HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **TESSERACT INTERNATIONAL PTY LTD**
Appellant

and

PASCALE CONSTRUCTION PTY LTD
Respondent

INTERVENER'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Australian Centre for International Commercial Arbitration (**ACICA**) seeks leave to be heard as *amicus curiae*.[1]

3. ACICA's proposed intervention is confined to making submissions on an important question of principle raised by this appeal, namely the basis (if any) on which an arbitral tribunal in an Australian-seated arbitration is to determine what substantive law *does not* apply to that arbitration.

4. ACICA's submissions are thus focused on assisting the Court to determine the correct limiting principle by reference to which an arbitral tribunal should determine the question of whether certain substantive laws apply to an arbitration. While ACICA submits that the parties' dispute in this case falls to be determined by reference to the limiting principle proposed by ACICA in Part III below, it takes no position on the

[1] Unless otherwise stated, the Appellant's defined terms are adopted in these submissions.

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ultimate issue as between the parties, being whether the Proportionate Liability Law applies to the arbitration proceedings from which this appeal arises.

5. For the purpose of this proposed intervention, ACICA notes that the Court of Appeal (**CA**) concluded that the Proportionate Liability Law is properly characterised as substantive and not procedural, since "*the overall effect of the scheme is plainly substantive*": CA[63] (CAB 44). Neither party has challenged the correctness of that conclusion: AS[43]; RS[10]. In these circumstances, ACICA's submissions proceed on the basis that the Proportionate Liability Law is properly characterised as substantive law. However, ACICA notes that the position is not necessarily settled.[2] It might be said the Proportionate Liability Law is directed to a substantive outcome but within a unique procedural framework. Importantly for present purposes, if the Proportionate Liability Law were properly characterised as (even partly) procedural, that would likely have significant implications for the question of whether that Law applies to an arbitration, as such a characterisation would take the inquiry outside s 28 of the CAA, and the analytical framework considered in Part III below may not apply, or apply in the same manner.

PART III: WHY LEAVE SHOULD BE GRANTED

6. *First*, the question of any outer limit to the parties' choice of substantive law under s 28 of the CAA (and if so, the basis of any such outer limit) arises out of the tension between party choice (the very foundation of arbitration) and the proper role of municipal law in constraining that choice. That question goes to the heart of the operation and effectiveness of the integrated framework of domestic and international commercial arbitration in Australia based on international instruments such as the UNCITRAL **Model Law** on International Commercial Arbitration.[3] That statutory interdependence and integration arises by virtue of (i) the common foundation of the Model Law and (ii) s 2A of the CAA, which requires the promotion of uniformity in interpretation of the domestic regime with the international regime as given force by the *International Arbitration Act 1974* (Cth) (**IAA**). It is a question, therefore, which

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[2] See the discussion in Davies et al, *Nygh's Conflict of Laws in Australia* (10th ed, 2019) at [20.32]; cf. *Australian Executor Trustees (SA) Limited v Kerr* (2021) 151 ACSR 204; [2021] NSWCA 5 at [229] per Gleeson JA (with whom Leeming JA and Emmett AJA agreed). See also Garnett, *Substance and Procedure in Private International Law*, (2012) at p. 127-128 [5.21].

[3] *Rinehart v Hancock Prospecting* (2019) 267 CLR 514 at 526 [13].

is both of great importance, and in which ACICA (as the peak arbitral institution in Australia) is vitally interested. It is an issue of principle that transcends the immediate question presented and has wider implications for the application of other statutory provisions in domestic and international arbitrations within the integrated statutory framework.

7. *Second*, as elaborated in Part IV below, ACICA's position as to the correct limiting principle by reference to which arbitral tribunals should determine the application of parties' choice of substantive law differs from that put forward by each of the parties to this appeal. In presenting this alternative analytical framework, ACICA seeks to contextualise previous decisions of this Court, as well as decisions of other major arbitral jurisdictions (including those cited by the parties), by reference to the arbitral framework in which they resided. This is important both as a matter of doctrinal integrity, and in light of the statutory command to promote uniformity in the application of the integrated statutory framework.[4] ACICA's proposed intervention would therefore assist the Court by advancing a different perspective on a central issue in the appeal.

8. *Third*, ACICA has subject-matter expertise that would allow it to provide "*significant assist[ance]*" to the Court on matters of importance relating to the operation and effectiveness of that integrated framework, and thereby "*assist it to reach a correct determination*"[5], if leave is granted.

PART IV: SUBMISSIONS

A. The CA's and the parties' approach

9. This appeal raises the question of how an arbitral tribunal ought to decide whether a particular aspect of substantive law *does not* apply to an arbitration, in circumstances

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4 CAA, s 2A(1); ***TCL*** *Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [7] per French CJ and Gageler J.

5 *Roadshow Films Pty Ltd v iiNet* (2011) 248 CLR 37 at [4] and [6] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ. ACICA has previously been granted leave to intervene as *amicus* in other important arbitration-related cases in this Court: *Westport Insurance Corporation v Gordian Runoff* (2011) 244 CLR 239; *TCL* (2013) 251 CLR 533; *Rinehart v Hancock Prospecting* (2019) 267 CLR 514.

where that body of substantive law has been chosen to apply.[6] It is convenient to identify how this question was answered by the CA and the parties in this Court so as to contextualise ACICA's submissions.

10. The CA's reasoning proceeded as follows: (a) while s 28 of the CAA operates to determine the choice of law, it does not operate to require that every substantive law within that system is to be applied: CA[70] (CAB 46); (b) s 28 of the CAA should be read as implicitly confined to those laws that apply by force of their own terms, by reason of an implied term of the parties' arbitration agreement, or are otherwise amenable to application in arbitration proceedings: CA[70]-[71] (CAB 46); (c) through the arbitration agreement, the parties conferred an implied authority to the arbitral tribunal to determine the dispute as though it were a court of law: CA[136]ff, esp. [171]-[174] (CAB 64, 74-75). This was said to be subject to: (i) any qualification where the relevant statute so required: CA[174]ff, esp. [186]-[204] (CAB 75, 79-84); or (ii) alternatively, a qualification by reference to the parties' objectively construed intention not to apply substantive law that is not amenable to arbitration: CA[172] (CAB 74).

11. The Appellant submits that: (a) the arbitral tribunal's obligation to apply substantive law arises under s 28 of the CAA: AS[16]-[22]; and from an implied term in the arbitration agreement by which the parties impliedly conferred on the arbitral tribunal the power to determine their dispute in accordance with the applicable substantive law: AS[23]-[42]; and (b) the CA erred in its conclusion that the Proportionate Liability Law is "*not amenable to arbitration proceedings*" or "*not able to be moulded*": AS[44]. However, the Appellant also appears to accept that it is correct to ask whether the relevant statute was amenable to arbitration, having regard to legislative intention as ascertained from the text, context and purpose of the statute in question: AS[45]. The Appellant's assertion of error on the part of the CA appears to lie in the CA's conclusion as to the proper construction of those particular statutes and, in particular, that they could not be "moulded": AS[93].

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[6] It does not raise the question of the effect of legislation that purports to exclude any ability to contract out, as to which more difficult issues arise. This appears, in any event, to be unique to the Queensland legislation: see *Civil Liability Act 2003* (Qld), s 7(3)). See CA(134), fn 101, and AS (Annexure A).

12. The Respondent submits that: (a) s 28 of the CAA is not determinative of the applicability of a particular statute to an arbitration: RS[12]; (b) a particular statute (which otherwise forms part of the chosen substantive law) nonetheless does not apply in an arbitration where that statute is not applicable or amenable to arbitration; and that the question of applicability or amenability is assessed by reference to the terms, structure and operation of that statute: RS[13]; (c) the implied power of the arbitral tribunal (which has been impliedly conferred by the parties) is such that either an entire statutory scheme (the "*law of the land*") is to be applied to an arbitration, or if only part of a statutory scheme can be applied to an arbitration, then that does not represent the "*law of the land*", such that the statutory scheme, in its entirety, does not apply to an arbitration: RS[14]-[17].

13. The reasoning of the CA, and the submissions of both parties, accordingly embrace the following propositions: (a) the arbitral tribunal's power to apply substantive law derives from the law chosen by the parties, by operation of s 28 of the CAA and from an implied term in the arbitration agreement; and (b) the application of a *particular* substantive law depends on whether it is amenable to arbitration, this question being determined by reference to legislative intention. The principal difference between the parties' respective submissions and the reasoning of the CA appears to be in whether the *particular* substantive law in question here – the Proportionate Liability Law – is amenable to arbitration, having regard to the text, context and purpose of *those statutes*.

14. By contrast, ACICA submits that the question of the applicability of substantive law does not turn on legislative intention underpinning any *particular* substantive law, but is instead properly ascertained by reference to party choice. That choice is embodied in, and operates through, s 28 of the CAA (see **Section B** below). The application of the parties' choice of substantive law via s 28 is mandatory, and neither the text of s 28 nor its purpose properly permit an arbitral tribunal to impose any limit to the parties' choice of substantive law, other than by reference to the principle of arbitrability and related conceptions of public policy (see **Section C** below). Alternatively, if the Court does not accept that arbitrability and public policy are the only limiting principles in this context, ACICA submits that any further limitation on the application of the parties' choice of substantive law under s 28, including the orders and remedies available to the arbitral tribunal, can only arise through the prism of the parties' implied

or inferred objective intentions as to the limits of their selection of the substantive law, discerned in the ordinary way through the contract and (if relevant and appropriate) any surrounding circumstances. Either way, the outer limits of the application of substantive law are not to be determined by reference to any divining of legislative intention as to whether the underlying substantive law in question extends to arbitration – such a view is in direct conflict with the terms of s 28 of the CAA, and fails to have regard to the status of s 28 as a provision of the Model Law (see **Section D** below).

B. Section 28 and party choice as the doctrinal foundation for the applicability of substantive law

15. As noted above at [10], the CA found, and it does not appear to be controversial between the parties, that the starting point in considering the application of substantive law in a domestic commercial arbitration is s 28 of the CAA. That provision was considered by French CJ and Gageler J in *TCL*, by reference to the *travaux préparatoires*[7] of the Model Law. Their Honours recognised at [13] and [15] that Art 28 was a manifestation of a deliberate design for consensual arbitration, being arbitration based on voluntary agreement of the parties, and that Art 28 operates as a guarantee of the parties' autonomy by allowing them to designate "*rules of law*" and not just "*law*", thereby broadening the range of options available to the parties in designating the law applicable to the substance of the dispute. Importantly, at [15] their Honours held that a submission to the effect that the arbitral tribunal's authority to decide is limited to a correct application of the chosen rules of law "*finds no foothold in the text of Art 28*", "*runs counter*" to these principles, and "*is opposed by the drafting history of Art 28*".[8]

16. Party choice is, therefore, the foundational principle on which s 28 of the CAA rests, and the purpose of s 28 is to preserve the primacy of party choice.

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[7] In particular, *Analytical commentary on draft text of a model law on international commercial arbitration: Report of the Secretary-General*, UN Doc A/CN.9/264 (25 March 1985); and Explanatory Note, 1985 Model Law on International Commercial Arbitration as amended in 2006, UNCITRAL Secretariat.

[8] French CJ and Gageler J at [15]-[16]; Hayne, Crennan, Kiefel and Bell JJ at [73]-[74].

17. That principle and purpose finds expression principally through s 28(1), which provides: "*The arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute*" (emphasis added). Section 28(1) is expressed to be mandatory, since the arbitral tribunal "*must decide*" in accordance with "*such rules of law as are chosen by the parties*". As French CJ and Gageler J recognised in *TCL* at [13], the reference to "*rules of law*" is important, since it indicates that party choice is not limited to any national body of law, and indeed contemplates that the parties may pick and choose a subset of national law, parts of different national laws, or indeed an international instrument or some other set of rules untethered to any national system such as the *lex mercatoria*, the UNIDROIT Principles of International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods (**CISG**).[9] This suggests little, if any, room for reading into s 28(1) any limitation on the parties' choice of substantive law. Certainly, there is no textual basis to exclude any rules of law that have been chosen by the parties; the parties' choice of substantive law is expressed to be direct and mandatory.

18. Sub-section 28(3) then provides the default rule in the absence of party choice: "*Failing any designation by the parties, the arbitral tribunal must apply the law determined by the conflict of laws rules which it considers applicable*" (emphasis added). In this scenario, the parties have not chosen any substantive law. The default rule applies, however, through the parties' (express or implied) choice of arbitral seat, which directs the arbitral tribunal to choose the applicable conflict of laws rule, which in turn provides the substantive applicable law. In that sense, the substantive law applicable to an arbitration by virtue of s 28(3) remains the result of party choice, albeit the parties' choice of substantive law is indirect.[10]

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[9] Explanatory Note, 1985 Model Law on International Commercial Arbitration as amended in 2006, UNCITRAL Secretariat, p. 33 at [39].

[10] In the present case, the CA found that "*the parties agreed to resolve their dispute in accordance with the substantive law of South Australia applicable to that dispute*": CA[43] (CAB 39). This therefore appears to be a s 28(1) case of direct party choice. That choice need not be contained in the underlying contract; it can be subsequently agreed: cf. CA[58] (CAB 43). It is therefore unclear on what basis the court below (CA[58] (CAB 43)) and the Appellant (AS[20]) consider this to be a s 28(3) case in which the parties have failed to designate any choice of substantive law.

19. It follows that s 28: (a) operates through the prism of party choice; (b) is mandatory; and (c) contains no textual limitation on its operation. Prima facie, therefore, the arbitral tribunal must apply all "rules of law" chosen or all "law" determined to apply. Whether any limitation can be implied into the obligation to apply the relevant substantive law under s 28 must be assessed by reference to the role of s 28 as a "*particular guarantee*"[11] of party autonomy in the integrated framework.

C. Primary submission: No outer limit to the parties' application of substantive law

20. The proper construction of s 28, having regard to both the text of the provision (and in particular its mandatory operation), and its underlying purpose (namely ensuring the primacy of party choice) requires an arbitral tribunal to apply the substantive law chosen by the parties (whether directly or indirectly), without any outer limit.

21. That is not to suggest that s 28 operates so as to overcome limitations to the arbitrability of a dispute.[12] The notion of non-arbitrability is "*central*" to the Model Law, and is premised on there being a "*sufficient element of legitimate public interest*" in certain subject matters such that it is inappropriate to arbitrate them privately outside the national court system; thus, the "*identification and control*" of these matters is properly within the domain of national legislatures and national courts, and not for the arbitral tribunal applying the parties' chosen substantive law.[13] Examples of a legitimate public interest that might suffice to render a dispute inappropriate to arbitrate include matters that so pervasively involve public rights, the interests of third parties, or subjects of uniquely governmental authority.[14] An instance of the latter in the particular Australian constitutional context is that the subject matter of the dispute must be arbitrable in the sense that it cannot be a matter "*relating to rights which … are required to be*

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[11] *TCL* at [15] per French CJ and Gageler J.

[12] CAA, s 1(5), s 34(2)(b)(i) and s 36(1)(b)(i); IAA, s 7(2)(b), s 8(7)(a), Art 1(5) of the Model Law as incorporated through s 16(1).

[13] ***Comandate*** *Marine Corporation v Pan Australia Shipping* (2006) 157 FCR 45 at [200] per Allsop J (with whom Finn and Finkelstein JJ agreed); *Rinehart v Welker* (2012) 95 NSWLR 221 at [211] per McColl JA. See also *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 351 per Deane and Gaudron JJ.

[14] *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206 at [90] per Martin CJ.

determined exclusively by the exercise of judicial power."[15] Of course, for these reasons an arbitral tribunal also lacks the coercive powers of a court.[16]

22. This constitutional dimension to arbitrability also explains the limitations on arbitrators to make certain orders or grant certain remedies (e.g., fines, divorce decree, a judgment *in rem* against a ship[17]). In general, it is a recognised principle of arbitrability that disputes which affect the rights of third parties or where third parties are necessary parties, may be non-arbitrable.[18] The underlying principle is that matters which engage third party rights or interests cannot be determined within the limitations of a private contractual process founded on party consent and which (usually) excludes those interests.[19] The limitation which the contractual basis of arbitration imposes on the powers of an arbitrator to make orders affecting non-parties though is not determinative of whether the dispute is itself arbitrable.[20] It will be necessary to understand precisely how third party rights are affected and whether orders can be made or crafted by the arbitral tribunal that do not unduly affect third party rights. It will also be necessary to understand precisely how third party rights are affected by an order or remedy granted by the arbitral tribunal, including whether the third party is bound by any such order or remedy or remains entitled to separately advance its rights in a court proceeding unaffected by the orders made by the arbitral tribunal as to any issue dealt with by the arbitral tribunal.

23. For example, in ***Rinehart v Welker***,[21] while the Court's supervisory jurisdiction over trusts constituted a legitimate public interest favouring the judicial resolution of a

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15 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 351 per Deane and Gaudron JJ.

16 ***Bloomberry*** *Resorts v Global Gaming Philippines LLC* [2021] SGCA 94 at [113].

17 *ACD Tridon v Tridon Australia* [2002] NSWSC 896 at [189] per Austin J. The other limitation referred to at [185]-[187] of *Tridon* had in fact been (correctly) rejected in *Ferris v Plaister* (1994) 34 NSWLR 474 (relevantly overruling *IBM Australia Ltd v National Distribution Services Pty Ltd* (1991) 22 NSWLR 466) on the basis of the separability principle.

18 *Allergan Pharmaceuticals Inc v Bausch* (1985) ATPR 40-636 at 47-173 to 174.

19 *Fulham Football Club v Richards* [2012] 1 All ER 414 at [40]; see also *Rinehart v Welker* (2012) 95 NSWLR 221 at [179] per Bathurst CJ; *Fitzpatrick v Emerald Grain* [2017] WASC 206 at [97]-[98] per Martin CJ.

20 Similarly, one commentator has observed that orders creating or transforming a right or "status" affecting rights restrict the availability of orders and remedies available in arbitration because "*the substantive law applicable to the dispute will often for public policy reasons, vest a particular court or courts with jurisdiction over this type of action, precisely because it is not only the parties to the dispute which could be affected by the result.*" See Ashford, 'Remedies (Other than Damages)', in *Handbook of International Commercial Arbitration* (2nd ed, 2014), p. 370.

21 (2012) 95 NSWLR 221 at [175]-[183] per Bathurst CJ.

dispute between a trustee and the beneficiaries under a trust, this factor did not mean that it was inappropriate for arbitration, especially when there may be sound reasons for resolving the dispute confidentially, and where the only third party potentially affected supported the reference to arbitration. By contrast, in *WDR Delaware Corporation v Hydrox Holdings*,[22] the question of entitlement to a winding up order was not considered arbitrable, although the underlying dispute between shareholders as to the performance of their contractual and statutory obligations was. Importantly, the making of a winding up order (a) is a classical instance of the exercise of judicial power, and (b) such an order would radically affect the rights of third parties (the wider body of creditors).

24. It bears emphasis that none of these situations involves any inquiry into legislative intent, as distinct from an assessment of the appropriateness of a particular dispute or subject matter to private arbitration, by reference to the sufficiency of the public interest justifying (or demanding) resolution by a national court and especially where it concerned a subject matter or the granting of an order or remedy that is exclusively the exercise of judicial power.

25. Nor does s 28 operate to displace the role of the related overriding principle of public policy in precluding the award of certain kinds of remedies in an otherwise arbitrable dispute.[23] Public policy, which in Australia is also informed by constitutional considerations, also explains why an arbitral tribunal cannot award certain kinds of remedies by reason of the nature of arbitration as (a) a private form of dispute resolution (such that an arbitral tribunal cannot impose remedies of a punitive nature, such as fines), and (b) a form of dispute resolution binding only on the parties to it (such that an arbitral tribunal cannot award remedies that might affect third parties, as explained in [22] above). In such cases, an appropriate remedy can be tailored as necessary having regard to the public policy considerations at play, so as to be enforceable by a court under the integrated framework.[24]

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[22] (2016) 245 FCR 452 at [161]-[164] per Foster J.

[23] See, eg, *Rinehart v Welker* (2012) 95 NSWLR 221 at [175]-[179] per Bathurst CJ, [214] per McColl JA. Public policy is also relevant at the post-award stage, in the context of set aside and recognition or enforcement proceedings: CAA, s 34(2)(b)(ii) and s 36(1)(b)(ii); IAA, s 8(7)(b).

[24] For example, instead of an order to remove a trustee or make a vesting order, an appropriate remedy might be to order the trustee to resign, and to appoint a new trustee and convey trust property to that person: *Rinehart v*

26. These considerations operate, in effect, as a *practical* limitation on the application of the substantive law chosen by the parties to the arbitration. They serve as an externally imposed fetter that is properly applied by the State in its assessment, through the agency of the national court, of the public interest in the sense described, informed by constitutional considerations. However, contrary to CA[180]-[187] (CAB 76-79), considerations of arbitrability and public policy do not provide a basis *in principle* on which the chosen substantive law can or ought to be disapplied by reference to legislative intention.

The CA's reasoning

10 27. The CA concluded that the parties' choice of substantive law was subject to a limiting principle assessed by reference to whether the substantive law in question is amenable to application in arbitration proceedings: CA [70]-[71] (CAB 46). This was based on two cumulative propositions:

a. first, that there is an implied term in an arbitration agreement that the arbitrator shall have authority to grant such relief as would have been available were the claimant to have sued in a court of law of appropriate jurisdiction, arising out of the agreement by the parties to arbitrate: CA [171]-[172] (CAB 74); and

b. second, that that implied term is "*subject to such qualifications as relevant statute law may require*": CA [176]ff (CAB 75), citing *Government Insurance Office of*
20 *NSW v Atkinson-Leighton* (1981) 146 CLR 206 (***GIO***) at 235 per Stephen J.

28. ACICA respectfully submits that this reasoning pays insufficient regard to the very different statutory background in which *GIO* and related decisions arose, long pre-dating the introduction of the integrated framework. In other words, ACICA does not suggest that *GIO* was wrongly decided, but that the necessity for such an implication that has been superseded by legislative and international developments. As French CJ

Welker (2012) 95 NSWLR 221 at [176] per Bathurst CJ, [216] per McColl JA. See also *Bloomberry* [2021] SGCA 94 at [104].

and Gageler J warned in *TCL* at [16], it is not appropriate to transpose, automatically, pre-Model Law cases into a Model Law context.[25]

"Implied terms" in the Model Law era

29. As to the CA's first proposition, it will be observed that the CA derived the language of "implied terms" from *GIO*.[26] That decision concerned a special case referred to the Supreme Court of New South Wales by an arbitrator pursuant to s 19 of the *Arbitration Act 1902* (NSW) on a question of law, being whether the arbitrator had power to award interest on the award. Notably, that statute included a provision (at s 5) by which a submission to arbitration was "*deemed*" to include certain provisions which were "*to be implied*" in the submission,[27] none of which contained any choice of law provision similar to s 28 of the CAA. It is unsurprising, therefore, that in that statutory context the High Court also assumed the language of "implied terms".

30. The judgments of Stephen J and Mason J (with whom Murphy J agreed) in *GIO* drew heavily on earlier English authority which had held that there was "*an implied term of the contract that the arbitrator must decide the dispute according to the existing law of the contract, and that every right and discretionary remedy given to a court of law can be exercised by him*", including interest.[28] That language of implied terms or implied authority drew from the applicable statutory context.[29] The Court recognised that the arbitrator derived power to award interest "implied" from the submission to arbitration, where previously it had been thought that such power could only be statutory.[30]

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[25] The statutory development of the arbitration framework across the States and Territories of Australia is helpfully traced in Jones and Walker, *Commercial Arbitration in Australia: Under the Model Law* (3rd ed, 2022) at [1.200]-[1.270].

[26] At 235-237 per Stephen J and 246-247 per Mason J (Murphy J agreeing).

[27] The *Arbitration Act 1902* (NSW) was modelled directly on the *Arbitration Act 1889* (UK), s 2 of which was headed "*provisions implied in submissions [to arbitration]*". While arbitration legislation in the United Kingdom developed apace through successive rounds of legislation in 1934, 1950, 1975, 1979, 1990 and finally in the presently applicable 1996 statute, the NSW legislation persisted for nearly a century until the enactment of the *Commercial Arbitration Act 1984* (NSW). In this way, the language of "implied" terms and "implied" authority came to be largely ingrained in arbitral discourse.

[28] *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 K.B. 240 at 262-263 per Tucker LJ.

[29] Relevantly, the *Arbitration Act 1889* (UK) (see above n 27).

[30] *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 K.B. 240 at 263 per Tucker LJ.

31. This approach has been criticised, to the extent that it seeks to equate an arbitral tribunal's *procedural* powers to that of a national court.[31] That appears to have been the basis on which Sir Kenneth Keith in his capacity as President of the New Zealand Law Commission[32] suggested that the approach of the majority in *GIO* was "*misconceived*". It led to the passage of legislation in New Zealand[33] and Singapore[34] that placed on a statutory footing (subject to considerations of arbitrability and public policy[35]) an arbitral tribunal's power to award any remedy or relief that could have been ordered by a court. Similar provisions exist in other major arbitral jurisdictions such as Hong Kong[36] and the United Kingdom.[37]

10 32. No objection could be taken, however, if the basis of the arbitrator's power or authority to decide is instead founded on party choice as embodied in the arbitration agreement (subject to limitations based on arbitrability and public policy).[38] Indeed, it is the rationale based on party choice that was subsequently approved by the House of Lords in *President of India v La Pintada Compania Navigacion SA*[39] as reflecting "*the true position*". However, that does not answer the substantive basis on which the arbitral tribunal is to exercise its undoubted power.

33. The introduction of the *Arbitration Act 1996* (UK) heralded an important change to the UK statutory framework.[40] It included a new s 46(1), a choice of law provision which drew heavily on Art 28 of the Model Law. In *Wealands v CLC Contractors*,[41]

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31 Mustill and Boyd, *Law and practice of commercial arbitration in England* (2nd ed, 1989), p. 294-295.

32 Law Commission, *Arbitration* (NZLC R20, 1991) at [252]-[261].

33 *Arbitration Act 1996* (NZ), s 12(1).

34 *International Arbitration Act 1994* (Singapore), s 12(5).

35 In New Zealand, this limitation is statutory: see *Arbitration Act 1996* (NZ), s 12(2), as discussed in *General Distributors Ltd v Casata* [2006] 2 NZLR 721 at [49]-[51]. In Singapore, the courts have construed the legislation as being so qualified: see *Bloomberry* [2021] SGCA 94 at [112] and *Silica Investors Limited v Tomolugen Holdings Limited* [2014] SGHC 101 at [105].

36 See *Arbitration Ordinance 2011* (HK) Cap 609, s 70, as well as its predecessor, the *Arbitration (Amendment) Ordinance 1996* (75 of 1996), which inserted s 2GF into the *Arbitration Ordinance 1963* (HK) Cap 341.

37 *Arbitration Act 1996* (UK), s 48.

38 Mustill and Boyd, *Law and practice of commercial arbitration in England* (2nd ed, 1989), p. 292 and 295.

39 [1985] AC 104 at 119.

40 As recognised by the Privy Council in *National Housing Trust v YP Seaton & Associates Company Ltd* [2015] UKPC 43 at [32]; see also the discussion in Mustill and Boyd, *Commercial arbitration: 2001 companion volume to the second edition* (2001), Part II, p. 182.

41 [1985] AC 104 at 119.

Mance LJ considered that this new choice of law provision operated to supply the basis on which the arbitral tribunal has power to award the remedy of contribution.

34. The continued use in the Model Law era of concepts derived from the common law (such as implied terms or implied authority) risks distracting from the imperative of construing the Model Law having regard to its international origin and international application,[42] and further risks obscuring fundamental concepts. In this case, it is necessary to delineate between:

a. the authority of the arbitral tribunal to decide the dispute, which derives from the parties' arbitration agreement;[43]

10 b. the obligation of the arbitral tribunal, which is to apply the chosen substantive law in accordance with s 28(1) or as determined in accordance with s 28(3); and

c. the powers of the arbitral tribunal, which (as explained by the Singapore Court of Appeal) are procedural, substantive and remedial in nature.[44] They are principally a matter of substantive law, subject to limitations based on arbitrability and related conceptions of public policy, as well as any limitations arising out of the *lex arbitri* (or procedural law) or any procedural rules adopted by the parties (e.g., the ACICA Rules, ICC Rules or UNCITRAL Rules.[45] Some procedural rules exclude or limit the arbitral tribunal's power to award certain remedies.[46]

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42 *TCL* at [8] per French CJ and Gageler J.

43 *TCL* at [9] per French CJ and Gageler J. See also *Comandate* (2006) 157 FCR 45 at [244]-[245], in which Allsop J declined to impose a condition on a stay in favour of arbitration which would have been to the effect that the parties consent to claims under the *Trade Practices Act* being heard in the arbitration, on the basis that that would pre-empt the authority of the arbitrator and the operation of the arbitration clause.

44 *Bloomberry* [2021] SGCA 94 at [108]-[111].

45 As to the important distinction between the *lex arbitri* (or procedural law) and any procedural rules adopted by the parties, see *Wagners Nouvelle Caledonie Sarl v. Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219 and Henderson, 'Lex Arbitri, Procedural Law and the Seat of the Arbitration' (2014) 26 Singapore Academy of Law Journal 886.

46 Eg, Art 24.1(a) of the SIAC Rules 2013 which provides that the arbitral tribunal may "*order the correction of any contract, but only to the extent required to rectify any mistake which it determines to have been made by all the parties to that contract*", subject to the *lex contractus*. This limitation was subsequently removed: see Art 27(a) of the SIAC Rules 2016 which simply empowers the arbitral tribunal to "*order the correction or rectification of any contract, subject to the law governing such contract*".

35. In circumstances where s 28 operates to require the application of the parties' chosen substantive law, there is no scope for any implied term arising out of the arbitration agreement, or for any implied authority on the part of the arbitral tribunal, to grant any particular substantive relief. Any such implication is no longer necessary,[47] since the question of power to grant that substantive relief is properly determined by applying the applicable substantive law.[48] It will be kept in mind that questions of substantive rights (or causes of action) under applicable substantive law and the appropriate remedy arising from those rights are inextricably intertwined as reflected in the maxim *ubi ius ibi remedium.*

Qualifications as required by "relevant statute law"

36. As to the CA's second proposition, the full observation made by Stephen J in *GIO* at 235 was:

> "*The principle to be extracted from this line of authority is that, subject to such qualifications as relevant statute law may require, an arbitrator may award interest where interest would have been recoverable and the matter been determined in a court of law. What lies behind that principle is that arbitrators must determine disputes according to the law of the land. … a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of law of appropriate jurisdiction.*"

(emphasis added)

37. The reference to "*relevant statute law*" appears to contemplate the possibility that a statute might expressly preclude arbitrators from awarding interest. Why a statute might be able to do so, in the circumstances of an "implied authority" derived from the parties' submission to arbitration, is not explained by his Honour. However, Mason J (with whom Murphy J agreed) did supply an explanation: his Honour reasoned at 247 that the arbitrator's power to award interest was implied into the parties' submission to arbitration because the *Arbitration Act 1902* (NSW) had given the Supreme Court

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[47] Whether in the strict or flexible sense: see *Realestate.com.au Pty Ltd v Hardingham* (2022) 97 ALJR 40; [2022] HCA 39 at [18]-[20] per Kiefel CJ and Gageler J, [75] per Gordon J, [114] per Edelman and Steward JJ. In the arbitral context, see *TCL* at [16] per French CJ and Gageler J, at [74] per Hayne, Crennan, Kiefel and Bell JJ.

[48] This is to be distinguished from the question of the arbitrator's *procedural* powers (a matter governed by the *lex arbitri*); these are powers that "*provide the procedural scaffolding for an arbitration, necessary to assist in the just and proper conduct of arbitration*": *Bloomberry* [2021] SGCA 94 at [109].

supervisory jurisdiction over the arbitration. His Honour then developed this further into the principle of "moulding" in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 368-369.

38. The majority approaches in *GIO* might be explicable on the basis that at the time, the power to award interest was considered *procedural* in nature. That may explain why such significance was given to the law of the seat, since it supplies the procedural framework for the arbitral tribunal's exercise of procedural powers.[49] However, if that is the correct rationale, it does not provide a sound basis for disapplying, as the CA did, *substantive* law.

10 39. In any event, when considered through the lens of the Model Law, it is apparent that the approaches in *GIO* accord great significance to the law of the seat, without clearly distinguishing the law of the seat from the parties' choice of substantive law, and without recognising the significance of each of these different systems of law.[50]

40. Notwithstanding the foregoing, drawing on *GIO* the CA suggested two possible bases on which it was said to be appropriate to have regard to qualifications as required by relevant statute law at CA[179] (CAB 76): the first was the recognition of a limit by reference to the parties' intention (as implied under the arbitration agreement) "*to confer authority upon the arbitrator to determine such rights, or grant such relief, as are amenable to determination in arbitration proceedings*"; and the second was the
20 application of a limit by reference to some overriding objective intention on the part of the legislature that the statute is not amenable to arbitration. The CA noted that there was "*unlikely to be any significant practical difference*" between the two bases, "*given the objective nature of both forms of analysis and given that both ultimately turn upon the amenability of the relevant provisions to application in arbitration proceedings*".

41. Neither of these proposed limits to the application of the substantive law ought be accepted by this Court. Both are in tension with the text and purpose of s 28 of the CAA, which requires the application of the substantive law chosen by the parties

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[49] Especially bearing in mind a statutory context in which the *Arbitration Act 1902* (NSW) gave the Supreme Court far more extensive supervisory powers over arbitral tribunals as compared to the present position.

[50] *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [36]-[38]; *Enka v Chubb* [2020] 1 WLR 4117.

(whether directly under s 28(1) or indirectly under s 28(3)) without any limitation, as explained above.

42. There are several reasons why legislative intention could not properly constitute the basis of a limitation upon party choice. As explained, s 28 serves as a guarantee of party choice and party autonomy underpinning the design of the Model Law. In particular, it will be recalled that s 28 permits parties to pick and choose from different systems of law or from parts of a system of law as they wish. This strongly suggests that the analytical framework for determining the content of applicable substantive law is de-nationalised, based as it is on party choice and party autonomy. In those circumstances, deference to a particular national legislature in considering the outer limits of the application of the substantive law to be applied in an arbitration proceeding is difficult to justify, in circumstances where the choice is not of a particular legislature's views but of particular chosen laws. As the US Supreme Court emphasised in *Mitsubishi Motors v Soler-Chrysler Plymouth Inc*:[51]

> "*To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims … the tribunal should be bound to decide that dispute in accord with the national law giving rise to the claim.*"

43. While the legislature of the arbitral seat may well supply the *lex arbitri*, as well as the statutory framework (if any) for exercise of the supervisory jurisdiction,[52] it could not supply the substantive applicable law save where chosen by the parties. While the supervisory jurisdiction and the jurisdiction that supplies the substantive applicable law may (as here) often coincide as a matter of party choice, it must be recalled that that is not necessarily the case, since parties can and do choose different applicable laws. It should not obscure that these systems of law are distinct, and in many cases could be supplied by different jurisdictions. In that regard the wider doctrinal implications of the immediate controversy to be resolved are to be kept in mind.

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[51] 473 US 614 (1985) at 636-637.

[52] *Westport Insurance Corporation v Gordian Runoff* (2011) 244 CLR 239 at [20] per French CJ, Gummow, Crennan and Bell JJ.

44. Further, while (as explained above at [21]-[26]) considerations of arbitrability or public policy can operate as an outer limit to the operation of the substantive law in an arbitration (in that they have the potential to prevent a dispute from being arbitrated, or prevent a particular remedy from being awarded), doctrinally these questions have nothing to do with the substantive applicable law.[53]

45. The operation of principles concerning arbitrability and public policy in this context thus does not support arbitral tribunals applying some limit to the application of the parties' chosen substantive law by reference to the intention of the legislature supplying that chosen substantive law.

D. Secondary submission: Any outer limit only discernible through party choice

46. ACICA's primary submission is that on the proper construction of s 28 of the CAA there is no inherent outer limit to the application of the substantive law chosen by the parties, other than the practical limits imposed by the principles of arbitrability and public policy. In the alternative, ACICA submits that any limitation on the application of the substantive law chosen by operation of s 28 can only arise through the prism of the parties' implied or inferred objective intentions as to the limits of their selection of the substantive law. Relatedly, the parties may specifically exclude the availability of certain remedies as part of the substantive law chosen or through their selection of certain procedural rules. For the reasons explained at [42]-[45] above, the intention of the legislature cannot itself operate as the touchtone or limitation on party choice in that regard as the extent of the substantive law and remedies to be applied.

47. As noted in [40] above, the CA considered that there was "*unlikely to be any significant practical difference*" between a limitation based on implied objective intention and a limitation based on legislative intention, "*given the objective nature of both forms of analysis and given that both ultimately turn upon the amenability of the relevant provisions to application in arbitration proceedings*": CA[179] (CAB 76). With respect, this is not necessarily so.

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[53] *Comandate* (2006) 157 FCR 45 at [200] per Allsop J (with whom Finn and Finkelstein JJ agreed). The lively debate as to whether the question of arbitrability is governed by the law of the arbitration agreement or the law of the seat (or both) need not concern this Court, save that it serves to emphasise the importance of delineating carefully between different bodies of applicable law: compare *Enka v Chubb* [2020] 1 WLR 4117; *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1.

48. *First*, it disregards the very real possibility that the parties' objectively ascertained intention[54] is that the relevant substantive law is to be applied, notwithstanding any legislative intention that can be discerned by implication in the relevant statute that the statute is not intended to be amenable to arbitration. Such an intention on the part of the parties may be discerned from the arbitration agreement itself, the terms of the choice of law clause, as well as surrounding contractual materials to which regard may properly be paid. There is no reason to assume that the parties should be taken to intend that the arbitral tribunal should accord deference to a legislative intention that a particular substantive law not apply to arbitration.

10 49. *Secondly*, in circumstances where the parties should be taken to have known (and therefore are more likely to be taken to have intended) that the legislature intended that the statute in question does not apply to arbitral proceedings, it is accepted that the arbitral tribunal may properly and consistently with s 28 decide not to apply that legislation, on the basis of the parties' objectively ascertained intention. This may occur, for example, in the rare scenario where the statute in question expressly states that it shall not apply to arbitration.

50. By no means, however, is that a foregone conclusion – even where legislation *expressly* states that it does not apply to arbitration, the parties may be taken to have intended that the statute apply nonetheless: cf. CA[177] (CAB 75). *Mastrobuono v*
20 *Shearson Lehman Hutton Inc* 514 US 52 (1995) provides a useful illustration of the point. There, the parties agreed a choice of law clause which designated the laws of the State of New York and an arbitration clause which provided that "*any controversy*" between the parties "*shall be settled by arbitration*". New York State law provided that the power to award punitive damages was limited to courts, and could not be awarded by arbitral tribunals. The arbitrator nonetheless awarded punitive damages. Stevens J held at 64 that the provisions could be harmonised by reading the choice of law clause to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators, such that "*the choice of law provision covers the rights and duties of the parties, while the arbitration clause*

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[54] *Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited* (2023) 407 ALR 613; [2023] HCA 6 at [28].

covers arbitration; neither sentence intrudes upon the other". The result was that the arbitrators could award punitive damages.

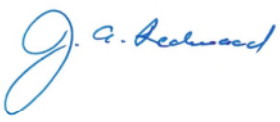
51. Another scenario where the parties' objectively construed intention may depart from that of the legislature may arise in the (presumably) even rarer scenario where, after the parties had agreed their choice of substantive law, the legislature amends a law so that it expressly states that it shall not apply to arbitration. It is unlikely that the parties would be taken objectively to have intended that their chosen substantive law is susceptible to statutory amendment in this way, such that the law in question should continue to be applied in the arbitration. Conversely, if amenability to arbitration by reference to legislative intention is the correct test, then the impugned law would be disapplied.

52. Ultimately, if this Court were to identify a limitation to party choice pursuant to s 28 notwithstanding Part C above, then by reason of the text, structure and purpose of s 28, any such limitation ought only be discerned through the prism of the parties' implied or inferred objective intentions as to the limits (if any) of their selection of the substantive law. It should not be presumed that – as the CA suggested – there is no practical difference between a limiting principle derived from the parties' inferred intentions as to the outer limits of their selection of substantive law, and the legislature's intention in respect of the statutes to be applied.

PART V: ESTIMATED TIME FOR ORAL ARGUMENT

53. ACICA respectfully considers that it could assist the Court further by brief elaboration of these submissions by oral argument of not more than 15-20 minutes.

Dated: 18 August 2023



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Annexure A

In accordance with paragraph 3 of Practice Direction No 1 of 2019 – Legislation and Authorities, Appeals and Other Full Court Matters

No	Legislation	Version	Provisions
Commonwealth			
1.	*International Arbitration Act 1974* (Cth)	As currently in force	Whole Act
New South Wales			
2.	*Arbitration Act 1902* (NSW)	As enacted	Whole Act
3.	*Arbitration Act 1902* (NSW)	As at 19 February 1981	Whole Act
4.	*Commercial Arbitration Act 1984* (NSW)	As enacted	Whole Act
Queensland			
5.	*Civil Liability Act 2003* (Qld)	As currently in force	Section 7(3)
South Australia			
6.	*Commercial Arbitration Act 2011* (SA)	As at 1 January 2012	Whole Act
New Zealand			
7.	*Arbitration Act 1996* (NZ)	As currently in force	Section 12
United Kingdom			
8.	*Arbitration Act 1889* (UK)	As enacted	Section 2
9.	*Arbitration Act 1934* (UK)	As enacted	Whole Act
10.	*Arbitration Act 1950* (UK)	As enacted	Whole Act
11.	*Arbitration Act 1975* (UK)	As enacted	Whole Act
12.	*Arbitration Act 1979* (UK)	As enacted	Whole Act
13.	*Courts and Legal Services Act 1990* (UK)	As enacted	Part V
14.	*Arbitration Act 1996* (UK)	As currently in force	Sections 46, 48
Hong Kong			
15.	*Arbitration Ordinance 1963* (HK) Cap 341	As at 30 June 1997	Section 2GF

No	Legislation	Version	Provisions
16.	*Arbitration Ordinance 2011* (HK) Cap 609	As currently in force	Section 70
Singapore			
17.	*International Arbitration Act 1994* (Singapore)	As currently in force	Section 12
Proportionate Liability Law			
18.	*Competition and Consumer Act 2010* (Cth)	As currently in force	Part IVA
19.	*Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA)	As currently in force	Part 3