Ius Gentium: Comparative Perspectives on Law and Justice 43

Gabriël A. Moens
Philip Evans *Editors*

Arbitration and Dispute Resolution in the Resources Sector

An Australian Perspective

Springer

Arbitration and Dispute Resolution
in the Resources Sector

IUS GENTIUM

COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE

VOLUME 43

Series editors

Mortimer Sellers
University of Baltimore

James Maxeiner
University of Baltimore

Board of Editors

Myroslava Antonovych, *Kyiv-Mohyla Academy*
Nadia de Araújo, *Pontifical Catholic University of Rio de Janeiro*
Jasna Bakšic-Muftic, *University of Sarajevo*
David L. Carey Miller, *University of Aberdeen*
Loussia P. Musse Félix, *University of Brasilia*
Emanuel Gross, *University of Haifa*
James E. Hickey, *Jr., Hofstra University*
Jan Klabbers, *University of Helsinki*
Cláudia Lima Marques, *Federal University of Rio Grande do Sul*
Aniceto Masferrer, *University of Valencia*
Eric Millard, *West Paris University*
Gabriël A. Moens, *Curtin University*
Raul C. Pangalangan, *University of the Philippines*
Ricardo Leite Pinto, *Lusíada University of Lisbon*
Mizanur Rahman, *University of Dhaka*
Keita Sato, *Chuo University*
Poonam Saxena, *University of Delhi*
Gerry Simpson, *London School of Economics*
Eduard Somers, *University of Ghent*
Xinqiang Sun, *Shandong University*
Tadeusz Tomaszewski, *Warsaw University*
Jaap de Zwaan, *Erasmus University Rotterdam*

More information about this series at http://www.springer.com/series/7888

Gabriël A. Moens · Philip Evans
Editors

Arbitration and Dispute Resolution in the Resources Sector

An Australian Perspective

Editors
Gabriël A. Moens
Curtin University School of Law
Bentley, WA
Australia

Philip Evans
Curtin University School of Law
Bentley, WA
Australia

ISSN 1534-6781 ISSN 2214-9902 (electronic)
Ius Gentium: Comparative Perspectives on Law and Justice
ISBN 978-3-319-17451-8 ISBN 978-3-319-17452-5 (eBook)
DOI 10.1007/978-3-319-17452-5

Library of Congress Control Number: 2015937364

Springer Cham Heidelberg New York Dordrecht London
© Springer International Publishing Switzerland 2015
This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.
The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.
The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made.

Printed on acid-free paper

Springer International Publishing AG Switzerland is part of Springer Science+Business Media
(www.springer.com)

Foreword

The publication of this important work focusing upon arbitration and the resolution of disputes in the resources sector from an Australian perspective is most timely for a number of reasons.

First, Australia has consolidated its position as a significant supplier of natural resources, both minerals and energy, into the international market, particularly in the market for resources in the Asia-Pacific region, in which the fastest developing economies of the world are located. Australian companies are also significant participants in the global resources market and are significant investors in natural resource projects on all continents of the globe (other than Antarctica).

Second, after decades of fragmentation the Australian law governing commercial arbitration, both domestic and international, can now be described as uniform and consistent across the various Australian State and Federal jurisdictions. The schism between the law governing international arbitration and domestic arbitration in Australia is now largely a relic of Australian legal history, as a result of State, Territory, and Commonwealth legislation enacted over the last five years. It is difficult to overstate the significance of those reforms to the resolution of disputes in the resources sector, given that the distinction between domestic and international disputes within that sector often turns upon the corporate vehicle through which the parties to the dispute have chosen to contract. If foreign investors in an Australian resource project choose to contract through wholly owned Australian subsidiaries, with the consequence that their disputes are characterised as domestic rather than international, no longer will this make a significant difference to the legal regime governing the resolution of that dispute. All disputes, whether domestic or international, to the extent that they are governed by Australian law at all, will be governed by a legal regime which adopts the UNCITRAL Model Law, in common with many other significant trading jurisdictions in the Asia-Pacific region including New Zealand, Singapore, Malaysia, Thailand, Vietnam, the Philippines, Japan, South Korea, India, Sri Lanka and (effectively) Hong Kong.

The alignment of Australia's laws with the dominant international legal regime for the resolution of disputes in the Asia-Pacific region, and the significance of Australia's participation in the international resources market is not merely

serendipitous. The familiarity, predictability, consistency and neutrality of legal regimes governing the resolution of commercial disputes are as important to foreign companies investing in Australian resource projects or trading with Australian resource suppliers as they are to Australian companies investing in resource projects elsewhere. The combination of these factors suggests that the minor role previously played by Australia in the resolution of international commercial disputes may be about to change, particularly in the natural resources sector.

This book stems from a successful conference organised by the Australian Centre for International Commercial Arbitration (ACICA) on the subject of arbitration and the resources sector which was held in Perth in May 2013. Perth was an obvious choice as a venue for the conference, given the volume of minerals and energy produced and exported from Western Australia and the consequent location of many producers and their legal advisers in Perth, coupled with Perth's proximity to the significant Asian markets. Since that conference, the focus of attention has been expanded to include mediation and adjudication, and contributions on those topics have been included in this book even though they were not addressed at the conference, and the range of contributors expanded accordingly.

The quality of the contributions contained within this book is evident from the qualifications and experience of the contributors, all of whom are significant participants in discourse and commentary in the fields of commercial arbitration and dispute resolution within Australia, and many of whom are well recognised internationally in those fields.

The topics addressed in the 12 substantive chapters are succinctly reviewed in the first chapter. Rather than repeat that exercise, it is sufficient for me to note the breadth of the topics essayed. They include the role of mediation in the resolution of disputes in the natural resources sector which will, no doubt, become increasingly significant in the years to come—a significance which has been recognised in other jurisdictions, notably by the recent creation of the Singapore International Mediation Centre. Another topic addressed in this book which is of particular significance not only to foreign companies investing in Australia, but also to Australian companies investing elsewhere, concerns the rights conferred upon investors by bilateral investment treaties, including the capacity to enforce those rights against a State party by way of arbitration pursuant to the terms of the relevant treaty. Those rights have given rise to significant contention in both political and legal circles in Australia in recent years. The topics addressed in this book are of interest not only to those engaged in the resolution of disputes, but also to those interested in the formulation of contractual provisions which will not only reduce the risk of dispute, but enhance the timely and efficient resolution of disputes should they arise.

Another topic addressed in this important work, and which is of particular interest to me, concerns the appropriate role of the courts in facilitating the achievement of the objective evident in the parties' agreement to endeavour to resolve their disputes through some means other than litigation. The various Australian cases reviewed in different portions of the book (and in which I have played some small part) justify the view that contemporary Australian courts, both

State and Federal, have willingly followed the lead of the Australian legislatures and have embraced an international perspective on the governance of commercial arbitration and dispute resolution generally. Consistently with the approach taken by courts in other comparable legal regimes, it is now clear that Australian courts will actively promote and support the attainment of the objectives embodied by the parties in their agreement. With well-drafted contracts, Australian courts are limiting the exercise of their jurisdiction to providing assistance in the gathering and presentation of evidence and to the enforcement of awards; they are not otherwise intervening unless the process has departed from public policies at a most fundamental level and is inconsistent with internationally accepted principles of fairness and justice, including the denial of natural justice.

The authors and editors of this important work are to be congratulated upon their significant contribution to this rapidly developing field. I am pleased to recommend this book to anyone with an interest in the resolution of disputes in the natural resources sector.

Wayne Martin
Chief Justice's Chambers
Supreme Court of Western Australia

Contents

1 **An Australian Perspective on Arbitration and Dispute Resolution in the Resources Sector** 1
Gabriël A. Moens and Philip Evans

2 **Australia's International and Domestic Arbitration Framework** 7
Richard Garnett

3 **The Importance of Arbitration to the Resources Sector** 23
Doug Jones

4 **Drafting Arbitration Clauses for the Resources Sector** 33
Michael Hales

5 **The Enforcement of Dispute Resolution Agreements in the Resources Sector** 43
Philip Evans

6 **Arbitral Law Reform in Australia: What Are the Signs of Progress to Date?** 63
Peter Megens and Andrea Stauber

7 **Mediation in the Resources Sector: 'Alternative' Dispute Resolution or Now the Norm?** 101
Michael Hollingdale

8 **Statutory Adjudication and the Resources Sector** 125
Jeremy Coggins

9 Recent International Commercial Arbitration and Investor-State Arbitration Developments Impacting on Australia's Investments in the Resources Sector . . . 153
Luke Nottage and Simon Butt

10 Domestic Court Proceedings Relating to International Commercial Arbitration in the Resources Sector 181
Gabriël A. Moens and John Trone

11 Resource Nationalism: Old Problem, New Solutions 197
Sam Luttrell

12 Mining Projects in OHADA: The Legal and Judicial Climate 231
Bruno Zeller

13 International Arbitration and the Client's Perspective 249
Greg Steinepreis and Eu-Min Teng

Editors and Contributors

About the Editors

Prof. Gabriël A. Moens JD, LLM, Ph.D., GCEd, MBA, FCIArb, FAIM, is professor of law and director of research, Curtin Law School, and emeritus professor of law at the University of Queensland. Prior to his current position, he served as pro-vice chancellor (Law, Business and Information Technology) and as a long-serving dean and professor of law at Murdoch University. He also served as professor of law and head, Graduate School of Law, University of Notre Dame Australia and as Garrick professor of law and director, The Australian Institute of Foreign and Comparative Law, The University of Queensland. He is editor-in-chief of *International Trade and Business Law Review*. In 2003, the Prime Minister of Australia awarded him the Australian Centenary Medal for services to education. He is a fellow (FCIArb) and chartered arbitrator (CArb) of the Chartered Institute of Arbitrators, London, and fellow and deputy secretary general of the Australian Centre for International Commercial Arbitration (ACICA). He is the editor-in-chief of the *ACICA Review*. He co-authored a commentary to the ACICA Arbitration Rules. Professor Moens is also a *Membre Titulaire*, International Academy of Comparative Law, Paris, and a fellow of the Australian Institute of Management (AIM WA). He has taught extensively in the UK, Germany, Belgium, Italy, Austria, Australia, Indonesia, Thailand, Singapore, Hong Kong, Japan and the USA. He is co-author of *The Constitution of the Commonwealth of Australia Annotated* (8th ed., 2012), *Jurisprudence of Liberty* (2nd ed., 2011), *Commercial Law of the European Union* (2010) and *International Trade and Business: Law, Policy and Ethics* (2nd ed., 2006).

Prof. Philip Evans is professor of law at Curtin Law School, Curtin University. He is also the principal of PJ Evans and Associates; Lawyers, Arbitrators, Mediators and Adjudicators. He is a graded arbitrator, accredited mediator and registered adjudicator under the *Construction Contracts Act 2004* (WA). He holds a current legal practice certificate. In addition to his university teaching and research roles, Professor Evans conducts regular continuing professional development

programs and in-house training in the areas of contract law, trade practices law, administrative law, statute law, dispute resolution, construction law, and arbitration. In 2013, he was appointed by the Western Australian government as a sessional arbitrator to resolve workers compensation disputes. Prior to commencing his legal studies, Professor Evans practiced as a civil and structural engineer for 20 years. Before leaving to practice law full time with a national law firm in 1998, Dr. Evans was the head of the Department of Construction Management at Curtin University. In 2001, he joined the College of Law at the University of Notre Dame Australia, where he was professor and associate dean of the School of Law, director of Graduate Law Programs, and the course coordinator of the Graduate Certificate in Building and Construction Law. In 2009, he joined Murdoch University and was subsequently appointed professor of law, deputy dean and dean of law before leaving to take up the professorial appointment at Curtin University in July 2013. He has lectured extensively in contract law, torts law, trade practices law, intellectual property law, evidence, project management, construction contracts, construction claims and dispute resolution in the construction industry. His contribution to construction law education and dispute resolution has been acknowledged through the awarding of fellowships by the Institution of Engineers (Australia), the Australian Institute of Building, the Australian Institute of Management and the Australian Centre for International Commercial Arbitration.

Contributors

Simon Butt teaches Indonesian law at the University of Sydney Law School and is currently an Australian Research Council postdoctoral fellow. He has written three books on Indonesian law: *Corruption and Law in Indonesia* (Routledge 2012); *The Indonesian Constitution: a Contextual Analysis* (Hart 2012, with Tim Lindsey) and *The Constitutional Court and Democracy in Indonesia* (Brill forthcoming 2015).

Jeremy Coggins is a senior lecturer in construction law and contract administration at the School of Natural and Built Environments, University of South Australia. In 2012, Jeremy completed a Ph.D. in law at the University of Adelaide on the topic of harmonisation of construction industry payment and adjudication legislation in Australia, and he has published several journal articles on the topic of the legislation. Jeremy is a member of the Australian Legislative Reform Subcommittee of the Society of Construction Law Australia, which recently published a report on security of payment and adjudication in the Australian construction industry. He is also a member of the Royal Institution of Chartered Surveyors and an associate of the Australian Institute of Quantity Surveyors.

Prof. Richard Garnett is professor of Private International Law at the University of Melbourne and a consultant to Herbert Smith Freehills. Professor Garnett holds degrees in arts and law from the University of New South Wales and an LLM from Harvard University where he was a Fulbright scholar. He regularly advises on cross-border litigation and arbitration matters and has appeared as advocate before a

number of tribunals, including the High Court of Australia. Professor Garnett has written extensively in the fields of private international law and international commercial arbitration, with his work cited by leading tribunals around the world, including the European Court of Human Rights, United States federal district courts, the Singapore Court of Appeal and Australian superior courts. In 2012, Professor Garnett published the book *Substance and Procedure in Private International Law* in the prestigious Oxford Private International Law Series, which is the first major work on the subject in English. From 2004 to 2005, Professor Garnett served as expert member of the Australian government delegation to the Hague Conference on Private International Law to negotiate the Hague Convention on Choice of Court Agreements. Professor Garnett has also been an adviser to the American Law Institute in its project on transnational intellectual property adjudication, co-rapporteur on the International Law Association project on transnational group actions and a director of the Australian Centre for International Commercial Arbitration.

Michael Hales is a dispute resolution partner at Minter Ellison, based in their Perth office. Before moving to Western Australia, he was a partner in a major commercial law firm in London for 16 years. He has significant experience of international disputes and has conducted arbitrations under most of the leading arbitral institutions and rules. He is admitted in Australia, England and Wales and the British Virgin Islands and is a past co-chair of the IBA's Litigation Committee.

Michael Hollingdale is an accredited mediator and a partner of Allens in the energy resources & infrastructure practice. His specialty area of practice is construction and engineering law in the energy and resources sectors and government transport sector. Resources sector matters that Michael has advised on include power stations, gas pipelines, refineries, underground and surface mine developments, along with development of port and rail-related mining infrastructure. He has practised as a mediator for over 20 years. He also advises on commercial claims management and dispute resolution strategies. Michael is chair of the Law Council of Australia's Construction and Infrastructure Committee. Michael was a member of the Law Council of Australia's ADR Committee for over 10 years and assisted in drafting various mediation guidelines. He is a graduate member of the Australian Institute of Company Directors (GAICD).

Prof. Doug Jones AO graduated from the University of Queensland with a combined Bachelor of Arts and Laws degree in 1974, followed by a Master of Laws in 1977. Doug has held appointments to professional bodies including past president of the Australian Centre for International Commercial Arbitration ('ACICA') (2008–2014) and fellow, chartered arbitrator and past president of the Chartered Institute of Arbitrators, London ('CIArb') (2011). He holds professorial appointments at the Queen Mary University of London and University of Melbourne. He practices as an international arbitrator based in London, Sydney and Toronto. Doug is acknowledged as a leading arbitrator and is highly ranked in a number of leading publications such as Chambers Asia-Pacific where he has been recognised as a star

individual in the Australian legal community for three successive years. In 2013, Doug was recognised as one of the most in-demand arbitrators and received a band one ranking in the international arbitration category. He was also ranked band one in the projects category and band two for dispute resolution/arbitration in Australia. At the Global Arbitration Review Awards 2013, Doug was joint runner-up in the category of the Best Prepared and Most Responsive Arbitrator of the Year Award. Most recently, he was awarded the Michael Kirby Lifetime Achievement Award at the 2014 Lawyers Weekly Law Awards in Sydney in recognition of his leadership and substantial contributions to the Australian legal profession. Doug is an officer of the Order of Australia, having received the award in June 2012 in the Queen's Birthday Honours List for distinguished service to the law as a leader in the areas of arbitration and alternative dispute resolution, to policy reform, and to national and international professional organisations.

Dr. Sam Luttrell is counsel in the International Arbitration Group of Clifford Chance, based in Perth, Western Australia. His practice covers both international commercial arbitration and investor-state arbitration, with a focus on high-value energy and resources disputes in the Asia-Pacific. In addition to his work as counsel, Sam is a member of the International Chamber of Commerce arbitrator nominations committee for Australia and a regular contributor to international arbitration journals. He published his first book (on bias challenges to arbitrators) in 2009 and is currently working on a new book on interim measures. Prior to joining Clifford Chance, Sam was with Freshfields in Paris.

Peter Megens LLB (First Class Hons), BComm Grad Dip Financial Law, University of Melbourne, is a partner in the Singapore office of King & Spalding where he specialises in litigation, arbitration and mediation, and in particular international arbitration. He was previously the immediate past vice-president of the Chartered Institute of Arbitrators in Australia. He is also a former adjunct professor in law at Murdoch University, a former national councillor and chapter chairman of the Institute of Arbitrators and Mediators Australia, former vice-president of the Australian Centre for International Commercial Arbitration, a chartered arbitrator and graded arbitrator and accredited mediator. Peter is a fellow of IAMA, ACICA, the Singapore Institute of Arbitrators, the Chartered Institute of Arbitrators, the Society of Construction Law and is active in ICC, LCIA and various other bodies. He is a former chair of the Construction and Infrastructure Law Committee of the BLS of the Law Council of Australia, a former member of the Victorian Supreme Court Technology Engineering and Construction Users Group. Peter is on the KLRCA and SIAC Panels of Arbitrators and the HKIAC List of Arbitrators. Peter has practised and published in arbitration, construction and resources matters in Australia and South-East Asia for over 30 years of which 25 years were as a partner with Australian firms practising in these areas. He is admitted to the Supreme Court of all Australian states and territories and to the Federal and High Courts of Australia.

Prof. Luke Nottage specialises in contract law, consumer product safety law and arbitration, with a particular interest in the Asia-Pacific. He is associate dean (International) and professor of comparative and transnational business law at Sydney Law School. Luke's many books include *International Arbitration in Australia* (Federation Press 2010) and *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge 2011). He is an ACICA special associate and founding member of the Rules Committee, and Japan Representative on the Australasian Forum for International Arbitration Council. Luke has consulted for law firms worldwide, the EU, OECD, UNDP and the Japanese government.

Andrea Stauber was admitted in South Australia and began her career in a boutique construction law firm. She then joined the building & construction dispute resolution team of King & Wood Mallesons (formerly Mallesons Stephen Jacques) in Melbourne in 2012, where she represented international clients in a number of domestic arbitrations. In 2013, Andrea moved to the Singapore office of King & Spalding to pursue her interest in international arbitration and help build the firm's construction and energy disputes practice in Asia. Andrea has advised and represented clients on a variety of large and complex matters, including infrastructure and power station projects as well as offshore oil & gas projects. She has a keen interest in providing practical and commercial advice, both during the life of a project with a view to avoiding disputes, as well as during the arbitration to achieve the best possible result for her clients.

Greg Steinepreis has been a partner of the firm now known as Squire Patton Boggs (AU) since 1983. He is a construction and services contracts lawyer who heads the Construction, Engineering and Infrastructure team in the firm's Perth office. His clients include principals, financiers, public sector authorities, contractors and consultants. Greg has been involved in many major resources, engineering and infrastructure projects in Western Australia. In his construction practice, he has negotiated, drafted, amended and reviewed the full range of construction and engineering contracts. Greg's specific project experience includes Australia's major liquefied natural gas (LNG) and iron ore mining projects. He has advised government authorities as well as leading contractors and consultants on the delivery of public infrastructure, including major roads and rail and on urban redevelopment. He also has assisted governmental entities and power producers regarding electricity supply contracts and electricity industry regulation. Greg's involvement in the construction and engineering industry is supported by more than 25 years of experience in dispute resolution. Not only does he advise parties in litigation, arbitration (international and domestic), adjudication and mediation, he also is a fellow of ACICA, a Grade 1 arbitrator with IAMA and an accredited mediator. Greg is active in several major legal and industry bodies including the Construction and Infrastructure Forum of the Chamber of Commerce & Industry Western Australia.

Eu-Min Teng is a construction litigation lawyer in the Squire Patton Boggs construction team in Australia, specialising in claims management and dispute resolution on major construction engineering and resources projects. Prior to joining Squire Patton Boggs, Eu-Min practiced in general commercial litigation and dispute resolution, and had carriage of a variety of litigious matters in various Australian Federal and State Courts. Eu-Min holds a Bachelor of Commerce and Bachelor of Laws (Honours) from The University of Western Australia, and a Master of Laws (LLM) from The University of Sydney. He is also currently enrolled in the Master of Construction Law course at The University of Melbourne. Eu-Min is a member of the Society of Construction Law Australia.

Dr. John Trone is an Adjunct Professor of Law at Murdoch University. He is the co-author of the 29th and 30th editions of *Australian Commercial Law* (2013, 2015); *Commercial Law of the European Union* (2010); and the 6th, 7th and 8th editions of *The Constitution of the Commonwealth of Australia Annotated* (2001, 2007, 2012). He is the author of *Federal Constitutions and International Relations* (2001). He has published numerous articles concerning constitutional law, international law and commercial law.

Prof. Bruno Zeller Ph.D. (Law), The University of Melbourne; Master of International Trade Law, Deakin University; B.Com. and B.Ed, The University of Melbourne. Bruno is a professor in transnational law at The University of Western Australia, Perth, where he teaches international trade law, conflict of laws, international arbitration and maritime law. His research interests include international sale of goods, free trade agreements and carbon trading. He is also an adjunct professor at Murdoch University, Perth, and a visiting professor at La Trobe University, Melbourne; Stetson University, Florida; and Humboldt University of Berlin. He is also a fellow of The Australian Institute for Commercial Arbitrations, Arbitrator (MLAANZ).

Chapter 1
An Australian Perspective on Arbitration and Dispute Resolution in the Resources Sector

Gabriël A. Moens and Philip Evans

Abstract The resources sector, in general, but in particular in Australia, contributes substantially to the national economy. This introductory chapter discusses the origins of this collection of essays and provides readers with the context in which dispute resolution in the resources sector takes place. It also provides an overview of the themes discussed in each chapter of this book. These chapters deal with arbitration, mediation and adjudication in the resources sector.

1.1 The Origins of This Collection of Essays

The Australian Centre for International Commercial Arbitration (ACICA) held a successful conference on arbitration and the resources sector on 16 May 2013. The conference brought together law firm partners, arbitrators, academics, business people, and representatives of the resources industry. The conference concluded with a spirited address by the Hon. Michael Mischin, Attorney-General of Western Australia. In his address, the Attorney-General announced that the *Commercial Arbitration Act 2012* (WA) would soon come into effect; this much anticipated event happened on 7 August 2013. The new Act is expected to facilitate the resolution of disputes in the resources sector, which is of utmost importance to the Western Australian economy and the resources sector. ACICA expressed the hope that the contributions made during the conference might be published to raise awareness of the importance of arbitration to resolve disputes in the resources sector. In order to provide a comprehensive Australian perspective on the resolution of resources disputes, the editors decided to extend the discussion to mediation and

G.A. Moens (✉) · P. Evans
Curtin Law School, Curtin University, Perth, Australia
e-mail: gabriel.moens@curtin.edu.au

P. Evans
e-mail: p.evans@curtin.edu.au

© Springer International Publishing Switzerland 2015

G.A. Moens and P. Evans (eds.), *Arbitration and Dispute Resolution in the Resources Sector*, Ius Gentium: Comparative Perspectives on Law and Justice 43, DOI 10.1007/978-3-319-17452-5_1

adjudication. To that end, they invited a number of contributors who, although they did not participate in the conference, were able to provide an Australian perspective on the resolution of disputes in the resources sector.

1.2 Overview of the Themes Discussed in This Book

One of the invited contributors, Professor Richard Garnett of the University of Melbourne, prepared a concise, but comprehensive, overview of the legal regime for arbitration in Australia. This regime, discussed in Chap. 2, has undergone dramatic changes in the past five years. International arbitration matters are now governed exclusively by the *International Arbitration Act* 1974 (Cth) (at least for arbitration agreements entered into on or after 6 July 2010) and domestic arbitration is regulated by new uniform State and Territory legislation (except in the ACT). His chapter examines key aspects of the Commonwealth legislation, including the enforcement of arbitration agreements and arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the scope and application of the UNCITRAL Model Law on International Commercial Arbitration in Australia (including the status of pre-6 July 2010 agreements) (Model Law) and the amendments introduced in 2010. He concludes his chapter with a discussion of the new principles applying to domestic arbitration.

Professor Doug Jones argues in Chap. 3 that, in the resources sector, arbitration has retained its position as a permanent feature of dispute resolution. Disputes in the resources sector involve various types of agreements, technical subject matters, and are often trans-national in nature: these are features that make arbitration an attractive dispute resolution method. To set the context for addressing the benefits that arbitration provides to the resources sector, his chapter focuses on these features and outlines the arbitration framework in Australia. His chapter also focuses on the features of the arbitration process itself that make it well suited to the resolution of disputes in the resources sector.

Chapter 4 discusses a range of issues that should be taken into account when drafting arbitration clauses for projects in the resources sector. These include the importance of understanding whether the arbitration comes within the scope of the international or domestic arbitration legislation and some key issues which parties and arbitrators should consider when selecting the applicable arbitration rules. Michael Hales also considers the questions of proportionate liability and consolidation, both of which are relevant to resources projects.

In Chap. 5, Professor Philip Evans discusses the enforcement of arbitral awards in the resources sector through a discussion of three recent cases decided in Western Australia and Queensland. These decisions uphold the principle that parties will be required to conform to the dispute resolution clauses in agreements and courts will not be reluctant to imply terms into the dispute resolution clause where there are claims of unenforceability due to uncertainty. Additionally, these decisions hold

that claims of futility arising from difficulties or failures with respect to compliance with either the mandatory negotiation or meditation procedures required as a condition precedent to arbitration will generally be unsuccessful. At the same time, tiered alternative dispute resolution clauses need to be drafted carefully in order to prevent lengthy and costly delays to the resolution of the dispute on the basis of the clause being deemed pathogenic and thus, unenforceable.

Peter Megens and Andrea Stauber argue in Chap. 6 that arbitration is an essential tool for enforcing resources and commodities contracts. Without it, Australia's international trade in resources would be vastly more complex and less efficient. They point out that, with the revised domestic Commercial Arbitration Acts, and the updated International Arbitration Act, Australia now has a newly enhanced arbitration legislative regime which accords with international best practice. They fathom that, whether it will actually deliver significant benefits to the resources industry largely depends on how it is interpreted by the courts. In their view, the early signs are promising, even if there is much work to be done. In their chapter, they also briefly survey some recent judicial trends in a number of South East Asian countries.

In addition to arbitration, mediation plays an important role in the resolution of resources disputes. Although arbitration is the preferred method to resolve disputes, a number of disputes are mediated following an unsuccessful negotiation or once arbitration has commenced. This issue is discussed in Chap. 7 by Michael Hollingdale. He usefully discusses the European Union's recognition of the value of mediation of cross border disputes through the adoption of its Mediation Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008. Other institutions and influential intermediaries, such as international arbitration centres and the ICC, have rules that facilitate and govern commercial mediation. He asks the question as to why disputants in the resources sector are not more predisposed to mediation as a first step in the dispute resolution process before resorting to arbitral or litigation proceedings. In his chapter, he advocates the case for the greater use of mediation by trans-national parties in the resources sector. He outlines some of the positive factors that ought to encourage parties to turn to mediation as their preferred dispute resolution process in this sector or indeed have it as the default dispute resolution process. He considers some potential negative factors that might dissuade parties from adopting a 'mediate first' approach. He also reviews different mediation processes and styles to demonstrate how mediation could be used to enhance its flexibility and suitability to the resources sector.

Over the course of the past seventeen years, construction industry payment and adjudication legislation, in one form or another, has been enacted in the United Kingdom (UK) and throughout Australia, as well as in several other international jurisdictions. This legislation has had a significant impact upon payment culture and dispute resolution within the construction industry. Whilst the UK, Australian and New Zealand Acts provide 'mining exclusions', the courts have generally narrowly interpreted these provisions. Jeremy Coggins argues in Chap. 8 that therefore, many types of construction works carried out at mining sites will still be covered by the legislation and subject to statutory adjudication. This chapter provides the reader

with a background to statutory adjudication, discusses the statutory adjudication process, and considers the key legislative differences between the jurisdictions which have adopted statutory adjudication. Finally, he also analyses the legislative provisions concerning the mining exclusions, and reviews the relevant judicial decisions concerning statutory adjudication in the resources sector.

In Chap. 9, Professor Luke Nottage and Associate Professor Simon Butt from the University of Sydney, identify two significant developments relating to international arbitration in the resources sector for businesspeople, legal advisors and policy-makers, particularly from an Australian perspective. In Part 2 of their chapter, they urge further reform of the *International Arbitration Act* 1974 (Cth) to address a 'legislative black hole' arising for certain international commercial arbitration agreements concluded prior to 6 July 2010 with the seat in Australia. In Part 3, the contributors deal with treaty-based investor-state arbitration (ISA), especially as it impacts on outbound investors from Australia. It reiterates opposition to the 'Gillard Government Trade Policy Statement' (April 2011–September 2013), which changed over two decades of treaty practice by insisting that Australia would no longer countenance any form of investor-state arbitration in future treaties, even with developing countries. They highlight problems that arise from such a stance, also proposed in a 2014 Bill in the Australian Senate, by discussing two recent Indonesian law issues affecting two existing treaties with Australia.

Professor Gabriël Moens and Dr John Trone argue in Chap. 10 that international commercial arbitrations often give rise to related proceedings in domestic courts. Their chapter examines some recent examples of domestic court cases relating to international commercial arbitrations in the resources sector. These cases have raised issues concerning the interpretation of the Model Law, arbitration under bilateral investment treaties, stay of proceedings, discovery under United States federal law and the enforcement of awards under the New York Convention. These cases were decided by courts in Australia, Canada, the United States, the United Kingdom and Singapore.

In his insightful Chap. 11, Dr. Samuel Luttrell explains how the investment treaty system works, where it came from, and what energy and resources companies need to do to obtain the benefits it provides. He argues that energy and resources companies are adventurous investors who explore and invest in countries that many other businesses might consider unattractive due to the risk of nationalisation, expropriation and other forms of governmental interference. In the past, when faced with such adverse measures, energy and resources companies usually had limited options: they could either sue in the courts of their host state (and run the risk of "home town justice") or ask their home state to intervene on their behalf. In the contributor's opinion, both remedies were defective for different reasons. Dr. Luttrell describes how, in response, over the last fifty years, a system of international investment law and arbitration has developed that gives aggrieved foreign investors the right to bring claims against their host state in their own name, in a neutral international forum that the host state does not control. But to have these rights of recourse, the investor and its assets must first be covered by an investment treaty.

Chapter 12 addresses the importance of engaging with the Organization for the Harmonization of African Business Law (OHADA) group of nations with a view to invest in mining projects. Professor Bruno Zeller argues that the question of risk and protection of the investment are important issues and, hence, knowledge of the legal landscape is important. OHADA, formally created in 1993, introduced nine uniform acts which override domestic legislation. Three documents govern any arbitration in the OHADA group of nations: first the OHADA Treaty, secondly the Uniform Act on Arbitration adopted in 1999 which deals with ad hoc arbitrations (UAA), and thirdly, the Arbitration Rules of the Common Court of Justice and Arbitration (CCJA) (Arbitration Rules) which are institutional rules. Furthermore, in some States but not all, the New York Convention is also applicable. He concludes that OHADA offers a moderately predictable legal system and that an institutional arbitration under the CCJA offers the least problems and ought to be the preferred option when writing a contract with an OHADA business partner.

In the final Chap. 13, Greg Steinepreis and Eu-Min Teng explore the benefits of international arbitration from the viewpoint of the client who is involved in the resources, energy and construction sectors. They argue that any dispute resolution process can be considered both objectively and based on perception. This issue is examined by taking into account a number of recent international arbitration surveys and reflecting on recent procedural initiatives aimed at improving the efficiency and effectiveness of the arbitration process. They make some suggestions regarding how international arbitration might better satisfy the client's expectations.

1.3 Conclusion

In concentrating on arbitration and other methods of dispute resolution, including mediation and adjudication, the contributors to the book hope to excite readers about the different dispute resolution methods used to resolve resources disputes. In particular, in offering a detailed Australian perspective, the book elucidates the different approaches that could be taken in the resources sector to resolve disputes expeditiously.

Acknowledgments Professor Moens and Professor Evans acknowledge the assistance of the contributors in the writing of this introductory chapter. The summaries of the chapters are based on Abstracts provided by the contributors to the editors of this volume.

Chapter 2
Australia's International and Domestic Arbitration Framework

Richard Garnett

Abstract The legal regime for arbitration in Australia has undergone dramatic changes in the past five years. International arbitration matters are now governed exclusively by the *International Arbitration Act* 1974 (Cth) (at least for arbitration agreements entered into on or after 6 July 2010) and domestic arbitration is regulated by new uniform State and Territory legislation (except in the ACT). This paper examines key aspects of the Commonwealth legislation including the enforcement of arbitral agreements and awards under the New York Convention, the scope and application of the UNCITRAL Model Law in Australia (including the status of pre-6 July 2010 agreements) and the amendments introduced in 2010. The paper concludes with a discussion of the new principles applying to domestic arbitration.

2.1 Introduction

The object of this paper is to examine the legal framework in Australia with respect to commercial arbitration, both international and domestic. International arbitration in Australia is now regulated exclusively by the Commonwealth *International Arbitration Act* 1974 ('the IAA') at least for arbitration agreements entered into on or after 6 July 2010. The new state arbitration legislation, for example in Western Australia the *Commercial Arbitration Act* 2012 ('the CAA'), now only applies to *domestic* arbitration agreements and is in force in all States and Territories except the ACT. This legislation applies retrospectively to agreements entered into before the CAA's coming into operation. The last three years have therefore been a time of great change and reform to the arbitration landscape in Australia.

R. Garnett (✉)
University of Melbourne, Melbourne, Australia
e-mail: r.garnett@unimelb.edu.au

R. Garnett
Herbert Smith Freehills, Melbourne, Australia

© Springer International Publishing Switzerland 2015

G.A. Moens and P. Evans (eds.), *Arbitration and Dispute Resolution in the Resources Sector*, Ius Gentium: Comparative Perspectives on Law and Justice 43, DOI 10.1007/978-3-319-17452-5_2

2.2 The New York Convention

In considering the Commonwealth legislation, some legislative history is important. The IAA was first enacted in 1974 to give effect to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the Convention'). The Convention had 149 state parties as of 10 January 2014 and has effectively become a universal global law. The Convention is attached to Schedule 1 of the IAA and enacted in two important provisions: section 7 which provides for the mandatory staying of judicial proceedings brought in breach of an arbitration clause or agreement (implementing article II of the Convention) and section 8, which provides for the enforcement of foreign arbitral awards in Australia (implementing article V).

2.2.1 Arbitration Agreements

Broadly speaking, section 7 imposes an obligation on an Australian court to stay local court proceedings brought in breach of an arbitration agreement[1] where the place of arbitration is a member state of the New York Convention or a party to the arbitration agreement is incorporated or has its principal place of business in such a country.[2] The term 'arbitration agreement' is broadly defined under the Convention to include both an arbitral clause in a written contract and an arbitration agreement signed by both parties or contained in an exchange of letters or telegrams.[3] This last phrase has been amended or interpreted in most countries to embrace more contemporary forms of electronic communication such as email and text message.[4]

Section 7 creates a mandatory stay procedure: generally speaking, a party cannot rely on mere arguments of convenience to avoid its obligation to arbitrate, which is in contrast to a foreign jurisdiction or choice of court clause where a court has a discretionary power not to enforce the clause.[5] Hence, the aim of this provision is to reinforce the arbitral process by limiting the scope for parties to escape their contractual obligations to arbitrate.

In practice, a party has only three real arguments to prevent enforcement of an arbitration clause which falls within the scope of the New York Convention. First, it may argue that the subject matter of the dispute is not 'capable of settlement by arbitration'[6] because the public interest requires it to be heard in a court. Originally

[1]IAA s 7(2).

[2]IAA s 7(1).

[3]IAA s 3(1), Convention art II(1).

[4]IAA s 3(4).

[5]See, e.g. *Global Partners Fund Limited v Babcock & Brown Limited* (*in liq*) *and Ors* [2010] NSWCA 196.

[6]IAA s 7(2).

this category of exclusion was quite broad but recently consumer protection,[7] competition[8] and most intellectual property disputes[9] have all been considered 'arbitrable' subject matter. The result is that there are now few disputes between private commercial entities which cannot be arbitrated on public policy grounds, at least where the interests of third parties, not bound by the arbitration clause, are not affected.[10]

The second argument a party may make to resist referral to arbitration is that the arbitration clause does not encompass the parties' claims as a matter of contractual construction. For example, assume a party brings actions in court for breach of section 18 of the *Australian Consumer Law* 2010 (Cth) ('ACL') [formerly section 52 of the *Trade Practices Act* 1974 (Cth)] and breach of contract. If the wording of the arbitration clause is narrowly construed, then perhaps only the breach of contract claim will be referred to arbitration with the result that the parties may have to contest claims arising from the one dispute in two different forums, a national court and the arbitration tribunal, which is expensive and inconvenient. This issue burdened the Australian courts on a number of occasions over the years[11] with divergent attitudes taken as to the proper scope of an arbitration clause.

Fortunately, in 2006 the Full Court of the Federal Court of Australia, in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,[12] decided that courts must strive to give a broad and flexible interpretation to arbitration agreements with the aim of referring as many of the parties' claims to arbitration as possible. This approach is justified by both party autonomy and the needs of international commerce which require certainty and efficiency in dispute resolution. So, where parties use generous wording in their arbitration clause (for example, submitting 'any dispute arising out of' or 'in connection with' this agreement to arbitration), then

[7] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; *Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177; *Casaceli v Natuzzi SpA* (2012) 292 ALR 143 (also franchising claims).

[8] *Mitsubishi Motors Corp v Soler-Chrysler-Plymouth Inc*, 473 US 614 (1985); *Casaceli v Natuzzi SpA* (2012) 292 ALR 143 (exclusive dealing), but compare *Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177 [56].

[9] An exception would be where an issue as to the validity or grant of a registered right such as a patent or trademark is involved: N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* (OUP 5th ed 2009) 125. In *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772 a dispute concerning the rights and obligations of parties to a contractual licence of a patent was held to be arbitrable.

[10] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 [192] (an application to wind up a company is likely not to be arbitrable because of its impact on third party creditors); *Parharpur Cooling Towers Ltd v Paramount* (*WA*) *Ltd* [2008] WASCA 110. In *AED Oil Ltd v Puffin FPSO Ltd (No. 2)* [2009] VSC 534 the status of taxation claims was left open.

[11] For an earlier study of this problem, see R. Garnett, 'The Current Status of International Arbitration Agreements in Australia' (1999) 15 *Journal of Contract Law* 29.

[12] (2006) 157 FCR 45.

the parties' entire dispute will be much more likely to be referred to the parties' stipulated method of dispute resolution.[13]

Yet, Australian courts have not gone so far as to adopt the English approach whereby an arbitration clause is to be construed, irrespective of the language used, in accordance with a presumption that all disputes will be decided by the arbitral tribunal.[14] So, where the parties use restrictive words of reference in their arbitration clause, a stay of the parties' entire dispute will not be granted.[15] A possible exception to this result would be where the parties included foreign choice of law and arbitration clauses in their contract and a party, on an application to stay Australian court proceedings, relied on such foreign law principles to determine the scope of the arbitration clause. Such principles would apply as the law governing the arbitration agreement and may yield a different outcome to the above position under Australian law.[16]

In the *Comandate* case, the court also made the very important finding that where parties agree on foreign choice of law and arbitration clauses they should be held to the consequences of their bargain even if this means that they may be denied rights under Australian statutory law such as the *Australian Consumer Law* because, for example, the foreign arbitrator may refuse to apply the statute.[17] If a party wants access to the ACL they should include a provision in their contract expressly preserving such rights. This reasoning is to be welcomed: it plainly does nothing for the reputation of Australia as a centre of international arbitration if parties are allowed to circumvent arbitration agreements by post-contract appeals to novel Australian statutory rights.

The third argument that may be made to avoid arbitration is that the arbitration clause is invalid because it infringes an overriding mandatory statute of the forum prohibiting arbitration of certain disputes, such as section 11(2) of the *Carriage of Goods by Sea Act* 1991 (Cth) (COGSA) or section 43 of the *Insurance Contracts Act* 1984 (Cth). Clearly in such a case no stay can be granted because there is no arbitration agreement left to enforce. Note in this regard that section 7(5) of the IAA provides that a court is not required to stay its proceedings where the arbitration clause is 'null and void, inoperative or incapable of being performed'. Yet, even in the context of section 11(2) of the COGSA, which invalidates a foreign arbitration clause contained in a 'sea carriage document', courts in recent decisions have held that the prohibition does not apply to an arbitration provision in a voyage charter

[13]Note the following recent cases where a stay of court proceedings in favour of arbitration was ordered: *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894; *Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177; *Casaceli v Natuzzi SpA* (2012) 292 ALR 143; *Cape Lambert Resources Pty Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WSACA 66.

[14]*Fiona Trust Holding Corp v Privalov* [2007] 4 All ER 951 (UKHL).

[15]*Rinehart v Welker* [2012] NSWCA 95.

[16]Two examples of cases where foreign law was relied upon were *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 and *Casaceli v Natuzzi SpA* (2012) 292 ALR 143.

[17]*Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [241].

party,[18] as opposed to a clause in a bill of lading. The pro-arbitration trend is unmistakeable.

Also on the issue of validity, it should be noted that Australian courts have accepted that the arbitration clause is 'separable' from the principal contract in which such clause is contained.[19] The consequence of this view is that the arbitral tribunal has the capacity to adjudicate a question as to the validity of such contract and so a party cannot avoid a stay of court proceedings simply on the basis that the principal contract was null and void. The arbitration clause *itself* must be shown to be invalid.

In relation to the 'inoperative' defence in section 7(5) of the IAA, parties have sought on occasion to argue that an arbitration clause cannot be enforced because it has been waived by one of the parties. Australian courts have, however, very sensibly required strong and unequivocal evidence of an intention by a party to abandon arbitration (usually in the form of gross delay or other conduct indicating a willingness to litigate) before accepting such an argument.[20]

2.2.2 Awards

Under section 8 of the IAA, a foreign arbitral award is enforceable in Australia if it was made in a New York Convention Country or any other country if the party seeking enforcement is incorporated in or has its principal place of business in a Convention country (including Australia).[21] Section 8(2) of the IAA provides that a foreign award may be enforced in a court of a State or Territory as if it were a judgment of that court. Alternatively, the plaintiff can apply to enforce the award under the *Foreign Judgments Act* 1991 (Cth). This last option may be useful where the defendant is resident outside Australia and the rules for service out of the jurisdiction will need to be employed to secure jurisdiction over the defendant.[22]

Note that section 8 of the IAA also restricts the range of available defences to enforcement to ensure that awards circulate freely throughout the world with minimal obstruction by national courts or laws. Generally it will only be where the tribunal exceeded its jurisdiction, the arbitration agreement was invalid, there was a serious irregularity in the arbitral process (for example, a party lacked notice of the

[18] *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2013] FCAFC 107; *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (2011) 112 SASR 297.

[19] *Ferris v Plaister* (1994) 34 NSWLR 474; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [229].

[20] *Zhang v Shanghai Wool and Jute Textile Co Ltd* (2006) 201 FLR 178; *Australian Granites Ltd v Eisenwerk* [2001] 1 Qd R 461; *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 [69].

[21] IAA ss 3(3), 8(1), (4).

[22] *ML Ubase Holdings Co Ltd v Trigem Computer Inc* [2005] NSWSC 224.

arbitration proceedings, was unable to present its case[23] or the tribunal departed from the agreed procedural rules) or a breach of public policy that enforcement will be denied.[24] Significantly, there is no defence to the effect that the tribunal made an error of law or fact in the award; the enforcing court must not retry the merits or act as an appellate court.[25] Also, the defences in the Convention cannot be supplemented by further defences under a country's domestic law that would be available to block enforcement of a domestic award. The defences in section 8 are therefore exclusive and exhaustive.[26]

A comment should be made about the public policy defence in section 8. Its use in the Convention does not have the broad catch-all meaning that it sometimes receives in domestic law: it refers to conduct which would be considered seriously opprobrious according to international standards, such as fraud, corruption or criminal conduct. For example, in an English decision,[27] an award was not enforced where the tribunal had granted damages for breach of a contract to smuggle carpets out of Iran in breach of Iranian law. The court felt that it would offend public policy to lend support to such conduct.

In one rogue Australian decision, however, a court refused to enforce an award made in the United States on the basis of public policy where the court found that many of the orders made by the arbitrator could not have been made by a Queensland court applying Queensland law.[28] Acceptance of such a view would open the way to a general review of arbitrators' decisions based on whether they mirrored the law and practice in the enforcing country. This approach is clearly inconsistent with the Convention and fortunately has not been followed in later Australian cases. Recent authority has now clearly established that a violation of public policy will only exist where enforcement of the award would constitute 'an offence to fundamental norms of fairness or justice'.[29] The public policy defence should therefore be only 'sparingly' applied.[30]

---

[23]Such an argument was recently rejected in *Gujarat NRE Coke Ltd v Coeclerici Asia* (*Pte*) *Ltd* [2013] FCAFC 109. Further, in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, it was stated that this defence will not be available unless there is demonstrated 'real unfairness' or 'real practical injustice' in how the dispute resolution was conducted.

[24]The defences are set out in IAA ss 8(5) and (7).

[25]An error of law objection also cannot be framed as a violation of public policy: *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 [133].

[26]IAA s 8(3A).

[27]*Soleimany v Soleimany* [1999] QB 785.

[28]*Resort Condominiums International v Bolwell* (1993) 118 ALR 655.

[29]*Castel Electronics Pty Ltd v TCL Air Conditioner* (*Zhongshan*) *Co Ltd* [2012] FCA 1214 [33], [177]; *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 [132]; *Traxys Europe SA v Balaji C Industry Pvt Ltd* (*No. 2*) (2012) 201 FCR 535 [96].

[30]*Castel Electronics Pty Ltd v TCL Air Conditioner* (*Zhongshan*) *Co Ltd* [2012] FCA 1214 [34].