CASE NOTE

EISENWERK RECONSIDERED (TWICE) – A CASE NOTE ON *CARGILL INTERNATIONAL SA V PEABODY AUSTRALIA MINING LTD*, AND *WAGNERS NOUVELLE CALEDONIE SARL V VALE INCO NOUVELLE CALEDONIE SAS*

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I INTRODUCTION

On 2 July 1999, the Queensland Court of Appeal handed down its decision in *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH*.[1] The case, which concerned the legal framework governing an international commercial arbitration, became instantly infamous[2] for

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[1] [2001] 1 Qd R 461 ('*Eisenwerk*').

[2] Megens and Cubitt suggest that *Eisenwerk* (and an analogous Singaporean decision, *John Holland Pty Ltd aka John Holland Construction & Engineering Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262) 'caused instant consternation in international arbitration circles'. See Peter Megens and Beth Cubitt, 'Arbitrators' Perspective: The Evolving Face of International Arbitration – The Past, the Present and the Future' (2010) 13 *International Arbitration Law Review* 1, 5; see also Peter Megens and Beth Cubitt, 'Meeting Disputants' Needs in the Current Climate: What Has Gone Wrong With Arbitration and How Can We Repair It?' (2009) 28(1) *The Arbitrator & Mediator* 115, 130. This observation (as made in

establishing the so-called *Eisenwerk* principle,[3] pursuant to which the adoption of arbitration rules was said to constitute a displacement of the *UNCITRAL Model Law on International Commercial Arbitration*.[4] The decision was not well received in arbitration circles, with a number of academic commentaries criticising the approach taken in *Eisenwerk* to the interactions and relationships between the curial law governing an arbitration, and procedural rules which may be adopted for the purposes of conducting an arbitration.[5]

More than 10 years later, in August 2010, two different courts in two different Australian states had occasion to review the *Eisenwerk* principle. On 11 August 2010, the New South Wales Supreme Court handed down its decision in *Cargill International SA v Peabody Australia Mining Ltd*.[6] Just nine days later, the Queensland Court of Appeal itself reconsidered *Eisenwerk* in *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS*.[7] Both decisions are notable not only because of the controversy surrounding the original *Eisenwerk* decision, but also because of the differing approach each takes to the *Eisenwerk* principle and the place that principle now occupies within an amended legislative regime for international commercial arbitration in Australia.

This case note comprises four main parts. In Part II, the legal background to the two recent decisions (that background consisting of the *Eisenwerk* case and Australia's international commercial arbitration legislation) is reviewed. In Parts III and IV, *Cargill International SA* and *Wagners* respectively are examined. Finally, in Part V, the current status of *Eisenwerk* in Australian law (in light of these two decisions and recent legislative reforms) is considered.

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the first mentioned article by Megens and Cubitt) was noted by the Supreme Court of New South Wales in *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887 (11 August 2010) ('*Cargill International SA*') [82].

[3] See generally Part II below.

[4] *UNCITRAL Model Law on International Commercial Arbitration*, adopted 11 December 1985 (the 'Model Law 1985').

[5] See, eg, Stephen Barrett-White and Christopher Kee, 'Enforcement of Arbitral Awards Where the Seat of the Arbitration is Australia – How the Eisenwerk Decision Might Still be a Sleeping Assassin' (2007) 24 *Journal of International Arbitration* 515. See also Björn Gehle, 'The Arbitration Rules of the Australian Centre for International Commercial Arbitration' (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 251, 256.

[6] [2010] NSWSC 887 (11 August 2010).

[7] [2010] QCA 219 (20 August 2010) ('*Wagners*').

II THE LEGAL BACKGROUND — EISENWERK AND THE INTERNATIONAL ARBITRATION AMENDMENT ACT 1989 (CTH)

The legal background to the *Cargill International SA* and *Wagners* decisions can be traced not only to the *Eisenwerk* case, but also further back to the *International Arbitration Amendment Act 1989* (Cth).

The *International Arbitration Amendment Act 1989* (Cth) was a key piece of legislation in the modernisation of Australia's international commercial arbitration laws. In particular, it amended the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth) to implement the *Model Law 1985* into Australian law,[8] and renamed the Act as the *International Arbitration Act 1974* (Cth) while doing so. The *Model Law 1985* is a model national law for the regulation of international commercial arbitration, formulated by the United Nations Commission on International Trade Law, and can be domestically implemented by nations (at their option) either with or without amendment.[9] The *International Arbitration Amendment Act 1989* (Cth) inserted the *Model Law 1985* into Schedule 2 of the *International Arbitration Act 1974* (Cth), and, through a new section 16(1) of that Act, gave it 'the force of law in Australia'.

The cases of *Eisenwerk*, *Cargill International SA* and *Wagners* arose, however, because of another provision, also inserted into the *International Arbitration Act 1974* (Cth) in 1989 — the then new section 21, which provided that:

> If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the *Model Law*, the *Model Law* does not apply in relation to the settlement of that dispute.

This effectively established the *Model Law 1985* as a default legal regime for the regulation of international commercial arbitration in Australia, but also preserved the right of parties to 'opt out' if they so wished.

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[8] It is noted that, pursuant to the *International Arbitration Amendment Act 2010* (Cth), most of the amendments made to the *Model Law 1985* by UNCITRAL on 7 July 2006 have now been incorporated into Australian law. However all three of *Eisenwerk*, *Cargill International SA* and *Wagners* were concerned with the original *Model Law 1985*.

[9] See, eg, Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd ed, 2010) 1–3.

The final piece of the legal background to *Cargill International SA* and *Wagners* is the *Eisenwerk* decision itself, which concerned the interpretation and application of the then[10] *International Arbitration Act 1974* (Cth) section 21. The parties' arbitration agreement referred to arbitration pursuant to the *ICC Arbitration Rules*[11] in the following manner:

> Any dispute arising out of the Contract shall be finally settled, in accordance with the *Rules of Conciliation and Arbitration of the International Chamber of Commerce*, by one or more arbitrators designated in conformity with those *Rules*.[12]

According to Pincus JA, with whom Thomas JA[13] and Shepherdson J[14] agreed, this agreement constituted an ousting of the *Model Law 1985* pursuant to the then *International Arbitration Amendment Act 1974* (Cth) section 21.[15] In Pincus JA's judgment, 'by expressly opting for one well-known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the *Model Law*'.[16]

The controversy surrounding *Eisenwerk* stemmed from the fact that the *Model Law 1985*, through its article 19(1), permits party agreement on the procedure to be followed in an international commercial arbitration. This party agreement is often exercised in practice by way of agreement on a set of arbitration rules. The *Model Law 1985's* non-mandatory rules can be contracted out of and displaced by party agreement on procedure, whilst its

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[10] As the *International Arbitration Amendment Act 2010* (Cth) has substituted a new s 21 into the *International Arbitration Act 1974* (Cth) (by way of legislative response to the *Eisenwerk* case — see Part V below), this case note refers to the provision considered in *Eisenwerk*, *Cargill International SA* and *Wagners* as the 'then' *International Arbitration Act 1974* (Cth) s 21.

[11] *Rules of Arbitration of the International Chamber of Commerce*, adopted 1 January 1998.The Court noted that there were two versions of the *ICC Arbitration Rules* possibly relevant to the case before it — the *Rules* adopted on 1 January 1998 (those in force at the time the arbitration was commenced), and the *Rules* adopted on 1 January 1988 (those in force at the time the parties' contracts were concluded) — but suggested (without analysis) that application of the 1998 *Rules* was 'the preferable view'; see *Eisenwerk* [2001] 1 Qd R 461, 465. While the temporal conflict of arbitration rules is a matter beyond the scope of *Cargill International SA* and *Wagners* (and, thus, this case note), for a recent analysis see Simon Greenberg and Flavia Mange, 'Institutional and Ad Hoc Perspectives on the Temporal Conflict of Arbitral Rules' (2010) 27 *Journal of International Arbitration* 199.

[12] Clause 13.1 of the parties' contract, extracted in *Eisenwerk* [2001] 1 Qd R 461, 465.

[13] Ibid 471.

[14] Ibid.

[15] Ibid 466.

[16] Ibid.

mandatory rules will prevail over any party agreement.[17] The conventional view in the arbitration world has been and continues to be that the adoption of a set of arbitration rules is not inconsistent with application of the *Model Law 1985*, but rather is envisaged by the *Model Law 1985* and can be properly accommodated within its legal framework.[18] As the *Eisenwerk* court took a very different view of the relationship between the *Model Law 1985* and the *ICC Arbitration Rules*, the case has sat uneasily with arbitration practitioners and academics over the course of the last decade. Indeed, the Commonwealth Attorney-General has gone so far as to note the 'impact' of *Eisenwerk* 'on Australia's reputation internationally'.[19]

III *CARGILL INTERNATIONAL SA* — THE NEW SOUTH WALES SUPREME COURT'S DECISION OF 11 AUGUST 2010

Cargill International SA was a decision of Ward J of the Supreme Court of New South Wales, handed down on 11 August 2010. Given that *Eisenwerk* (a decision of the Queensland Court of Appeal) was not binding on the Court, Ward J was called upon to consider its persuasiveness in New South Wales in the course of rendering judgment.

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[17] See generally Binder, above n 9, 280 [5-013]–287 [5-032].

[18] See, eg, Richard Garnett and Luke Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (Sydney Law School Legal Studies Research Paper No 10/88, September 2010) 4 (arguing that the result in *Eisenwerk* 'was odd since it ignored the fact that the *Model Law* expressly contemplated that parties may include arbitral rules in their agreement consistently with having a *Model Law* arbitration'). See also Barrett-White and Kee, above n 5, 524 (arguing that 'the proposition outlined by Pincus JA in *Eisenwerk* is incorrect and … the *Model Law* and *ICC Rules* … are certainly reconcilable'); Luke Nottage and Richard Garnett, 'Top 20 Things to Change in or Around Australia's International Arbitration Act' (2010) 6 *Asian International Arbitration Journal* 1, 26 (arguing that *Eisenwerk* 'fundamentally misunderstands the relationship between (opt-in) [a]rbitration [r]ules, incorporated by reference into the parties' arbitration agreement, and arbitration legislation (mostly now opt-out default rules, plus some mandatory rules)'.

[19] Robert McClelland, 'International Commercial Arbitration in Australia: More Effective and Certain' (Speech delivered at the International Commercial Arbitration: Efficient, Effective Economical? Conference, RACV City Club, Melbourne, 4 December 2009). See also Nottage and Garnett, 'Top 20 Things to Change', above n 18, 25 (noting that *Eisenwerk* 'has been another obstacle to having Australia being taken seriously as an arbitration venue').

A The Facts

The dispute before the Court in *Cargill International SA* arose out of a partial award rendered by an arbitrator on 7 December 2009.[20] The substance of the dispute between the parties at arbitration concerned a claim by Excel Coal Ltd (known as Peabody Australia Mining Ltd at the time of litigation) for money owing in relation to deliveries of coal, and a counterclaim by Cargill International SA for demurrage.[21] In the partial award, the arbitrator found that moneys were owing to Excel Coal Ltd, and also dismissed the counterclaim pursued by Cargill International SA.[22]

Cargill International SA initiated proceedings before the Supreme Court of New South Wales in an attempt to challenge the partial award of 7 December 2009.[23] It had two alternative bases for doing so, and the way in which its arguments were framed directly called into question the correctness of *Eisenwerk*.

The first prong of Cargill International SA's attack on the partial award was an application for leave to appeal that award pursuant to the *Commercial Arbitration Act 1984* (NSW) section 38(4)(b).[24] The second (and alternative) prong of Cargill International SA's attack on the partial award was an application for an order of the Court that the partial award be set aside under article 34(2)(b)(ii) *Model Law 1985*,[25] which provides that an award 'may be set aside by the court … if … the court finds that … the award is in conflict with the public policy of this State [ie Australia]'.

It can therefore be seen that Cargill International SA's alternative claims for relief against the arbitrator's award were based on both the domestic arbitration legislation of New South Wales, and also Australia's international commercial arbitration legislation. In determining Cargill International SA's challenge to the partial award, Ward J was required to determine which of the two legal regimes in fact governed the arbitration as 'an initial jurisdictional question'.[26] This, in turn, required consideration of the *Eisenwerk* principle,

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[20] *Cargill International SA* [2010] NSWSC 887 (11 August 2010) [1].

[21] Ibid [2].

[22] Ibid [3].

[23] Ibid [8].

[24] See ibid [9]. It should be noted that the Parliament of New South Wales has recently enacted the *Commercial Arbitration Act 2010* (NSW) which came into force on 1 October 2010, repeals the 1984 legislation and establishes a new (domestic) regime for that state based on the *Model Law*.

[25] See *Cargill International SA* [2010] NSWSC 887 (11 August 2010) [10].

[26] Ibid [8].

given the arbitration clause on which the arbitration had been based in this case:

> In respect of matters which are to be referred to an Expert pursuant to the foregoing provisions of this clause 18 any appeals from the Experts [sic] decisions, and other disputes or claims arising out of or in connection with a Transaction and/or this Agreement, including any questions regarding its existence, validity or termination, *shall be referred to International Arbitration under the Rules of Arbitration of the International Chamber of Commerce* with any arbitration to be heard in Sydney in the English language before three arbitrators.[27]

B The Decision

In considering the issue of whether or not the parties had opted out of the *Model Law 1985* pursuant to the then *International Arbitration Act 1974* (Cth) section 21, the Court undertook its analysis in two stages.

1 The First Question — Is Adoption of Procedural Rules an Opting Out of the Model Law 1985?

First, the Court directly considered the question of whether adoption of a set of procedural arbitration rules constitutes an implied agreement to oust the *Model Law 1985* pursuant to the then *International Arbitration Act 1974* (Cth) section 21. In doing so it directly considered the correctness of *Eisenwerk*.

Ward J commenced analysis of this question by determining that an agreement to opt out of the *Model Law 1985* pursuant to the then *International Arbitration Act 1974* (Cth) section 21 may be either express or implied.[28] In this particular respect, her Honour was in agreement with the approach taken in *Eisenwerk*.[29] However, her Honour disagreed with the more controversial aspect of the *Eisenwerk* decision. In relation to the *Eisenwerk* principle, her Honour opined:

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[27] Clause 18.9 of the parties' contract, extracted in ibid [39] (emphasis added by the Court). It should be noted that, in the arbitration as actually conducted, the parties' dispute was heard by a sole arbitrator rather than three arbitrators (by agreement of the parties). See ibid [40], though nothing turns on this point for the purposes of this case note's analysis.

[28] Ibid [37].

[29] See ibid — '[t]o the extent that *Eisenwerk* … is authority for the proposition that the relevant opt out agreement can be one which is an implied agreement, then I would not conclude that it was plainly wrong.'

> *Eisenwerk* stands as authority for the proposition that, by expressly adopting a different 'form of arbitration' (there, that being the *ICC Rules*), parties will be taken to have shown a sufficient intention not to adopt the form or system of arbitration provided for under the *Model Law* (and that this is sufficient to amount to an opt-out agreement for the purposes of the Commonwealth Act).[30]

The Court did expressly note the deference which must be accorded by it to decisions of the Queensland Court of Appeal,[31] however ultimately held that the reasoning employed in *Eisenwerk* was plainly wrong and should not be followed.

Ward J noted that the reasoning underlying the *Eisenwerk* decision was based on a number of premises:

> What was the reasoning underlying the conclusion in *Eisenwerk*? Although reference was made by Pincus JA, first, to the perceived high level of inconvenience which would follow from a result that the parties are bound to both a *Model Law* arbitration and to an ICC arbitration; secondly to the fact that the former would not be an arbitration under the aegis of an established international organization, as the latter would be; and, thirdly, to the fact that the *Model Law* had not then been widely adopted, the basis for the conclusion that there had been an implied opting out of the *Model Law* was the perceived inconsistency and irreconcilability as between the provisions of the *Model Law* and those of the *ICC Rules*.[32]

In relation to the three 'peripheral or background matters', the Court noted:[33]

- first, that 'the perceived inconvenience … is overstated' given that many of the *Model Law 1985's* provisions are default provisions and thus 'there is no reason why the two systems could not operate together';

- second, that this matter was not relevant 'in pointing to the intention of the parties' on the matter under consideration; and

[30] Ibid [45]. This is a particularly interesting contrast to the interpretation of *Eisenwerk* given in *Wagners*, discussed in Part IV below.

[31] See *Cargill International SA* [2010] NSWSC 887 (11 August 2010) [48]–[53].

[32] Ibid [60].

[33] Ibid [61].

- third, 'apart from the question of how this would be relevant … the breadth of acceptance worldwide of the *Model Law* is now very different from that which was the case in 1999'.

Further, in relation to the principal basis for the *Eisenwerk* decision, the Court emphasised the difference between the law governing an international commercial arbitration (the *lex arbitri*) and any chosen procedural rules of arbitration.[34] After noting that 'the decision in *Eisenwerk* has been roundly criticised for policy reasons … and as to the perceived failure to recognise the distinction between the *lex arbitri* and the procedural rules governing arbitration',[35] Ward J noted that such criticism 'confirms the view I would in any event have formed … that there is a distinction between adoption of procedural rules and the application of the *lex arbitri* and that since the *Model Law* … permits the adoption of rules other than those for which it would in default of an alternative choice have provided, the choice by the parties of the *ICC Rules* to apply in their arbitration would not of itself constitute an opting out of the *Model Law*'.[36]

In its conclusion on the first question the Court held that the parties, 'simply by referring their disputes to arbitration under the *ICC Rules*', had not 'impliedly opted out of the *Model Law*'.[37] While adverting to the fact that the language used in the arbitration agreements in both *Cargill International SA* and *Eisenwerk* differed[38] and that it was 'possible' to reach this conclusion 'simply by distinguishing the facts' in the two cases, since *Eisenwerk's* reasoning appeared to have its basis in the fact that the *Model Law* and the *ICC Arbitration Rules* were incompatible, it seemed to Ward J 'that it is by no means clear that it can be distinguished in that fashion'.[39] Instead, Ward J held that:

> [I]nsofar as *Eisenwerk* is authority for the proposition that the adoption by the parties of procedural rules (such as the *ICC Rules*) to govern the conduct of the arbitration of their disputes amounts of itself to an implied agreement

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[34] Ibid [62]–[77].

[35] See ibid [78]; citations to the academic commentaries and critiques considered by the Court can be found at [80]–[82].

[36] Ibid [83].

[37] Ibid [87].

[38] The arbitration agreement in *Cargill International SA* indicated that disputes would be 'referred to' arbitration 'under' the *ICC Arbitration Rules*: see clause 18.9 of the parties' contract, extracted in ibid [39]. On the other hand, the arbitration agreement in *Eisenwerk* referred to disputes being 'finally settled, in accordance with' the *ICC Arbitration Rules*: see clause 13.1 of the parties' contract, extracted in *Eisenwerk* [2001] 1 Qd R 461, 465.

[39] *Cargill International SA* [2010] NSWSC 887 (11 August 2010) [88].

> to opt out of the *Model Law* … I have formed the view that that decision is plainly wrong and is one which should not be followed by this Court.[40]

2 The Second Question — Did Eisenwerk's Existence Affect the Objective Intentions of the Parties?

Second, the Court also considered the further question of whether the parties must have intended to oust the *Model Law 1985* by adopting an arbitration clause in the form that they did, in knowledge of the then existing state of the law (represented by the decision in *Eisenwerk*).

The Court approached this issue as a matter of pure contractual interpretation. Essentially, the argument of Cargill International SA was 'put on the basis that the proper construction of a contract is to be determined by what a reasonable person in the parties' position would have understood it to mean in the circumstances existing at the time of the contract's execution'[41] (which included the *Eisenwerk* case). The Court did suggest that, all other things being equal, 'experienced practitioners in the area of arbitration would have been well aware by 2005 [ie the time of executing the agreement] of the risk that, by reference to *Eisenwerk*, an adoption of the *ICC Rules* might lead to the conclusion that they had opted out of the *Model Law*'.[42] However, critically on this point, the Court held that the difference in wording between the clause used in *Eisenwerk* and the clause used in *Cargill International SA* compelled a different conclusion.[43] While in *Cargill International SA* the parties were '*referring* their disputes for arbitration under the *ICC Rules*', in *Eisenwerk* the parties were 'providing for the *settlement* of their disputes in accordance with those *Rules*'.[44] As this '(rather subtle) linguistic distinction'[45] was treated as being more than semantic and having potential substance,[46] the Court held that the parties had not excluded the *Model Law* pursuant to the then *International Arbitration Act 1974* (Cth) section 21 on this basis.

3 The Court's Decision on the Facts of the Case

On the basis of its analysis of these two questions, the Court concluded that there was no agreement between the parties, pursuant to the then *International*

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[40] Ibid [91].

[41] Ibid [92].

[42] Ibid [95].

[43] See ibid [108].

[44] Ibid [109] (emphasis added by the Court).

[45] Garnett and Nottage, 'The 2010 Amendments', above n 18, 6.

[46] See *Cargill International SA* [2010] NSWSC 887 (11 August 2010) [109].

Arbitration Act 1974 (Cth) section 21, to opt out of the *Model Law 1985*. This finding disposed of Cargill International SA's first alternative argument.[47] In relation to its second alternative argument based on the *Model Law 1985*, Ward J rejected the argument that there had been a denial of natural justice constituted by a failure of the arbitrator to deal with one of Cargill International SA's arguments, and therefore found that there was no infringement of Australian public policy[48] justifying interference with the partial award under article 34(2)(b)(ii) *Model Law 1985*.[49] Cargill International SA's application for relief against the arbitrator's partial award of 7 December 2009 was dismissed.[50]

C Comments

From an analytical point of view, perhaps the most interesting facet of Ward J's decision in *Cargill International SA* is the way in which her Honour approaches the similarities and differences of that case vis-à-vis *Eisenwerk*.

In relation to the first question considered by Ward J — whether the adoption of procedural rules constitutes an opting out of the *Model Law 1985* — her Honour drew express attention to the fact that distinguishing *Cargill International SA* and *Eisenwerk* on the basis of the different wording of their respective arbitration clauses was 'possible'.[51] However, in her Honour's opinion, it was 'by no means clear' that this distinction could be made (given the basis of the reasoning in *Eisenwerk*), thus requiring a decision by the Court on the correctness or otherwise of *Eisenwerk*.[52] On this first question, it appears that Ward J was of the opinion that *Cargill International SA* and *Eisenwerk* were not so different as to require the two cases to be distinguished.

However, when Ward J came to consider the second question — whether *Eisenwerk's* existence affected the objective intentions of the parties — a different approach was adopted. In this contractual interpretation context, her

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[47] Though the Court did go on to explain (by way of *obiter dicta*) that even if it had found the *Commercial Arbitration Act 1984* (NSW) applicable, an entitlement to relief would not have been made out: ibid [112]–[223].

[48] The *International Arbitration Act 1974* (Cth) s 19(b) clarifies that 'a breach of the rules of natural justice' in relation to the making of an award causes an award to be 'in conflict with the public policy of Australia'.

[49] See *Cargill International SA* [2010] NSWSC 887 (11 August 2010) [241].

[50] Ibid [252].

[51] See ibid [88].

[52] See ibid.

Honour was willing to distinguish *Cargill International SA* from *Eisenwerk* on the basis of the language used in their respective arbitration agreements.[53]

On one view, Ward J's analysis simply gave differing treatment to *Eisenwerk's* relevance to what are in reality two different legal issues. On another view, however, Ward J could be seen to (in effect) be holding *Eisenwerk* both indistinguishable and distinguishable at the same time. It remains to be seen how these questions will be approached by later cases. However, given her Honour's extensive (*obiter dicta*) treatment of the merits of Cargill International SA's case under the *Commercial Arbitration Act 1984* (NSW),[54] it is perhaps unlikely that this aspect of Ward J's decision will have any bearing on the ultimate outcome of the dispute between Cargill International SA and Peabody Australia Mining Ltd.

IV *WAGNERS* — THE QUEENSLAND COURT OF APPEAL'S DECISION OF 20 AUGUST 2010

Wagners was a decision of McMurdo P, Muir JA and White JA of the Queensland Court of Appeal, handed down on 20 August 2010 — a mere nine days after *Cargill International SA*. By way of a case stated, their Honours were asked to reconsider the *Eisenwerk* principle, which had originated from the Queensland Court of Appeal itself. The principal judgment was delivered by Muir JA, with McMurdo P and White JA[55] agreeing with Muir JA's answers to the questions posed.

A The Facts

The dispute before the Court in *Wagners* arose by way of a case stated for the Queensland Court of Appeal, pursuant to the *Uniform Civil Procedure Rules 1999* (Qld) rule 483.[56]

The facts, as they were presented in the case stated, can be succinctly put. A contract was entered into between Wagners Nouvelle Caledonie Sarl and Vale

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[53] See ibid [108].

[54] See ibid [112]–[223].

[55] White JA's judgment also offered some additional observations concerning the *Eisenwerk* decision – see *Wagners* [2010] QCA 219 (20 August 2010) [49], and the discussion in Part IV(B) below.

[56] *Wagners* [2010] QCA 219 (20 August 2010) [3].

Inco Nouvelle Caledonie SAS on 29 June 2005, which included an arbitration clause.[57] That clause provided as follows:

> Any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with and subject to the *UNCITRAL Arbitration Rules*. In the absence of an agreement by the parties to the appointment of an arbitrator, the appointing person shall be the National President of the Institute of Arbitrators and Mediators Australia (IAMA). The administrating body shall be [IAMA]. There shall be one arbitrator, the language of the arbitration shall be English, the place of the arbitration shall be Brisbane.[58]

Pursuant to this clause, Vale Inco Nouvelle Caledonie SAS initiated arbitral proceedings by issuing a notice of arbitration as required by the *UNCITRAL Arbitration Rules*,[59] and a dispute arose between the parties as to whether the *Model Law 1985* governed the arbitration.[60] This once again raised the issue considered in *Eisenwerk*.

Three distinct questions were put to the Queensland Court of Appeal in the case stated:

> Question (a): Whether clause 8.17 of the Contract between the Appellant and the Respondent ('the Litigants'), which relevantly provided '*any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with and subject to the UNCITRAL Arbitration Rules*', constituted, within the meaning of section 21 of the *International Arbitration Act 1974* (Cth) ('the Act'), an agreement between the Litigants '*that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law*' such that by the terms of section 21 the *Model Law* does not have any application to any part of the settlement of the dispute the subject of the arbitration between the Litigants …
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> Question (b): Whether the principle contained in paragraph 12 of [Eisenwerk], namely 'that, by expressly opting for one well known form of arbitration, the parties sufficiently showed an intention not to adopt or be

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[57] Ibid [4].

[58] Clause 8.17 of the parties' contract, extracted in ibid.

[59] *Arbitration Rules formulated by the United Nations Commission on International Trade Law*, adopted 28 April 1976. It is noted that the *UNCITRAL Arbitration Rules* have recently been revised, resulting in the publication of the (new) *Arbitration Rules formulated by the United Nations Commission on International Trade Law*, effective 15 August 2010 – however, it was the original 1976 version of the *UNCITRAL Arbitration Rules* in issue in *Wagners*.

[60] *Wagners* [2010] QCA 219 (20 August 2010) [4].

> bound by any quite different system of arbitration, such as the Model Law' ('the Eisenwerk [p]rinciple'), is distinguishable from the facts of this case, by reason of the adoption by the Litigants of the UNCITRAL Arbitration Rules rather than the [ICC Arbitration Rules] …
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> Question (c): If the answer to question (b) is 'no', whether the *Eisenwerk* [p]rinciple was correctly decided …[61]

The parties' motivation in seeking to have these questions decided by the Court of Appeal appears from the judgment to be that 'a binding and authoritative determination by the Court of Appeal as to the applicable supervisory law is essential to the efficacious conduct of the arbitration in respect of the underlying dispute [with it being] important for [the parties] to know at an early stage of the arbitration their rights of judicial review of any award of the [a]rbitrator'.[62] The contention that the parties had exercised their right under the then *International Arbitration Act 1974* (Cth) section 21 to opt out of the *Model Law 1985* had been put forward by Wagners Nouvelle Caledonie Sarl in this case.

B The Decision

The Court's ultimate decision on the questions in the case stated can be summarised as follows:

- in relation to question (a), concerning the issue of whether the parties' arbitration agreement excluded the *Model Law 1985*, the Court answered 'no';
- in relation to question (b), concerning whether the *Eisenwerk* principle was distinguishable on the basis that the *UNCITRAL Arbitration Rules* had been chosen by the parties rather than the *ICC Arbitration Rules*, the Court indicated that it was 'inappropriate to answer this question'; and
- in relation to question (c), concerning whether the *Eisenwerk* principle was correctly decided (should the answer to question (b) be 'no'), the Court indicated that 'no answer to this question is required' given the answer to question (b).[63]

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[61] Ibid [1] (emphasis in the original).

[62] Ibid [4] (paragraph [17] of the facts upon which the case was stated).

[63] Ibid [1].

While this disposed of the issues in dispute for the parties, what is most interesting about *Wagners* is the Court's reasoning, the way in which it interpreted *Eisenwerk*, and the ways in which these matters differed from the approach taken in *Cargill International SA*.

It is clear from the judgment of Muir JA that the Court would have ideally liked to approach the case more squarely on the basis of contractual interpretation. Muir JA noted, before moving on to consider the three questions raised by the case stated, several key principles of contractual construction, including that:

- the task involves ascertaining the objective intentions of the parties;
- commercial contracts should be given commercially sensible interpretations; and
- in both cases, the surrounding circumstances have importance.[64]

After doing so, Muir JA noted the 'curious feature' of the case stated, namely the fact that 'nothing is disclosed concerning the parties, the background to the [c]ontract, let alone its terms and conditions' — this leading his Honour to note that the Court's task was 'of a somewhat unusual and sterile nature'.[65]

1 Question (a) of the Case Stated

Muir JA did return to the issue of contractual interpretation in dealing with question (a) of the case stated. His Honour noted that whether or not the parties have opted out of the *Model Law 1985* pursuant to the then *International Arbitration Act 1974* (Cth) section 21 is a matter of interpreting their arbitration agreement — and that the role, construction or categorisation of the *Model Law 1985* as well as Parliament's intentions (where they do not find expression in the clear language of the then section 21) are largely irrelevant.[66]

Muir JA was of the opinion that '[a] reasonable person with the attributes of the parties would have been aware that the [*UNCITRAL Arbitration Rules*] and the *Model Law* were capable of operating together', in light of the 'wealth of commentary and other materials' available.[67] Referring to article 1(2)

[64] Ibid [25].
[65] Ibid [28].
[66] Ibid [31].
[67] Ibid [33].

UNCITRAL Arbitration Rules,[68] and articles 19,[69] 2(d)[70] and 2(e)[71] *Model Law 1985*, the Court drew attention to the fact that the two bodies of rules were capable of effective interaction and that these four provisions 'operate to prevent conflict between the two'.[72] Against these considerations, the Court found that the parties had not excluded the *Model Law 1985's* operation — though it did suggest (by way of *obiter dicta*) that a different result could conceivably be reached even in the case of an arbitration agreement similar to the one concluded by the parties, if such a construction was compelled by 'indications elsewhere in the agreement, or in the background to the agreement … or [where] the expressly adopted rules [are] so incompatible with the provisions of the *Model Law* as to compel the inference that the parties intended to exclude it'.[73] Question (a) of the case stated was thus answered 'no'.[74]

2 Questions (b) and (c) of the Case Stated

In dealing with questions (b) and (c) of the case stated, Muir JA took a markedly different approach to the *Eisenwerk* decision from that taken by Ward J in the Supreme Court of New South Wales. Muir JA held that '[w]hat is said to be "the principle contained in paragraph 12" of *Eisenwerk* is, in truth, no principle at all [but] is a conclusion as to the contractual intention of particular parties in particular circumstances'.[75] Muir JA therefore treated the contentious finding in *Eisenwerk* as establishing not a point of law, but as being a finding of fact in the circumstances of that case. Given the 'significant differences' between the *ICC Arbitration Rules* and the *UNCITRAL Arbitration Rules*, and that the *UNCITRAL Arbitration Rules* and the *Model*

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[68] Art 1.2 *UNCITRAL Arbitration Rules* provides that '[t]hese Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.'

[69] Art 19 *Model Law 1985* provides that the parties may agree on the procedure to be followed by the arbitral tribunal, and reserves a residual discretion to the arbitral tribunal over matters of procedure where the parties have not reached such an agreement (or reached an agreement on a particular procedural point in issue).

[70] Art 2(d) *Model Law 1985* provides that 'where a provision of this Law, except [A]rticle 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination'.

[71] Art 2(e) *Model Law 1985* provides that 'where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement'.

[72] *Wagners* [2010] QCA 219 (20 August 2010) [40].

[73] Ibid [41].

[74] Ibid.

[75] Ibid [42].

Law 1985 were intended by UNCITRAL (the body promulgating both) to work together, it was found that '[t]he decision in *Eisenwerk* is … plainly distinguishable.'[76]

This approach to *Eisenwerk* was further emphasised by Muir JA when pointing out that a court's construction of a contractual provision in one case 'should rarely be regarded as propounding generally applicable principles of law'.[77] Indeed, Muir JA adverted to the fact that even identically worded contracts can be construed differently if the parties and surrounding circumstances in two cases differ.[78] Muir JA also alluded to the fact that identically worded provisions can be given differing meanings over time where relevant circumstances change — noting as an example the fact that at the time *Eisenwerk* was decided 19 countries had adopted the *Model Law 1985*, while at the time *Wagners* was decided the number of countries that had adopted the *Model Law* had grown to over 60.[79]

Interestingly (given current developments in the Australian international commercial arbitration environment), Muir JA quoted Lord Macmillan in *Read v J Lyons & Co Ltd*,[80] to the effect that the judiciary's task is to decide the case before it and not 'to rationalize the law of England', with '[t]hat attractive if perilous field … left to other hands to cultivate'.[81] Indeed, as is discussed in Part V below, these 'other hands' (being Parliament) have recently considered *Eisenwerk* as part of a review of the *International Arbitration Act 1974* (Cth).

In light of this analysis, Muir JA found that it was inappropriate to answer question (b) of the case stated; and that question (c), which was conditional upon question (b) being answered 'no', did not require an answer.[82] Most interesting, to reduce the decision in *Wagners* to its essence, while finding that

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[76] Ibid [46].

[77] Ibid [43].

[78] Ibid.

[79] Ibid [44]. It should be noted for completeness that this statistic, reflected in materials available on the UNCITRAL website — see UNCITRAL, *Status 1985 – UNCITRAL Model Law on International Commercial Arbitration* (2010) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> — refers to countries which have enacted legislation based on either the original *Model Law 1985* or the *Model Law 1985* as amended on 7 July 2006. This point was not noted by the Court, but, given that relatively more countries have adopted the original *Model Law 1985* (and today, still more than the 19 mentioned in *Eisenwerk*), it does not substantially affect the point made.

[80] [1947] AC 156.

[81] Ibid 175.

[82] *Wagners* [2010] QCA 219 (20 August 2010) [47].

the factual conclusion reached in *Eisenwerk* need not be reached on its particular facts, the Queensland Court of Appeal was clearly not of the opinion[83] that *Eisenwerk* itself had been wrongly decided.

3 The Additional Observations of White JA

Before moving on from *Wagners*, it is interesting to note that White JA was willing to offer some further comments on *Eisenwerk*. White JA suggested that, given that the so-called *Eisenwerk* principle 'continues to be cited in isolation from the facts, issues and arguments in the case, it does require some revisiting'.[84] White JA suggested that she was in agreement with the observation in the arbitrator's interim award that *Eisenwerk* 'cannot properly be understood as meaning' that '[a] mere agreement of the parties to adopt, or adapt, any arbitral procedural rules necessarily, or in all circumstances, leads to the legal conclusion that the parties have [opted out of the] *Model Law*'.[85] White JA also adverted to the fact that it appeared the Court in *Eisenwerk* had 'failed to grapple with the distinction between the *lex arbitri* … and the procedural rules adopted by the parties for the arbitration proper'.[86] Her Honour suggested that the *Model Law 1985* 'can sit harmoniously' with the dichotomy between the *lex arbitri* and procedural arbitration rules.[87] However, in her Honour's ultimate decision, White JA agreed with the answers given to the case stated questions by Muir JA,[88] and her Honour's additional comments (not being reflected in the reasoning in Muir JA or the judgment of McMurdo P) constitute *obiter dicta* only.

C Comments

The greatest practical relevance of *Wagners* lies in its potential implications for future cases, following its characterisation of the *Eisenwerk* principle as a factual determination.

As is evident from the Court's reasoning, and its answer to question (a) of the case stated, characterisation of the *Eisenwerk* principle as a factual determination allowed the later Queensland Court of Appeal to reach a contrary factual determination in a case involving the *UNCITRAL Arbitration*

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[83] Unlike Ward J of the Supreme Court of New South Wales in *Cargill International SA*.

[84] *Wagners* [2010] QCA 219 (20 August 2010) [50].

[85] Ibid [51].

[86] Ibid [52].

[87] Ibid.

[88] Ibid [56].

Rules, as opposed to the *ICC Arbitration Rules* which were in issue in *Eisenwerk*.

However, aspects of the Court's reasoning suggest that its implications may go even further — and may allow a court subsequently seized of a case involving an indistinguishably worded arbitration agreement to come to a decision at odds with *Eisenwerk* without having to find that it was incorrectly decided. This can be seen in Muir JA's suggestion that '[w]ith the passage of time, circumstances may change so that a provision in a contract worded identically to a provision in a contract construed by a court some time before, may need to be construed differently'.[89] Muir JA gives (as a specific example of a possibly changing circumstance) the increase in usage of the *Model Law 1985* so that it has come from being 'something of a novelty to a common practice'.[90] If a court in a later case (otherwise indistinguishable from *Eisenwerk*) found this changing circumstance to be of importance, it may be that the court could draw upon this passage of Muir JA's judgment in order to avoid the result which eventuated in *Eisenwerk* without having to overrule *Eisenwerk* itself.

V *EISENWERK* — NOW AN ANSWERED QUESTION?

The handing down of the judgments in *Cargill International SA* and *Wagners* is particularly timely because, in addition to *Eisenwerk* being reconsidered by the courts, *Eisenwerk* has also been recently reconsidered by the legislature.

The Commonwealth Attorney-General launched a review of the *International Arbitration Act 1974* (Cth) on 21 November 2008,[91] and released a Discussion Paper[92] identifying nine questions to be considered as part of the review. One

[89] Ibid [44].

[90] Ibid.

[91] See generally Australian Government – Attorney-General's Department, *Review of International Arbitration Act 1974* (2010) <http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_ReviewofInternationalArbitrationAct1974>.

[92] See Australian Government – Attorney-General's Department, *Review of the International Arbitration Act 1974 – Discussion Paper* (2008) <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Review+of+the+International+Arbitration+Act+1974+-+Discussion+Paper.pdf/$file/Review+of+the+International+Arbitration+Act+1974+-+Discussion+Paper.pdf>.

of those questions, 'Question D', asked whether 'the *International Arbitration Act* [should] be amended to reverse the *Eisenwerk* decision'.[93]

After receiving a number of submissions supporting amendment of the *International Arbitration Act 1974* (Cth) in this respect,[94] the Commonwealth Government introduced the International Arbitration Amendment Bill 2009 (Cth) into Federal Parliament on 25 November 2009. As eventually passed,[95] the amending legislation substituted a new *International Arbitration Act 1974* (Cth) section 21[96] which now provides:

> If the *Model Law* applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.

This new provision makes clear that international commercial arbitrations in Australia are now exclusively governed by the *Model Law* framework. Under the new *International Arbitration Act 1974* (Cth) section 21, it is no longer possible for parties to opt out of the *Model Law*. It is therefore not possible for the operation of the various state or territory Commercial Arbitration Acts to be enlivened (as an alternative to the Model Law), given that they will now always be displaced, in the case of international commercial arbitration, by the *Commonwealth Constitution* section 109. The new section 21, by replacing the old *International Arbitration Act 1974* (Cth) section 21, has as one of its purposes the legislative reversal of *Eisenwerk*.[97] It came into force

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[93] See ibid [D]. In a recent article, Nottage and Garnett place the *Eisenwerk* issue amongst the top 20 law reform issues relating to international arbitration in Australia: see Nottage and Garnett, 'Top 20 Things to Change', above n 18, 24–25.

[94] See, eg, Australian Centre for International Commercial Arbitration, *ACICA's Submission – Attorney-General's Review of the International Arbitration Act 1974* (2008) 10; Australasian Forum for International Arbitration, *Review of the International Arbitration Act 1974 (Cth): Submissions of the Australasian Forum for International Arbitration* (2009) 5; Chartered Institute of Arbitrators, *Comments and Submissions upon a Review of the International Arbitration Act, 1974* (2009) 8; Australian National Committee of the International Chamber of Commerce, *Review of the International Arbitration Act 1974* (2009) 2; Bruno Zeller, *Review of the International Arbitration Act 1974 – Discussion Paper* (nd) 1. Submissions made to the review can be accessed at Australian Government – Attorney-General's Department, above n 91.

[95] As the *International Arbitration Amendment Act 2010* (Cth); it should be noted that the new *International Arbitration Act 1974* (Cth) s 21 was amended during its passage through Parliament.

[96] See *International Arbitration Amendment Act 2010* (Cth) s 3 & Sch 1, cl 16.

[97] See *Revised Explanatory Memorandum, International Arbitration Amendment Bill 2010* (Cth) 16 [113].

on 6 July 2010, the date upon which the amending legislation received royal assent.[98]

It can therefore be seen that as of 6 July 2010, the continuing relevance of *Eisenwerk* is an answered question. However, in the wake of *Cargill International SA* and *Wagners*, its authority concerning international commercial arbitrations conducted pursuant to arbitration agreements entered into before that date[99] remains unclear. While the Supreme Court of New South Wales in *Cargill International SA* unambiguously rejected the *Eisenwerk* reasoning, the Queensland Court of Appeal in *Wagners* characterised the decision in *Eisenwerk* as being one of fact and (while coming to a different conclusion on the facts of *Wagners*) did not go so far as to suggest that *Eisenwerk* was decided incorrectly. Given the arrangements with respect to the temporal applicability of the *International Arbitration Amendment Act 2010* (Cth),[100] the 'uncertainty' following *Cargill International SA* and *Wagners* 'will persist for some time'.[101]

VI CONCLUSION

The handing down of two state court decisions on a now repealed legislative provision may not seem, on its face, to be of great significance. However, viewing the decisions of the Supreme Court of New South Wales in *Cargill International SA* and the Queensland Court of Appeal in *Wagners* in this way is to ignore their true importance.

The important implications of the *Cargill International SA* and *Wagners* decisions can be seen in the facts that:

- both cases were handed down within nine days of each other;

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[98] See *International Arbitration Amendment Act 2010* (Cth) s 2(1), item 8. As to the temporal application of the new *International Arbitration Act 1974* (Cth) s 21, see Garnett and Nottage, 'The 2010 Amendments', above n 18, 13–16.

[99] It is noted that questions have been raised as to the effect of the *International Arbitration Act 1974* (Cth) s 30 on the date upon which certain provisions amended pursuant to the *International Arbitration Amendment Act 2010* (Cth) become effective. See generally Garnett and Nottage, 'The 2010 Amendments', above n 18, 13–16.

[100] See generally the *International Arbitration Amendment Act 2010* (Cth) ss 2(1) & 3; Sch 1, Pt 2.

[101] Garnett and Nottage, 'The 2010 Amendments', above n 18, 7.

- the New South Wales Supreme Court and the Queensland Court of Appeal both took very different approaches in their reconsideration of the *Eisenwerk* case;

- Ward J in the New South Wales Supreme Court was willing to decide that *Eisenwerk* was plainly wrong and should not be followed by the courts in that State;

- the Queensland Court of Appeal was willing to come to a different decision from the one in *Eisenwerk* on the facts of the case before it, but unlike Ward J was not prepared to decide that *Eisenwerk* was wrongly decided given that (in its opinion) the *Eisenwerk* principle was in truth only a factual determination; and

- despite legislative intervention in the form of a new *International Arbitration Act 1974* (Cth) section 21, the old section 21 (considered in *Eisenwerk*) will continue to apply to international commercial arbitrations conducted pursuant to arbitration agreements concluded before 6 July 2010.

Eisenwerk has been a controversial decision in Australia over the last decade, and after the different approaches taken to its reconsideration in *Cargill International SA* and *Wagners*, its ripple effects may continue to be felt for some time.