



Australian Perspectives on Arbitration and Other Methods of ADR for Construction Disputes

International Construction Arbitration
Hanoi, Vietnam

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Dr Donald Charrett

Barrister, Arbitrator & Mediator

Dr Donald Charrett

EXPERT DETERMINATION CHAMBERS
Legal and engineering expertise



Dr Donald Charrett

Agenda

- Construction disputes
- ADR in Australia
- International arbitration
- Domestic arbitration
- Australian arbitration practice
- Expert evidence

Construction Disputes

- Construction projects extend over a long period of time.
- Complex and extensive contract documents.
- Extensive documentary project records.
- Disputes involve one or more of:
 - Legal entitlement, e.g. is an Employer's instruction a Variation?
 - Time, e.g. is Contractor entitled to an EOT?
 - Cost, e.g. what are the cost consequences of delay?
 - Quality, e.g. is Contractor's work defective?
- Factual evidence may involve complex technical issues.
- Expert evidence is often required and is frequently controversial.



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Construction Disputes

- Disputes may involve a complex intersection of legal and technical issues.
- Submitted documents frequently involve many lever arch files:
 - Legal submissions
 - Lay witness statements on relevant facts supported by project documents
 - Expert witness statements, e.g. programmes, quantum of calculated loss, opinions on alleged defects.
- Tribunal needs legal expertise and ability to understand technical evidence.



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ADR in Australia

- Negotiation between Senior Executives.
- Mediation, usually a precondition to other methods of ADR or a court hearing.
- Statutory adjudication of cost disputes:
 - State and Territory legislation for a process of rapid adjudication
 - “Pay now, argue later”
 - Does not finally determine legal rights.
- Dispute Boards.
- Expert Determination.
- Arbitration.

ADR in Australia

Dispute Boards in Australia:

- Appointed at start of project and meet regularly with parties during project execution.
- Primary function is dispute avoidance (DAB = Dispute Avoidance Board).
- Informal advice on an issue to avoid a dispute.
- Advisory opinion before a formal dispute is initiated.
- Rapid, cost effective determination of formal dispute, based on legal and contractual entitlements.
- Many DBs have had no formal disputes to determine.
- No disputes have been subsequently referred to arbitration.

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International Arbitration

International Arbitration Act 1974 (Cth):

- Gives effect to Australia's obligations under the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*New York Convention*).
- Gives effect to the *UNCITRAL Model Law on International Commercial Arbitration* as amended in 2006. (83 countries have implemented the *UNCITRAL Model Law on International Commercial Arbitration*).
- Gives effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (*ICSID Convention*).

International Arbitration

International Arbitration Act 1974 (Cth):

- Where arbitration agreement or a party satisfy s7(1), a court **shall** stay any court proceedings and refer the parties to arbitration.
- Court may make interim orders in respect of property.
- No court stay if *arbitration agreement is null and void, inoperative or incapable of being performed*.
- Foreign award may be enforced by a court as if the award were a judgement or order of the court.
- Court may only refuse enforcement on limited jurisdictional or procedural grounds, e.g. fraud, corruption or breach of the rules of natural justice.



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International Arbitration

International Arbitration Act 1974 (Cth):

UNCITRAL Model law has the force of law in Australia, subject to specific explanations, clarifications and amendments:

- Article 17B – No preliminary order directing another party not to frustrate the purpose of the interim measure requested.
- Article 18 – A party has been given a full opportunity to present its case if it has been given a reasonable opportunity.
- Articles 17I, 34 & 36 – specific provisions of Australian public policy.
- Chapter VIII Recognition and Enforcement of Awards does not apply if the *New York Convention* applies.



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International Arbitration

International Arbitration Act 1974 (Cth):

- S21 – If the *Model Law* applies, State and Territory arbitration legislation does not apply.
- Additional provisions to *UNCITRAL Model Law* that enable courts to support an arbitration:
 - s23 Parties may obtain subpoenas
 - s23A Failure to assist arbitral tribunal
 - s23B Default by party to an arbitration agreement



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International Arbitration

International Arbitration Act 1974 (Cth):

- Additional provisions to *UNCITRAL Model Law* in relation to confidentiality:
 - s23C Disclosure of confidential information
 - s23D Circumstances in which confidential information may be disclosed
 - s23E Arbitral tribunal may allow disclosure in certain circumstances
 - s23F Court may prohibit disclosure in certain circumstances
 - s23G Court may allow disclosure in certain circumstances

International Arbitration

International Arbitration Act 1974 (Cth):

- Additional provisions to *UNCITRAL Model Law* in relation to procedure:
 - s23H Death of a party to an arbitration agreement
 - s23J Evidence
 - s23K Security for costs
 - S24 Consolidation of arbitral proceedings
 - S25 Interest up to making an award
 - S26 Interest on debt under award
 - S27 Costs

International Arbitration

International Arbitration Act 1974 (Cth):

- Additional miscellaneous provisions to *UNCITRAL Model Law*:
 - s28 Immunity
 - s29 Representation in proceedings
 - s30A Severability

Domestic Arbitration

Commercial Arbitration Act 2011 (Vic):

- As uniform as possible with *UNCITRAL Model Law*.
- Changes to amend or supplement the provisions in their application to domestic arbitration in Victoria or to accommodate modern drafting styles.
- Additional provisions to *UNCITRAL Model Law*.
- The paramount object of the Act *is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.*
- Domestic arbitration where parties to an arbitration agreement have their places of business in Australia.



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Domestic Arbitration

Commercial Arbitration Act 2011 (Vic):

- Does not apply where other Acts prohibit arbitration, e.g. domestic building contracts.
- Act contains explanatory notes noting differences from the *Model Law*.
- Articles 17B and 17C and other provisions referring to preliminary orders omitted.
- s18 requires that each party be given a **reasonable** (instead of “full”) opportunity to present its case.



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Domestic Arbitration

Commercial Arbitration Act 2011 (Vic):

New sections not in *Model Law*:

- s24A Representation.
- s24B General duties of parties.
- s27A Parties may obtain subpoenas.
- s27B Refusal or failure to attend before arbitral tribunal or to produce document.
- s27C Consolidation of arbitral proceedings.
- **s27D Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary.**

Domestic Arbitration

Commercial Arbitration Act 2011 (Vic):

New sections not in *Model Law*:

- s27E Disclosure of confidential information.
- s27F Circumstances in which confidential information may be disclosed.
- s27G Arbitral tribunal may allow disclosure of confidential information in certain circumstances.
- s27H The Court may prohibit disclosure of confidential information in certain circumstances.
- s27I Court may allow disclosure of confidential information in certain circumstances.



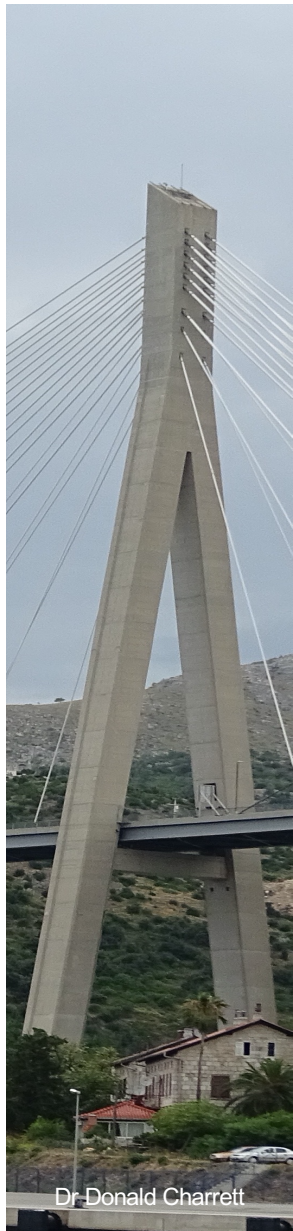
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Domestic Arbitration

Commercial Arbitration Act 2011 (Vic):

New sections not in *Model Law*:

- s27J Determination of preliminary point of law by the Court
- s33A Specific performance
- s33B Costs
- s33C Application of *Legal Profession Uniform Law (Vic)*
- s33D Costs of abortive arbitration
- s33E Interest up to making of award
- s33F Interest on debt under award
- s34A Appeals against awards
- S37 Death of a party



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Domestic Arbitration

Commercial Arbitration Act 2011 (Vic):

New sections not in *Model Law*:

- s38 Interpleader
- s39 Immunity
- s40 Supreme Court – limitation of jurisdiction
- s41 Court rules
- s42 Regulations

Australian Arbitration Practice

- Small matters may be decided on the papers.
- Hearings normal for large matters.
- Common for all oral lay evidence to be given before expert evidence.
- Strict time limits in hearings are common – referred to as “stop clock” or “chess clock” arbitration.
- Parties only required to be provided a reasonable time to present their case.
- Challenge for arbitrators is to constrain the time and cost of an arbitration.



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Expert Evidence

- Party appointed experts are the norm, briefed by lawyers acting for the parties.
- After exchange of expert reports and reports in reply, the experts may be required to meet and produce a joint report, identifying issues on which they agree, and those in which they disagree, with reasons for their disagreement.
- Joint experts' conference (or conclave) may have an independent facilitator to identify issues from the experts' reports and assist in the preparation of the joint report.
- Expert evidence in a hearing usually given concurrently, sometimes referred to as a "hot tub".



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THANK YOU