procedural due process.[132] These are values that are protected by the grounds of review in Articles 34 and 36 of the Model Law, and other provisions of the Model Law. It is a specific ground for setting aside an award or refusing its recognition and enforcement that the party against whom the award is invoked was unable to present its case. This reflects the hearing rule of natural justice. And this ground of review must also be seen in light of Article 18 of the Model Law which provides that the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case. This has been interpreted as reflecting pre-existing common law rules of natural justice.[133] And the bias limb of natural justice is safeguarded by Article 12 of the Model Law which provides for a challenge to the arbitrator if circumstances give rise to justifiable doubts as to his or her impartiality and independence.[134] This reflects a principle analogous to the constitutional standard of bias for Ch III courts and judges.[135] The Model Law, therefore, may fairly be said to require arbitrators

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127 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 569; *Kable v State of New South Wales* [2012] NSWCA 243 at [2].

128 *Totani* (*id*) at 64 [136].

129 *Ainslie v Ainslie* (1927) 39 CLR 381 at 402; *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 566-567 [76]-[78].

130 See *Beals v Saldanha* [2003] 3 SCR 416 at [44]. See also *Jenton Overseas Investment Pte Ltd v Townsing* (2008) 221 FLR 398 at 399-403 [6]-[20].

131 Davies, Bell and Brereton, *Nygh's Conflict of Laws in Australia* (2010, 8th ed), p 843.

132 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470 recognising that natural justice concerns lie at the heart of the separation of judicial power under Ch III.

133 *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 at 459.

134 See, for example, *Gao Haiyan v Keeneye Holdings Ltd* [2011] HKCFI 240.

135 *North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146; Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. See also, as to the independence of arbitrators, *Hashwani Jivraj* [2011] UKSC 40 at 647 [41].

to "act judicially"[136] in a manner reviewable by the supervisory court and ultimately the enforcing court. This is consistent the underlying rationale of the separation of powers.[137]

102 In addition, it is a basic principle of Ch III that a body act within its jurisdiction. This core value is protected by the Model Law by Article 16(3), which provides for full judicial review over all matters relating to the arbitral tribunal's jurisdiction.[138]

103 A final fundamental value protected by Ch III is protecting the institutional integrity of those courts within the integrated Australian judicial system established by Ch III. The public policy ground for refusing enforcement is to be interpreted narrowly in accordance with the need for uniformity and the pro-enforcement bias of the Convention but, at bottom, it is protective of the Court's institutional integrity.[139] It is calculated, amongst other things, to ensure the Court does not lend its aid to the enforcement of awards that would erode public confidence in its own integrity by enforcing an award tainted by fraud, bribery or illegality. For example, in *Soleimany v Soleimany*,[140] the English Court of Appeal refused to enforce an award because it was concerned to preserve the integrity of its own processes which would be compromised by enforcing an illegal contract.[141]

104 In summary, in three critical respects; procedural fairness, jurisdiction and institutional integrity, the Model Law establishes a structure that accords with the fundamental values that lie behind Ch III.

F. No Conferral of Judicial Power on Arbitral Tribunal

105 The Plaintiff's alternative contention that the arbitral tribunal impermissibly exercises the judicial power of the Commonwealth is also misconceived.

106 The arbitral function is not an exercise of sovereign power because it arises from the voluntary agreement of the parties.[142] Another important consideration in determining whether judicial power is engaged in respect of a decision made by an arbitral tribunal is whether that body is empowered with the ability to enforce its award.[143] An arbitral tribunal lacks any coercive machinery to enforce its orders. Rather, the enforceability of its orders, in those relatively rare instances when they are not voluntarily followed by the parties, requires an independent exercise of judicial power by a Ch III court pursuant to Articles 35 and 36 of the Model Law. This is a powerful consideration militating against the conclusion that arbitral tribunals exercise the judicial power of the Commonwealth. Accordingly, a combination of the absence of coercive state power in initiating the arbitration and an independent exercise of judicial power by the State to enforce the award—the product of that arbitration—lead inexorably to the conclusion that arbitral tribunals do not exercise judicial power.

107 *Brandy v Human Rights and Equal Opportunity Commission*[144] does not alter this outcome. *Brandy* concerned determinations made by the Commission, a government body established by federal statute, not a private body empowered to adjudicate by private contract. In that case

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136 Bathurst, "Justice for Hire: Have Gavel, Will Travel (Or, Arbitrators and the Judicial Duty)" (26 July 2012, Address to New South Wales Law Society).

137 Kennedy. "Arbitrate This: Enforcing Foreign Arbitral Awards and Chapter III of the Constitution" (2010) 54 *MULR* 558 at 586-590.

138 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 at 812 [28], 834-837 [98]-[104] and 850-851 [161]-[162].

139 An award will not be enforced under the public policy if it is inconsistent with natural justice (ss 8(7A) and 19 of the IAA) or was induced by fraud or corruption. These additions already reflect components of public policy and were only included out of an abundance of caution. See Holmes & Brown, *The International Arbitration Act: A Commentary* (2011, Lexis Nexis), p 76.

140 [1999] QB 785.

141 At 800. See *Nicholas v R* (1998) 193 CLR 173 as to the relationship between Ch III and protecting the integrity of the Court's processes and the administration of justice.

142 *QH Tours Ltd v Ship Design & Management* (1991) 105 ALR 371 at 385-386 and in *Hi-Fert Pty Limited v Kiukiang Maritime Carriers Inc (No 5) Fertilisers Inc* (1998) 159 ALR 14 at [12].

143 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *Attorney-General v Alinta Ltd* (2008) 233 CLR 542 at 579.

144 (1995) 183 CLR 245.

the mere registration in the Federal Court of the determination by the Commission gave it the effect of an order of that Court. Registration, an administrative act of the court, converted a non-binding administrative determination into a binding, authoritative and curially enforceable determination. The Commission had been invalidly invested with judicial power because upon registration of determination in the registry of the Federal Court the determination had effect "as if were an order made by the Federal Court" and thereby clothed the determination with judicial power. In contrast, Articles 35-36 of the IAA do not have the effect of converting the arbitration process into an exercise of the judicial power of the Commonwealth.[145]

108 The important difference between the enforcement provisions of the IAA and the registration machinery in *Brandy* is that awards under the IAA are not rendered enforceable as orders of a Court *automatically* through a registration mechanism but rather only upon application by a party in accordance with usual curial processes. As explained in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (*id*), this is a process that involves application of the usual rules of procedure, evidence and onus of proof. On no fair reading of the process can it be viewed as akin to an administrative process of registration. The Court is not converted into a mere automaton bound to enforce the award. The enforcement provisions of the IAA/Model Law lack a crucial step that was central to the finding of invalidity in *Brandy*. It was the combination of exercise of executive power by the Commission and performance of an administrative act by the Registrar of the Federal Court creating an order of the Court that offended Ch III's conception of judicial power. Judicial power was conferred by s 25ZAB without any preceding judicial determination. The function of the Court under the IAA in enforcing an award cannot be characterised as an administrative act.[146] Rather, as explained above, enforcement is an independent exercise of judicial power. It should also be observed that this exercise of judicial power is adversarial,[147] not inquisitorial nor investigative, and is an example of a judicial function that is closely analogous to a function historically performed by common law courts prior to Federation by statute or at common law.[148]

Part VI: ESTIMATED TIME FOR ARGUMENT

109 The Joint Interveners estimate that the time for presentation of any oral argument by them, if permitted, is 20-30 minutes.

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145 It may be doubted whether federal jurisdiction is properly engaged because the underlying controversy to be quelled involves no federal law and the controversy to be quelled on enforcement proceedings to the Federal Court is not the underlying controversy but a narrower controversy as to whether the award quelling the underlying controversy should be enforced by order of the Court.

146 See, *Love v Attorney-General (NSW)* (1990) 169 CLR 307.

147 *Saraceni v Jones* (2012) 287 ALR 551 at 571 [109].

148 See, *Saraceni v Jones* [2012] HCA 38, referring to *R v Davison* (1954) 90 CLR 353. The enforcement function of a Court under the IAA in this way is analogous to the enforcement under section 12 of the 1889 *Arbitration Act (UK)* and at common law in a similar way that the power of examination under s 596 of the Corporations Act was held to be analogous to the historic examination in relation to companies in voluntary liquidation.