

Review of the International Arbitration Act 1974

Submission in response to the Discussion Paper of November 2008

**C L I F F O R D
C H A N C E**

Introduction

Any review of the International Arbitration Act 1974 (the "**Act**" or the "**International Arbitration Act**") must begin with an analysis of the fundamental principles which the Australian legislature wish to embody in the legislation. It is only once these principles have been identified that a more systematic review of the constituent parts of the legislation can begin. In essence, these principles will form the backbone of the legislation, and for our purposes, the pilot for review. It goes without saying that the specific provisions of the legislation cannot, and should not, be inconsistent with the fundamental principles of the legislation.

In this context, one central question which the Australian legislature must address is the role that they wish the courts to play in the arbitral process. It is worthy of note that English arbitration law provides, as a matter of principle, that the courts will adopt a supportive, non-interventionist approach to arbitration. This principle has shaped much of the English Arbitration Act 1996 (the "**English Act**"), and it would similarly shape much of the revised International Arbitration Act. There is much to commend a non-interventionist approach. The parties have of course chosen arbitration as the means for resolving their dispute and undue court interference is directly inconsistent with, and necessarily frustrates this choice. As was stated in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* ("**Comandate**"):¹

"it may be of no, or little, comfort for such parties to be assured that any particular forum is reliable and otherwise satisfactory (as the case may be). It was not what was agreed. If parties can be forced to submit to fora different to those which they have chosen, a significant unstable variable is introduced into the performance of the international bargain - the uncertainty as to the legal system and the law to govern an international dispute, including doubts about venue and departure from what may be familiar procedures, or at least procedures in which they have sufficient confidence to agree as those to govern the resolution of any dispute".

It is critical that the Australian legislature codify the degree to which the courts may intervene in and/or interfere with the arbitral process.

It is self-evident from the passage above that international arbitration has a pivotal role to play in international commerce. Australia harbours ambitions of not only becoming a centre of international commerce, but also a centre for arbitration. It is critical therefore that the legal profession, including the judiciary, are well equipped to deal with the exigencies and nuances of the arbitral process, and become well versed with the solutions to real arbitral problems. An amended International Arbitration Act would certainly aid this process.

As arbitration practitioners with an Australian background, we are delighted to be providing our comments to the Discussion Paper of November 2008. As London-based practitioners, much of our submission draws reference to English arbitration law. As a common law jurisdiction with a developed and extensive body of arbitration law, we feel that the English system provides a useful benchmark and cannon for comparison.

¹ [2006] FCAFC 192, para 192.

Additionally, and as the Discussion Paper invites us to do, we draw reference to the UNCITRAL Model Law itself ("**Model Law**"), both in its original form and as revised in 2006. We also consider, where appropriate, the Singaporean International Arbitration Act 1994 (the "**Singapore Act**") and the Hong Kong Arbitration Ordinance (Chapter 341) (the "**Hong Kong Act**"), as both Singapore and Hong Kong have adopted the Model Law and seek to be arbitration centres in the Asia-Pacific region.

Finally, we consider the New Zealand Arbitration Act 1996 ("**New Zealand Act**"), New Zealand being another State that has adopted the Model Law, as well as the recent innovative amendments made to that Act in 2007, particularly the amendments incorporating the revised Model Law provisions on interim measures, and the amendments to the provisions on confidentiality.

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A. Meaning of the "writing" requirement in Part II of the Act

- (i) ***Should the meaning of the writing requirement for an arbitration agreement, in Part II of the International Arbitration Act (subsection 3(1)) be amended?***
- (ii) ***If so, should elements of the amended writing requirement in article 7 (option I) of the UNCITRAL Model Law, as revised in 2006, be used in the amended definition?***

RECOMMENDATION:

We recommended that ss 3(1) of the International Arbitration Act be amended to incorporate Article 7 (Option I) of the UNCITRAL Model Law, as revised in 2006.

DISCUSSION:

The need for the "writing" requirement

In order to ascertain whether the writing requirement in the International Arbitration Act should be amended, it is worth recounting why there is a writing requirement in the first place. The reason, of course, is that the agreement to arbitrate is a significant step for the parties to take. This agreement, which in essence excludes the jurisdiction of national courts, must therefore be clearly established.

It follows that the definition for *whether* an arbitration agreement has been clearly established must itself be delineated with sufficient clarity.³ Any definitional ambiguity would shroud the determination with uncertainty. This may lead to challenges and problems at both the jurisdictional stage and the enforcement stage of arbitral proceedings.⁴

The writing requirement in the International Arbitration Act currently lacks the necessary degree of clarity, both in commission and omission:

- (i) Firstly, outside of the specific examples given, the definition in the International Arbitration Act provides no guidance as to the form which a written arbitration agreement may take. The words "*shall include*" in Article II.2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**" or the "**Convention**") indicate that the examples of the form requirements given (i.e. the signature of the parties or the exchange of documents) are not exhaustive. However, little guidance is given to a court or tribunal faced with a particular agreement which falls outside of the specific examples given. Some further guidance was given in *Comandate* where the Federal Court indicated that the writing requirement may be satisfied by clear, mutual documentary exchange showing the terms of, and the parties' assent to, the arbitration agreement. Though this formulation still requires the exchange of documents.

³ It is worth noting that traditionally, an arbitration agreement would be established by a document with the signature of the parties, or by the mutual exchange of documents.

⁴ One of the grounds for refusing to recognise and/or enforce an award, both in the New York Convention and in the Model Law, is the existence and/or validity of an arbitration agreement.

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- (ii) Secondly, notwithstanding that the Convention provides a non-exhaustive list of the ways in which an arbitration agreement may be deemed to be "*in writing*", the specific examples given do not take full account of developments in technology. The Convention, and thus the Act, is silent for example, on whether information contained in electronic communications would satisfy the writing requirement.

Article 7 (Option I)

In our view, providing examples of the ways in which an arbitration agreement may be "*in writing*" would necessarily be inadequate. On the other hand, it could be said that the wide formulation in Article 7(3) of the revised Model Law (Option I) may lead to uncertainty. Article 7(3) provides that:

*"an arbitration agreement is in writing if its content is recorded **in any form**, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."* (emphasis added)

Although there may be some concerns as to the far-reaching scope of this provision, on balance, it is our view that it reflects the commercial realities of any given situation that might arise. Coupled with the non-exhaustive list of examples of written agreements provided in Articles 7(4) to (6), it is our view that the revised Article 7 of the Model Law provides the only viable alternative in today's modern society, particularly given the fast pace in which technology is constantly changing.

It is evident that having a wide definition of the "*writing requirement*" was not a concern for the English legislature. Indeed s 5(6) of the English Act provides that "*references in this Part to anything being written or in writing include **its being recorded by any means***" (emphasis added). The critical words "*its being recorded by any means*" are of significant width, and are comparable with the formulation in Article 7(3) of the Model Law (Option I). Commentators have noted that "*such a wide definition would seem to include all forms of electronic transmission and communication, and will almost certainly embrace a sound recording*".⁵ As the Departmental Advisory Committee on Arbitration Law noted in its report on the Arbitration Bill (the "**DAC Report**"):⁶

"it seems to us that English law as it stands more than justifies this wide meaning; see, for example, Zambia Steel v James Clark⁷. In view of rapidly evolving methods of recording we have made clear that "writing" includes recording by any means."

Whilst the International Arbitration Act should therefore be amended to provide courts and tribunals with clear principles which would facilitate their determination of the satisfaction of the writing requirement, the Australian legislature should be wary of adopting principles which simply have the effect of limiting the definition. On one view, the Federal Court did just this in *Comandate* by stipulating the requirement for an exchange of documents between the parties.

⁵ Bruce Harris, Rowan Planterose & Jonathan Tecks, *The Arbitration Act 1996 - A Commentary*, (4th edition, 2007), 69.

⁶ DAC Report, para 34.

⁷ [1986] 2 Lloyd's Rep 225.

Moreover, it may be that an amendment that is limited in scope might soon be inhibited by technological developments which force further amendments to the Act. In consequence, it is our view that Article 7 (Option I) of the Model Law (as revised) should be incorporated in any amendments to the Act.

Article 7 (Option II)

It is self-evident from these reasons that the adoption of Option II alone would be insufficient. Firstly, there is no "*writing requirement*" within Option II. This has little to commend it. An agreement to arbitrate is of such significance that it must be easily recognisable in some form. It is an agreement "*in writing*" that is the best form of such evidence.⁸ Secondly, and as discussed above, it is of pivotal importance that the International Arbitration Act provide some form of guidance to the members of the legal profession, including the judiciary, on *whether* an arbitration agreement is in existence. Option II merely describes what an arbitration agreement is; it does not elucidate whether one is in existence.

Review of the UNCITRAL Arbitration Rules

It is pertinent to note that a Working Group of UNCITRAL, which is tasked with a revision of the 1976 UNCITRAL Arbitration Rules, has agreed to delete the writing requirement contained in Article 1(1) of the rules. They did so on the grounds that the form of the arbitration agreement is a matter that should be left to the applicable law and that the retention of that requirement would create difficulties in those States that had deleted any such requirement in their legislation.⁹

Conclusion

For the reasons highlighted, we express a preference for the inclusion in the revised International Arbitration Act of Option I, and not Option II, as the former provides a broad interpretation of the writing requirement which, on balance, reflects prevailing commercial realities.

⁸ As recognised by Lawrence Boo (Deputy Chairman of SIAC), 'The writing requirement - Is there really a new for change' (2008) 4 *Singapore Arbitrator* 2, 2-3

⁹ See, A/CN.9/619 - Report of Working Group II (Arbitration and Conciliation) on the work of its forty-sixth session, 7-8, paras 25-31, p7-8, and A/CN.9/646 - Report of Working Group II (Arbitration and Conciliation) on the work of its forty-eighth session, 16, para 71.

B. Grounds on which a court may refuse to enforce a foreign arbitral award

Should the International Arbitration Act be amended to provide expressly that a court may refuse to recognise and enforce an arbitral award only if one of the grounds listed in subsections 8(5), 8(7) or 8(8) is made out?

RECOMMENDATION:

We recommend that the International Arbitration Act be amended to provide expressly that a court may refuse to recognise and enforce an arbitral award only if one of the grounds listed in ss 8(5), 8(7) or 8(8) is satisfied.

DISCUSSION:

Section 8 of the International Arbitration Act

It appears from the wording of s 8 that a court has a discretion whether or not to recognise or enforce a foreign arbitral award. That discretion may permit the court to refuse to recognise or enforce a foreign arbitral award on grounds other than those listed in ss 8(5), 8(7) or 8(8). Section 8(2) provides:

*"Subject to this Part, a foreign award **may** be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory."* (emphasis added)

There do not appear to be any words in the remainder of s 8 that limit this discretion. In particular, neither ss 8(5), 8(7) or 8(8) state that the grounds listed therein are the **only** grounds upon which the recognition or enforcement of an award may be refused.

This approach to the recognition and enforcement of foreign arbitral awards is contrary to the explicit terms of the New York Convention as well as international practice. There is no general discretion in the Convention as to the recognition and enforcement of awards. Article III provides:

*"Each Contracting State **shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.** There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."* (emphasis added)

A court has a discretion to refuse to recognise or enforce an award if one of the grounds listed in Article V is satisfied, but it does not have a general discretion not to recognise and enforce an award for any other reason. Article V provides:

*"1. **Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the***

competent authority where the recognition and enforcement is sought, proof that ... [the article goes on to list the grounds for challenge]

2. **Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that [the subject matter was not arbitrable or the award was contrary to public policy].**" (emphasis added)

The grounds listed in Article V are exhaustive, i.e. they are the only grounds upon which an award may be refused recognition or enforcement.¹⁰

Comparison with the English Act

Section 8 of the International Arbitration Act may be contrasted with ss 101 and 103 of the English Act, which apply to the recognition and enforcement of awards made in a territory of a State which is a party to the New York Convention. Section 101(1) provides that a "New York Convention award **shall** be recognised as binding on the persons as between whom it was made" (emphasis added). Whilst s 101(2) provides that a "New York Convention award **may**, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect" (emphasis added), s 103 clearly limits any discretion of the court to do so. Section 103(1) provides:

"Recognition or enforcement of a New York Convention award **shall not be refused except in the following cases.**" (emphasis added)

Subsections (2) and (3) go on to set out the grounds listed in Article V.1 and V.2 of the New York Convention.

It is the absence of this limitation in s 8 of the Act that may have led to the confusion which is evident in the decision of the Queensland Supreme Court in *Resort Condominiums International Inc v Bolwell and Another*¹¹ ("*Resort Condominium*"). Having looked at the issue as to whether or not the "award" in that case was an award that could be recognised under the New York Convention (and indeed there is a strong argument that it was not),¹² Lee J looked at the issue of recognition and enforcement under the Act and the Convention. His Honour expressly acknowledged the difference in wording between s 8 of the International Arbitration Act and Article V of the Convention:¹³

"There are differences between the opening words of s 8(5) and Article V(1). In the latter case, recognition and enforcement of an award may be refused only if the party

¹⁰ David St John Sutton, Judith Gill & Matthew Gearing, *Russell on Arbitration*, (23rd Edition, 2007) ("**Russell on Arbitration**") 462 and Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration*, (4th Edition, 2005) ("**Redfern and Hunter**") 444-446.

¹¹ [1995] 1 Qd R 406.

¹² For a discussion of whether the "award" was an award or order, see Michael Pryles, 'Interlocutory Orders and Convention Awards: The Case of *Resort Condominiums v Bolwell* [1994] *Arbitration International* 385; Matthew Secombe, 'Shades of Delocalisation - Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore' (2000) 17(5) *Journal of International Arbitration* 123, 136-137 ("**Secombe**"); and Redfern and Hunter, 335.

¹³ [1995] 1 Qd R 406, 426.

against whom it is sought "furnishes proof" to the competent authority (i.e. the Court) on one or more of the matters contained in that Article, whereas in s 8(5), enforcement may be refused "if that party proves to the satisfaction of the court" one or more of the matters contained in the subsection." (emphasis included)

Having considered the parties' submissions, Lee J went on to state:¹⁴

"It may also be thought that the omission of the word "only" from the opening words of s 8(5) of the Act, when compared with the opening words of Article V of the Convention, is a further pointer to the existence of a residual discretion. I conclude that Mr North's submissions are correct, namely that a general discretion exists whether to enforce a foreign award, although the general rule is that a valid foreign award is usually enforced if all the conditions are satisfied."

In reaching this conclusion, Lee J relied upon a decision of Kerr J of the English High Court in *Dalmia Cement v National Bank of Pakistan*.¹⁵ In that case, Kerr J was applying Part II of the Arbitration Act 1950 (UK) which related to the enforcement of awards under the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. Not only was that decision applying a different convention but it was also applying the law applicable in England prior to the enactment of the Arbitration Act 1975. The latter gave legislative effect to the New York Convention in England.

In contrast to s 8 of the International Arbitration Act, s 3 of the Arbitration Act 1975 provided that "a Convention award shall, subject to the following provisions of this Act, be enforceable", whilst s 5 provided that "enforcement of a Convention award **shall not be refused except in the cases mentioned in this section**"(emphasis added).

Sections 3 and 5 of the Arbitration Act 1975 were incorporated into ss 101 and 103 respectively of the English Act. It is now beyond doubt that in England the courts do not have a residual discretion to refuse to recognise and/or enforce an award. An English court can only refuse to recognise and/or enforce an award upon one of the grounds specified in s 103. As stated in *Russell on Arbitration*:

*"As stated above, subject to production of the required documents **the court has no discretion but to recognise and enforce a New York Convention award unless the party opposing the enforcement proves one or more of the grounds specified in s.103 of the Arbitration Act 1996**. These grounds of refusal are exhaustive, and if none of the grounds is present the award will be enforced. ... The onus of proving the existence of a ground rests upon the party opposing enforcement, but that may not be the end of the matter. The court also has a discretion to refuse enforcement where one or more of the grounds are made out. **That discretion is not to be exercised arbitrarily** however because the word "may" in s.103(2) is intended to refer to the corresponding word in the New York Convention. **In any event the discretion is not open ended** and should only be exercised where "despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost by, for example, another agreement or estoppel", or where there are*

¹⁴ Ibid, 427.

¹⁵ [1975] Q.B. 9.

circumstances "which might on some recognisable legal principles affect the prima facie right to have an award set aside arising in cases listed in s.103(2)".¹⁶ (emphasis added)

Comparison with the New Zealand Act

It is interesting to note that the recent amendments to the New Zealand Act have included a slight amendment to the provisions relating to the recognition and enforcement of an award, essentially amending provisions that are similar to ss 101 and 103 of the English Act to make it clear that awards must be recognised and enforced unless one of the grounds for refusing to recognise or enforce an award has been satisfied.

Article 35(1) of sch 1 to the New Zealand Act provided that:

*"An arbitral award, irrespective of the country in which it was made, **shall be recognised** as binding and, upon application in writing to the High Court, **shall be enforced** by entry as a judgment in terms of the award or by action, subject to the provisions of this article and of article 36."* (emphasis added)

Article 36(1) provided that "*recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused **only***" (emphasis added) if one of the grounds for challenging the award listed in that article are satisfied.

Section 8(5) of the New Zealand Arbitration Amendment Act 2007 (the "**Amendment Act 2007**") repealed Article 35 of sch 1 and replaced it with the following:

"(1) An arbitral award, irrespective of the country in which it was made, -

*(a) **must be recognised** as binding; and*

*(b) on application in writing to a Court, **must be enforced** by entry as a judgment in terms of the award, or by action, subject to the provisions of this article and of article 36."* (emphasis added)

Conclusion

Accordingly, we recommend that s 8 of the International Arbitration Act be amended along the lines of the amendments to the New Zealand Act. At the very least, s 8 should be amended along the lines of the English Act. Such amendments would remove any purported residual discretion of the courts such as that articulated in *Resort Condominiums* and would not only reflect Australia's international obligations under the New York Convention but would also bring Australian law and practice in line with international practice.

¹⁶ See Russell on Arbitration, 462, quoting from *Dardana Ltd v Yukos Oil Co (No. 1)* [2003] 2 Lloyd's Rep 326 per Mance L.J. quoted with approval in *Svenska Petroleum Exploration AB v Lithuania (No. 1)* [2005] Lloyd's Rep 515 at [19] and in *Kanoria v Guinness* [2006] EWCA Civ 222 at [25].

C. Application of the UNCITRAL Model Law to international commercial arbitration taking place in Australia.

Should the International Arbitration Act be amended to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies?

RECOMMENDATION:

We recommend that careful consideration be given to any amendment that would provide expressly that the International Arbitration Act governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies. Whilst there is a need to amend s 21 of the Act along the lines of s 15(2) of the Singapore Act (see response to Question F), any further amendments to ss 16 or 21 or any other section of the Act, as suggested, must maintain some flexibility to accommodate the agreement of the parties and the manner in which they have chosen to conduct the arbitration.

DISCUSSION:

General principle

The general principle guiding international practice is that, unless the parties have expressly agreed otherwise, the law of the seat of the arbitration governs the procedural matters in the arbitration.¹⁷ An arbitration agreement that provides that the seat of the arbitration is in Australia but does not otherwise stipulate the law to be applied to the arbitral proceedings, will be subject to the International Arbitration Act. Further, as the International Arbitration Act gives the Model Law the force of law in Australia (s 16), the Model Law would apply to that arbitration.

It is only in circumstances where the parties have stipulated (and that stipulation usually needs to be in express terms) that a different law, for example English law, is to apply to the procedure of the arbitration that the parties' agreement may override the default rule. Even then, the mandatory provisions of the International Arbitration Act and the Model Law (if any)¹⁸ will still apply to the arbitration.

Whilst it is theoretically possible for parties to make such a stipulation in their arbitration agreement, it is not usually a choice that is considered to be sensible due to the practical difficulties that may arise. As Redfern and Hunter have recognised, referring to an example

¹⁷ See Michael Pryles, Australia, Jan Paulsson (ed), *International Handbook on Commercial Arbitration* (2006) 2 ("Pryles"); and Redfern and Hunter, 80.

¹⁸ There appears to be some controversy over which provisions, if any, of the Model Law are mandatory. The Model Law itself does not contain a list of the mandatory provisions. See 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(5) *Journal of International Arbitration* 515 ("**Barrett-White and Kee**") for a discussion of the possible test for determining whether a provision of the Model Law is mandatory and which provisions might satisfy that test (524-526). In contrast, the mandatory provisions of the English Act are listed in s 4 and sch 1 of that Act.

where the arbitration is to be held in Switzerland but the parties have agreed that it is subject to the procedural law of Germany.¹⁹

"It is not easy to understand why parties might wish to complicate the conduct of an arbitration in this way (unless, as is possible, they do not understand what they are doing). It means that the parties and the arbitral tribunal would need to have regard to two procedural laws. That of Germany, as the chosen procedural laws, and that of Switzerland, to the extent that the provisions of Swiss law (such as the requirement of equality of treatment of the parties) are mandatory. Nor is this all. If it becomes necessary during the course of the arbitration to have recourse to the courts - for example, on a challenge of one of the arbitrators - to which court would the complainant go? The Swiss court would presumably be reluctant to give a ruling on German procedural law; the German court might well prove unwilling to give a ruling on a procedural matter which it could not directly enforce, since the arbitration was not within its territorial jurisdiction."

Position in English law

Although the application of a law other than the law of the seat of arbitration is a theoretical possibility, the English courts have acknowledged that such a choice may be difficult to implement in practice. In the *Peruvian Insurance* case, the Court of Appeal acknowledged that even if the parties agreed that English procedural law would govern an arbitration taking place in X, the courts would not have the power to exercise jurisdiction over the arbitration in X. As Kerr LJ stated:²⁰

"There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y. The limits and implications of any such agreement have been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences which such an agreement would involve. Thus, at any rate under the principles of English law, which rest upon the territorially limited jurisdiction of our courts, an agreement to arbitrate in X subject to English procedural law would not empower our courts to exercise jurisdiction over the arbitration in X."

In a subsequent case, *Union of India v McDonnell Douglas Corporation*,²¹ Saville J of the Commercial Court came to the view that an arbitration taking place in London was subject to the supervisory jurisdiction of the English court even though the parties had agreed that the procedural law was the Indian Arbitration Act 1940. In that case, the arbitration agreement provided that *"the arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any re-enactment or modification thereof"*.²² Saville J recognised the *"theoretical possibility that the parties are free to choose to hold their*

¹⁹ Redfern and Hunter, 87-88.

²⁰ *Naviera Amazonia Peruana SA v Compañía Internacional de Seguros de Perú* [1988] 1 Lloyd's Rep 116 CA, 120.

²¹ [1993] 2 Lloyd's Rep 48.

²² *Ibid.*, 49-50.

*arbitration in one country but subject to the procedural laws of another*²³ but found that the "jurisdiction of the English Court under the Arbitration Acts over an arbitration in England could not be excluded by an agreement between the parties to apply the laws of another country or indeed by any other means unless such was sanctioned by those Acts themselves".²⁴ He also acknowledged that it was "highly unsatisfactory" that the arbitration could be governed by both the express choice of the parties and the seat of the arbitration but held that although the parties had agreed to import those provisions of the Indian Arbitration Act 1940²⁵

"which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law; [on a] proper construction of [the arbitration agreement] the pending arbitration between the parties and any award made by the arbitral tribunal is subject to the supervisory jurisdiction of the Indian Courts or the English Courts".

Position in Australian law

In Australia, there is a concern that in the absence of an express provision that the International Arbitration Act governs exclusively an international commercial arbitration that takes place in Australia, the arbitration and, more importantly, the award may be subject to the Commercial Arbitration Act of the relevant State or Territory ("**CAA**").²⁶ For example, if a court, applying the *Eisenwerk* decision, adopted the view that the parties had opted out of the Model Law (pursuant to s 21 of the Act) by providing that the ICC Rules of Arbitration (the "**ICC Rules**") applied to the arbitration, a court may apply the relevant CAA if called upon to assist the arbitral process in any way.²⁷ Such an approach could have the undesirable result that the award may be subject to judicial review on questions of law arising out of the award under s 38 of the CAA. Neither the Act nor the Model Law permit such a review and, indeed, such review goes further than that usually allowed in international practice.²⁸

It may be, as in *Aerospatiale Holdings Australia v Elspan International Ltd*,²⁹ that the parties have expressly provided that the arbitration is to be conducted in accordance with the relevant CAA. Such an agreement may be a "legitimate" "opting out" of the Model Law such as that recognised by English commentators and judges, as explained above. However, it does not explain nor justify the approach taken by the Queensland Supreme Court in

²³ *Ibid*, 50.

²⁴ *Ibid*, 51.

²⁵ *Ibid*, 51.

²⁶ It has been suggested that if the seat is in Australia and the parties have opted out of the Model Law, it may be necessary to enforce the award pursuant to s 33 of the CAA of the relevant state or territory. For a discussion of this suggestion, see Barrett-White and Kee, 520-521. See also Pryles, 2.

²⁷ See the discussion of this possibility in Barrett-White and Kee, 520-521; and in Jennifer Galatas, 'The Role and Attitudes of the Courts in Australia to International Commercial Arbitration', (2005) 22 *International Construction Law Review* 27, 34-36 ("**Galatas**").

²⁸ One notable exception is s 69 of the English Arbitration Act which provides for an appeal on a point of law in certain circumstances. Parties may expressly exclude the operation of this provision in their arbitration agreement.

²⁹ [1992] 28 NSWLR 321. See also Galatas, 35.

Eisenwerk. Nor does the reference to a CAA, which is an act that governs domestic arbitrations, justify a court taking a similar approach where the parties have referred to another statute, such as the Industrial Relations Act, that contains no provisions in relation to the conduct of an arbitration.³⁰

Party autonomy requires flexibility

Despite the logistical hurdles that may arise if the parties do stipulate that a procedural law different to that of the seat arbitration is to apply to their arbitration, current international practice is unlikely to accept that such hurdles constitute a valid reason for overriding the principle of party autonomy. Some flexibility must be maintained to accommodate the choice of the parties. It appears that s 21 was intended to encapsulate this flexibility.³¹ As discussed below in response to Question D, there is a need to amend s 21 to correct the approach adopted in *Eisenwerk*. Any further amendments to s 21, however, should not impair the flexibility currently given to parties to choose the procedural law of their arbitration.

The intended scope and extent of the amendment suggested here, i.e. that the "*Act be amended to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies*" is unclear. To the extent that this would prevent the parties from choosing non-Australian law as the procedural law even though the seat of the arbitration is in Australia, this suggested amendment would go beyond international practice. If it is intended to prevent the default application of the relevant CAA in circumstances that would not be appropriate, then it is welcomed.

Conclusion

For these reasons, it is our view that any amendment along these lines would not only require careful and extensive consideration, but would need to be considered in conjunction with any proposed amendment to s 21 along the lines of s 15(2) of the Singapore Act (see response to Question F). It may also be an appropriate opportunity to consider issues of arbitrability (see response to Question I).

³⁰ See the discussion in context of Question I in relation to arbitrability.

³¹ For a discussion of s 21 see Secombe, 128-131; Richard Garnett, 'International Commercial Arbitration: the Australian Legal Regime', <http://new.vicbar.com.au>.

D. Clarify that adoption of arbitral rules by the parties does not constitute "opting out" of the UNCITRAL Model Law.

Should the International Arbitration Act be amended to reverse the Eisenwerk decision, by adopting a provision similar to subsection 15(2) of the Singaporean International Arbitration Act?

RECOMMENDATION:

We recommend that s 21 of the International Arbitration Act be amended to reverse the *Eisenwerk* decision by adopting a provision similar to s 15(2) of the Singapore Act.³² Consideration should also be given to the inclusion of a provision similar to s 15A of the Singapore Act.

DISCUSSION:

Arbitral law vs procedural rules of arbitration

As pointed out in the Discussion Paper, one of the criticisms that has been directed at the *Eisenwerk* decision is that it is contrary to elementary principles of international arbitration, i.e.:

"the parties' choice to adopt procedural rules of arbitration (eg the ICC Rules) in an arbitration agreement, is different from, and should have no direct bearing on the arbitral law (eg the UNCITRAL Model Law as implemented by the International Arbitration Act)".

This is not only because "*procedural rules of arbitration and the arbitral law can both apply to and govern arbitration*" but also because of their different nature and the scope and extent of their application. An arbitration does not take place in a legal vacuum but within a national legal system which operates within a wider international legal framework.³³ The arbitral law of the seat of the arbitration provides a legal framework through which the courts of that seat may supervise and support the arbitral proceedings.³⁴ It is also the arbitral law that confers jurisdiction on a court to support and supervise the arbitration, not the arbitration rules (it is only the legislature that has the power to grant jurisdiction to a court, this being an exercise

³² As mentioned in the Discussion Paper, this section was amended following the decision of the High Court of Singapore in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262, which followed the decision in *Eisenwerk*.

³³ Note, however, that the de-localisation theory has sort to remove, at least to some extent, arbitration from what may be seen as the constraints of the national legal system, though in practice arbitration can be "de-localised" only if this is allowed under the applicable national law. Belgium's attempts to de-localise arbitration have been reversed. It is only the arbitral system conducted by the International Centre for the Settlement of Investment Disputes ("ICSID") pursuant to the International Convention on the Settlement of Investment Disputes that can be considered to be self-contained. For a brief discussion of de-localisation, see Redfern and Hunter, 89-91.

³⁴ Please note that it is not necessary for all meetings and hearings to take place at the seat of the arbitration. Most arbitral rules provide that the tribunal and the parties may agree to have hearings or meetings at another location and that any agreement to do so does not change the legal "seat" of the arbitration. See, for example, Article 14 of the ICC Rules, Article 16 of the LCIA Rules, Rule 18 of the SIAC Rules and Rule 16(2) of the UNCITRAL Rules. See also Article 20(2) of the UNCITRAL Model Law.

of sovereign power).³⁵ If the parties do agree that an arbitral law different to the law of the seat of the arbitration applies to the arbitration, then the courts of the seat of the arbitration are placed in a difficult position as demonstrated by the English decisions above.³⁶

Unlike the arbitral law, the procedural rules or arbitral rules do not have the force of law. The procedural rules often reflect the agreement of the parties to "opt in" or "opt out" of a provision in the arbitral law. Whilst there are many matters upon which the procedural rules and the arbitral law overlap, the arbitral rules provide more detail on procedural aspects of the arbitration, just as civil procedure rules or rules of court provide more detail in relation to court proceedings. Any purported overlap or inconsistency is usually resolved by the agreement of the parties: i.e. the arbitration rules chosen by the parties will prevail unless the matter relates to a mandatory provision of the arbitral law. As recognised by Redfern and Hunter:³⁷

"there is a great difference between the general provisions of the law governing the arbitration (the lex arbitri) and the detailed procedural rules that will need to be adopted, adapted, for the fair and efficient conduct of the proceedings. The rules of the arbitral institutions, such as the ICC and LCIA, provide an overall framework within which to operate, as do the UNCITRAL Arbitration Rules. However, it is important to note that even these rules will need to be supplemented by more detailed provisions."

The difference between the arbitral law and procedural rules is also reflected in the fact that UNCITRAL found it necessary to adopt the Model Law in 1985 (which was amended in 2006) in addition to the UNCITRAL Arbitration Rules in 1976. The UNCITRAL Arbitration Rules provide a comprehensive set of arbitral rules which the parties may agree will govern their arbitration. The Model Law, on the other hand, is intended to assist States in reforming and modernising their laws on arbitral procedure. States, such as Australia, New Zealand and Singapore, may, and indeed have, adopted the Model Law in full, or with amendments, as part of their national law.

There may be (and indeed there have been many) arbitrations where the parties have agreed that the arbitration is to be governed by the UNCITRAL Arbitration Rules and that it is to take place in a State that has adopted the Model Law. The application of the UNCITRAL Arbitration Rules does not oust the application of the Model Law. Nor does the operation of the Model Law oust the Arbitration Rules.³⁸ The UNCITRAL Arbitration Rules and the Model Law will operate side by side. If there is any inconsistency or conflict between the two, the rules, as the embodiment of the parties' agreement, will prevail unless overridden by a mandatory provision of the Model Law.

³⁵ See the discussion in Barrett-White and Kee, 524.

³⁶ See *Naviera Amazonia Peruana SA v Compañía Internacional de Seguros de Perú* and *Union of India v McDonnell Douglas Corporation* referred to above (n.16 -17)

³⁷ Redfern and Hunter, 83.

³⁸ See the discussion below in relation to the amendments to Section 15A of the Singapore Act.

Indeed, the Model Law expressly recognises that, subject to any mandatory provisions, the parties are free to agree on the procedure to be followed by the tribunal in the proceedings. Article 19 states:

- "1. Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
- 2. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."*

Article 2(e) expressly provides that a parties' agreement *"includes any arbitration rules referred to in that agreement"*.

Accordingly, the parties may agree to "opt-in" or "opt-out" of certain provisions of the Model Law, that agreement being reflected in the adoption of arbitral rules such as the ICC Rules.

Reconciling the application of the Model Law and Arbitral Rules

The court in *Eisenwerk* had difficulty in reconciling the provisions in the Model Law and the ICC Rules³⁹ that relate to the number and identity of the arbitrators. These provisions can be easily reconciled as demonstrated by the simple example given below. Article 10 of the Model Law provides that:

- "1. The parties are free to determine the number of arbitrators.*
- 2. Failing such determination, the number of arbitrators shall be three."*

The parties' agreement as to the number of arbitrators may be found in the arbitration agreement itself or in any rules, such as the ICC Rules, that the parties have agreed will govern their arbitration. Thus, any agreement reflected in the ICC Rules prevails over the relevant provision of the Model Law.⁴⁰

Article 8 of the ICC Rules provides:

- "1. The disputes shall be decided by a sole arbitrator or by three arbitrators.*
- 2. Where the parties have not agreed upon the number of arbitrators, the [ICC Court of Arbitration] shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators."*

The ICC Rules go on to provide where the parties have agreed that the dispute will be settled by a sole arbitrator (Article 8(3)) or three arbitrators (Article 8(4)) and the procedure for

³⁹ The court in *Eisenwerk* was referring to the 1988 version of the ICC Rules, whereas we have referred to the current version, the 1998 Rules. We are not aware of any differences between these versions that would impact upon this analysis.

⁴⁰ It is evident by the terms of Article 10 of the Model Law, this being an "opt-in" provision, that this article is not a mandatory provision.

appointing those arbitrators. Thus, in these circumstances, if there is no agreement of the parties, Article 8(4) of the ICC Rules prevails over Article 10(2) of the Model Law: it is the ICC Court of Arbitration that determines whether to appoint one or three arbitrators.

A similar reconciliation can be reached in terms of the process of appointing the arbitrators. Article 11 of the Model Law provides:

"2. *The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.*

[paragraph (3) sets out the procedure where there is no agreement]

4. *Where, under an appointment procedure agreed upon by the parties,*

a. *a party fails to act as required under such procedure, or*

b. *the parties, or two arbitrators, are unable to reach agreement expected of them under such procedure, or*

c. *a third party, including an institution, fails to perform any function entrusted to it under such procedure,*

*any party may request the court or other authority specified in article 6 to take the necessary measure, **unless the agreement on the appointment procedure provides other means for securing the appointment.***

5. *A decision on a matter, entrusted by paragraph (3) or (4) of this article to the court or the other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties."*

Section 18 of the Act specifies the courts that have the jurisdiction to carry out these functions.

In our example, there is no need to refer to Article 11(4) and (5) of the Model Law because the default procedure provided in the ICC Rules, this being the parties agreement, will secure the appointment of the arbitrator(s). The default procedure for the appointment of a tribunal under the ICC Rules is set out clearly in Articles 8(3) and (4), the former relating to a sole arbitrator, the latter to a tribunal of three arbitrators. It is the ICC Court of Arbitration that has the ultimate authority to appoint an arbitrator, including the Chairman, if the parties fail to nominate a sole arbitrator within 30 days or if they fail to appoint their party-nominated arbitrator to a tribunal of three arbitrators. The ICC Court will also appoint the Chairman unless the parties have agreed upon another procedure or if that procedure does not result in the appointment of a Chairman within a time limit fixed by the parties. Accordingly, this example indicates that the Model Law and the ICC Rules can be reconciled.

This is the approach adopted not only by the Model Law but by many other national arbitration laws. To take one example, s 57 of the English Act provides that the parties may agree to grant the tribunal the power to correct and clarify their award and that if there is no such agreement, the remaining provisions of s 57 apply. Section 57 provides that an application to correct an award must be made within 28 days of the receipt of an award. In contrast, Article 30 of the Rules of the International Dispute Resolution Centre of the American Arbitration Association ("**AAA Rules**") provides that an application to correct an award must be made within 30 days of the receipt of the award. The difference on the application of these two provisions may be significant, more than 2 days if the award was not sent and received immediately upon the date of signature. If the parties have agreed that the AAA Rules will apply but the seat of the arbitration is in London, then they have agreed that the longer time period for making an application to correct an award applies.

As pointed out in response to the previous question, it is only if the parties have expressly provided that the procedural law to be applied is something different to the seat of the arbitration, that the Model Law may not apply. Even in those circumstances, however, the English courts have confirmed the supervisory jurisdiction of the English courts where the seat is in London even though the parties have stipulated a different procedural law in the arbitration agreement.⁴¹

Section 15A of the Singapore Act

It is worth noting that the amendment to s 15(2) of the Singapore Act did not settle this issue completely in Singapore, further amendments were required. Subsequent to the amendment to s 15(2), the High Court of Singapore held in *Dermajaya Properties v Premium Properties*⁴² that the application of the Model Law (as the law of the seat of the arbitration) would exclude completely an "inconsistent" or "incompatible" set of arbitration rules. It considered that even the UNCITRAL Arbitration Rules were incompatible to the Model Law. Following criticisms by the international arbitration community, as well as the arbitration community in Singapore, the legislature adopted s 15A to confirm the application of both the Model Law and the arbitral rules chosen by the parties and specify the circumstances in which provisions of the arbitral rules may be considered to be "inconsistent" with the Model Law.

Although the Australian courts have not taken this approach (or at least not yet), given that the line of cases in Singapore that led to these amendments stemmed from the *Eisenwerk* decision, we suggest that consideration be given to adopting provisions similar to both s 15(2) and s 15A of the Singapore Act.

Conclusion

For these reasons, we recommend that s 21 of the International Arbitration Act be amended along the lines of s 15(2) of the Singapore Act and that consideration be given to incorporating s 15A of the Singapore Act.

⁴¹ See *Union of India v McDonnell Douglas Corporation* discussed above.

⁴² (2002) 2 SLR 164 discussed in Attorney-General's Chambers, *Proposed Amendment to the International Arbitration Act on Rules of Arbitration Report*, 2 October 2002.

E. Drafting inconsistencies in Part III, Division 3 (Sections 22-27).

- (i) ***Should these drafting inconsistencies in Part III, Division 3 of the International Arbitration Act be remedied?***
- (ii) ***If so, should it be clarified that sections 25-27 (relating to interest up to the making of the award, interest on the debt under the award, and costs) apply on an 'opt-out' basis (that is, applying unless the parties agree otherwise)?***

RECOMMENDATION:

We recommend that these drafting inconsistencies in Part III, Division 3 of the Act be rectified and Section 22 expressly state that some of these optional provisions are to apply on an "opt-in" basis (i.e. ss 23 and 24), whilst others apply on an "opt-out" basis (i.e. ss 25-27).

DISCUSSION:

Section 23

In relation to s 23 we refer to our comments below in response to Question F which indicate that s 23 would be redundant if the revised Articles 17-17J of the Model Law were adopted. Assuming that s 23 is not amended through the adoption of the amended version of Article 17 of the Model Law (see below), it may be appropriate to retain this provision as an "opt-in" provision (assuming that if the revised Article 17 is rejected then similar reasons would apply to rejecting an amendment that s 23 is an "opt-out" provision).

Section 24

Section 24 relates to the consolidation of arbitral proceedings. The general principle in international commercial arbitration is that proceedings cannot be consolidated unless all of the relevant parties have agreed to that consolidation.⁴³ That agreement may be contained in the arbitration agreement or the applicable arbitral rules.⁴⁴ However, it is unusual for the courts of the seat of arbitration to have the power to consolidate the proceedings.⁴⁵ For that reason, it may be appropriate to require parties to "opt-in" to this provision to ensure that they are fully aware that they are agreeing to the consolidation of the proceedings.

Sections 25 - 27

The remaining provisions, ss 25-27, relate to issues of interest and costs, which are most appropriately dealt with as "opt-out" provisions. For example, s 49 of the English Act sets out the provision of interest unless the parties have agreed otherwise. Similarly, s 61 provides that costs follow the event unless the parties have agreed otherwise.

Conclusion

⁴³ See Redfern and Hunter, 173-176.

⁴⁴ See, for example, the ICC Rules, Article 4(6) for the consolidation of two or more arbitrations and the LCIA Rules, Article 22.1(h) for the joinder of parties.

Accordingly, it is our view that s 22 should be appropriately amended and that ss 25-27 should apply as "opt-out" provisions.

⁴⁵ For example, two arbitral laws that do provide for consolidation are the Netherlands Code of Civil Procedure 1986, Article 1046 and the Hong Kong Arbitration Act of 1982, s 6B. See also Redfern and Hunter, 173-176.

F. Revisions to the International Arbitration Act to reflect 2006 amendments to the UNCITRAL Model Law.

- (i) *Should the International Arbitration Act be amended to adopt recent amendments to the UNCITRAL Model Law?*
- (ii) *If article 7 of the revised Model Law (amending the definition of an 'arbitration agreement' is adopted), should option 1 (providing a broad interpretation of the writing requirement) or option II (removing the writing requirement) be adopted?*

RECOMMENDATION:

We recommend that the revised International Arbitration Act adopt the 2006 amendments to the Model Law, particularly Articles 2A and Articles 17-17J. With respect to Question F(ii), we refer to our response to Question A.

DISCUSSION:

Promotion of uniform interpretation

In considering the adoption of the new Article 2A, which is designed to promote a uniform interpretation of the Model Law, it is worth bearing in mind the scope and purpose of the Model Law, as described by UNCITRAL:⁴⁶

*"The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and **reflects a worldwide consensus on the principles and important issues of international arbitration practice**. It is acceptable to States of all regions and the different legal or economic systems of the world. **Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law** and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law." (emphasis added)*

Section 17 of the International Arbitration Act currently allows the court to have regard to the documents of UNCITRAL and, particularly, the documents of the Working Group which prepared the Model Law. While we are confident that a reading of these documents alone will reveal an international consensus in favour of the principle described above, new Article 2A of the Model Law may allow wider regard to be paid to international practice. In particular, it would encourage the courts to approach questions regarding the degree to which they may or should intervene in the arbitral process by reference to international practice, at least to the extent that the courts do not already do so.⁴⁷

⁴⁶ UNCITRAL Secretariat, UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 ("**Model Law and Explanatory Notes**"), 23.

⁴⁷ See our response to Question H for a discussion of the different approaches that have been taken by the Federal Court and the NSW Court of Appeal in relation to the construction of arbitration agreements, as well as Joachim Delaney and Katharina Lewis, 'The Presumptive Approach to the Construction of Arbitration Agreements and Separability - English Law Post Fiona Trust and Australian Law Considered', (2008) 14 *UNSW Law Journal Forum* 50 ("**Delaney and Lewis**").

Further, the inclusion of Article 2A would facilitate Australia's ambition to become a centre for international arbitration by encouraging the courts to pay due regard to international practice, particularly in relation to the law and practice of other leading centres for arbitration where the Model Law has been implemented or has informed the development of the relevant law including, in particular, England and Singapore.

Ex parte orders

It is our view that the International Arbitration Act should be amended to include the amendments in Articles 17 to 17J of the Model Law relating to interim measures. The General Assembly acknowledged in its resolution 61/33 of 4 December 2006 that the amendments relating to interim measures reflected "*current practices in international trade and modern means of contracting*" and would "*significantly enhance the operation of the Model Law*".⁴⁸

Similarly, the New Zealand Justice and Electoral Committee recommended to Parliament that these amendments be included to increase certainty and encourage consistency with international practice.⁴⁹

"Recent changes to the Model Law set out detailed provisions for the making of interim measures, including the appropriate test for the arbitral tribunal to use regarding the need for interim measures, and provision for the making of preliminary orders. We consider that including amendments to reflect the recent update to the Model Law would increase certainty for arbitral parties by providing more detail as to how and when interim measures will be applied. This amendment would also ensure that the Act remains consistent with the Model Law, and with arbitral legislation in other jurisdictions."

These amendments (with some minor changes) were adopted by the Amendment Act 2007 which came into force on 17 October 2007.

Given that the Discussion Paper indicates that the Government does not intend to implement the provisions on *ex parte* interim measures (Articles 17B and 17C relating to preliminary orders), we have focused on this issue in this submission. As the Government is no doubt aware, *ex parte* orders were a controversial issue that involved much debate during the sessions of the Working Group.⁵⁰ We can understand that there may be concerns about implementing these provisions.

⁴⁸ GA Resolution 61/33 (4 December 2006) reproduced in Model Law and Explanatory Notes, viii.

⁴⁹ Justice and Electoral Committee Report, Arbitration Amendment Bill (2007). www.parliament.nz/en-NZ/PB/Legislation/Bills/b/7/e/00DBHOH_BILL7633_1-Arbitration-Amendment-Bill.htm. See also Amokura Kawharu, 'New Zealand's Arbitration Law Receives a Tune-Up' (2008) 24(3) *Arbitration International* 405 ("Kawharu"), 412.

⁵⁰ See the following reports of the Working Group: Report of the Working Group on Arbitration on the work of its 37th session dated 11 November 2002; Report of the Working Group on Arbitration on the work of its 41st session dated 4 October 2004. We also refer you to Sundaresh Menon and Elaine Chao, 'Reforming the Model Law Provisions on Interim Measures of Protection' (2006) 2(1) *Asian International Arbitration Journal* 1, ("Menon and Chao") 10-11.

By way of outline, we first consider the reasons why provisions on *ex parte* interim measures should be included in the Act. We then consider the factors which mitigate against the inclusion of such provisions before considering Articles 17B and 17C which adopt a solution which, in our opinion, goes some way towards alleviating those concerns.

Reasons "for"

There are two central themes which underline the inclusion of provisions empowering the tribunal to order interim measures on an *ex parte* basis. Firstly, doing so would be consistent with the parties agreement to arbitrate. Secondly, the inclusion of such provisions would underline Australia's desire to provide a suitable forum for resolving real commercial disputes. Considering each in turn:

- (i) By virtue of an arbitration agreement, the parties have in effect made at least two critical choices. Firstly, they have mutually chosen arbitration as their selected forum for resolving their disputes. Secondly, and in correlation, they have purported to exclude the jurisdiction of the national courts. The International Arbitration Act's silence with respect to *ex parte* interim orders effectively frustrates these choices. Put simply, the Act requires a party to take its issue to the national courts. This is directly inconsistent with the express agreement of the parties.

This of course leads us to a correlative issue; one concerning the role which the courts should play in the arbitral process. It may be argued that, should the Australian legislature wish to respect the autonomy of the arbitral process and limit the role which the courts should play, then they should provide tribunals with the power to grant *ex parte* interim measures. Doing so would represent another step in limiting the role of the courts.

- (ii) Secondly, as Australia wishes to become a centre for international commerce, it must be well equipped to provide solutions to critical commercial situations.⁵¹ In this respect, it may be argued that the Act's silence on *ex parte* interim measures is somewhat counter-productive. There is of course a critical distinction that must be made between providing the tribunal with the power to grant *ex parte* interim measures, and allowing the tribunal to abuse that power. The former will provide a party with the comfort that there is a solution to their commercial predicament in the forum of their choice. The latter is a separate issue, and one which the legislature can overcome by careful drafting and the insertion of appropriate safeguards.

In addition to these underlying themes, there are practical factors which support the inclusion of provisions relating to *ex parte* interim measures. A party may be faced with the situation where an *ex parte* interim measure is both necessary and urgent. Let us suppose that there was a real risk that the assets which are the subject of a dispute would be dissipated by the respondent party. The claimant party would be severely prejudiced if it was unable to obtain an *ex parte* order from a tribunal (particularly given that the court's powers to issue *ex parte* orders are often restricted) and any interim measure granted by the tribunal had in effect

⁵¹ The Working Group noted that "*these injunctions were becoming more common and served an important purpose in international trade*". A/CN.9/589 - Report of Working Group II (Arbitration and Conciliation) on the work of its forty-first session, 6, para 23.

been rendered worthless because the respondent party had already disposed of the relevant assets. As recognised by one commentator:⁵²

"Although, [the] power [to award ex parte interim measures] may be used scarcely in practice, it would provide a useful addition to the armoury of the tribunal."

Reasons "against"

Three of the key concerns that have been expressed in opposition to conferring tribunals with the power to grant *ex parte* orders are:⁵³

- (a) It would go against the consensual basis of arbitration. When one considers that the parties have consensually agreed to refer their disputes to arbitration, allowing a party to apply for an interim measure on an *ex parte* basis appears somewhat anomalous.
- (b) It would undermine the fundamental right of a party to be heard. In particular, it has been said that *ex parte* interim measures are "extremely difficult to reconcile with existing provisions of the Model Law, notably article 18 (which required that parties should be treated equally and be given a full opportunity of presenting their case), article 24(3) (which required that all documents should be communicated to both parties) and paragraph 36(a)(ii) (which allowed refusal to recognise or enforce an award if a party had been unable to present its case)".⁵⁴
- (c) It may prejudice the impartiality of the arbitrators. It has been argued that empowering the arbitrators with the ability to order an *ex parte* interim order may require them to, at an early stage, make some determination of the merits of the dispute (though it should be emphasised that any analysis of the merits at this stage would be on a *prima facie* basis only). There is an argument that this mechanic runs counter to the arbitrators' duty to treat the parties equally at the merits stage of proceedings. It is not only the concern that the arbitrators may look into the dispute but also the lack of communication with, and thus the visibility of the party on the other side. It would, if nothing else, jeopardise one party's confidence in the arbitrators. In consequence, many have felt that the power to order *ex parte* interim measures should be reserved for State courts.

Proposed solution - adopting Articles 17B and 17C

Notwithstanding these arguments, empowering a tribunal to grant an *ex parte* interim order could be appropriate, provided that "*strict conditions were imposed to ensure that the power was not subject to abuse*".⁵⁵ On balance, it is our view that the scope and extent of these

⁵² Ali Yeşilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer, The Netherlands, 2005), Chapter 5, ("Yeşilirmak") paragraph [5-94].

⁵³ For a further discussion of these concerns, see Yeşilirmak, paragraphs [5-89] to [5-100].

⁵⁴ See, A/CN.9/569 - Report of Working Group II (Arbitration and Conciliation) on the work of its forty-first session, 8, para 16.

⁵⁵ See, A/CN.9/523 - Report of Working Group II (Arbitration and Conciliation) on the work of its thirty-seventh session, 6, para 17.

provisions together with "*carefully drafted safeguards*"⁵⁶ that have been built into the operation of these provisions dispel these concerns. In particular, it is worth taking into account the following aspects of Articles 17B and 17C:⁵⁷

- These provisions are not mandatory. Whilst they have been formulated as "opt-out" provisions, parties are given a choice and may be advised by their legal counsel to agree with the other parties to opt out of these provisions either before or after a dispute has arisen in appropriate circumstances;
- Article 17B does not give the tribunal the power to grant the interim measure that is actually being requested, it is only being given the power to grant a "**preliminary order**" directing the other party not to frustrate the purpose of the interim measure that is being requested. As the Working Group noted, such a preliminary order is intended to be like a "stop order"⁵⁸ or a "bridging device"⁵⁹ that preserves the status quo whilst the tribunal is given an opportunity to consider the request after hearing the submissions of both parties;
- The tribunal is not only required to apply the conditions for requesting an interim measure listed in Article 17A but it is also required to take into account the "real need" for the order, i.e. the real risk of the other party frustrating the purpose of the measure if it was aware of the requesting party's application (Article 17B(2)); and the harm likely to result from the order being granted or not (Article 17B(3));
- The tribunal must give notice to the other party "**immediately after**" it has decided upon an application for a preliminary order (this would appear to apply to requests for a preliminary order which are rejected as well as those that are accepted) (Article 17C(1));
- Any party against whom a preliminary order is directed must be given an opportunity to present its case "**at the earliest practicable time**" (Article 17C(2));
- The tribunal shall decide "**promptly**" on any objection to the preliminary order (Article 17C(3));
- A preliminary order has a **limited duration of 20 days**, this period intended to be long enough to give the other party an opportunity to respond and the tribunal an opportunity to deliberate and determine whether or not to grant the interim measures (Article 17C(4));⁶⁰ and

⁵⁶ See Model Law and Explanatory Notes, 31.

⁵⁷ For more discussion of these characteristics, see Model Law and Explanatory Notes, 31 and Menon and Chao, 10-11.

⁵⁸ See, A/CN.9/569 - Report of Working Group II (Arbitration and Conciliation) on the work of its forty-first session, 12, para 30.

⁵⁹ *ibid*, 11, para 26

⁶⁰ As the Working Group II (Arbitration and Conciliation) noted however, there is a concern that this 20 day limit may become the default rule as opposed to the maximum period. See A/CN.9/523 - Report of Working Group II (Arbitration and Conciliation) on the work of its thirty-seventh session, 21, para 73.

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- A "preliminary order" is to be distinguished from an "interim measure" for the purposes of Article 17; in particular, Article 17C(5) expressly provides that **a preliminary order is not enforceable by a court and does not constitute an award.**

The inclusion of these characteristics in Articles 17B and 17C, particularly the limited duration of a preliminary order and the unenforceability of preliminary orders before the courts, goes some way to ensure respect for the equality of the parties as well as the impartiality of the tribunal. In determining whether to grant a preliminary order the Tribunal would consider the merits of the dispute on a *prima facie* basis only. Although the other party would initially be excluded from the application (in order to prevent frustration of the interim measure requested) this is on a temporary basis only, as the other party must receive notice, including copies of all communications between the requesting party and the Tribunal, immediately after the preliminary order has been granted (or rejected as the case may be).⁶¹

The Working Group also noted that "*more neutral language*" should be adopted so as to preclude the possibility of prejudice.⁶² Additional safeguards have also been suggested, such as ensuring that the requesting party face strict liability for any losses which result from a measure wrongfully obtained. It has also been suggested that the requesting party should be able to demonstrate the non-existence of any other legal remedy, and that the tribunal should be given the power to modify or terminate the *ex parte* measure. Finally, it has also been suggested that wording be included such that the tribunal is aware that an *ex parte* award should only be ordered in exceptional circumstances.⁶³

Recognition and enforcement of interim measures

In relation to the recognition and enforcement of interim measures pursuant to Articles 17H and 17I, we note that s 23 of the Act already provides that parties may agree that interim measures issued by a tribunal may be recognised and enforced pursuant to Articles 35 and 36 of the Model Law. Thus, as noted in the Discussion Paper, s 23 will be made redundant and should be repealed if Articles 17H and 17I are adopted.

On the one hand, it could be said that there is no need to amend s 23; the possibility of the courts recognising and enforcing interim measures is at least recognised in the Act. On the other hand, the Act has been criticised for designating s 23 as an "opt-in" provision; both the Hong Kong and Singapore Arbitration Acts, for example, provide for the recognition and enforcement of interim measures by the court.⁶⁴ The recent amendments to the New Zealand

⁶¹ If there was a hearing between the tribunal and the requesting party to consider the preliminary order, which in any event is unlikely, the hearing could be transcribed so that the other party may subsequently receive a copy of the transcript.

⁶² See A/CN.9/523 - Report of Working Group II (Arbitration and Conciliation) on the work of its thirty-seventh session, 13, para 43. The Working Group suggested that wording along of the lines of "*there is a reasonable prospect that the requesting party will succeed on the merits, provided that the determination on this issue shall not prejudice any subsequent determination by the tribunal*" received support.

⁶³ See generally A/CN.9/523 - Report of Working Group II (Arbitration and Conciliation) on the work of its thirty-seventh session.

⁶⁴ See the comparison discussed of s 23 of the International Arbitration Act, s 2 GG of the Hong Kong Act and s 12(5) of the Singapore Act in Secombe, 136-139.

Act included the adoption of Articles 17H and 17I, with some minor changes (see sch 1 Articles 17L and 17M of that Act).

It is our view that the International Arbitration Act should be amended to include Articles 17H and 17I. These articles specifically deal with the recognition and enforcement of interim measures and in doing so include safeguards that are not present in the Act as it currently stands. Unlike s 23, Articles 17H and 17I include the following specific characteristics:

- Articles 17H and 17I will apply to all arbitrations; the text does not appear to be subject to the parties agreement to either "opt-in" or "opt-out";
- The party seeking recognition or enforcement of the interim measure must inform the court if there is any termination, suspension or modification of that measure (Article 17H(2));
- The court may order the requesting party to provide appropriate security if this had not already been determined by the tribunal or where it is necessary to protect the rights of third parties (Article 17H(3));
- In addition to the grounds for refusing to recognise or enforce an interim measure in Article 36(1)(a)(i), (ii), (iii) or (iv) (though note that Article 36(1)(v) which only applies in relation to an award that is subject to challenge proceedings is excluded) and Article 36(1)(b) (arbitrability and public policy), a court may refuse to recognise or enforce an interim measure if it finds that the interim measure is incompatible with its own powers (unless it decides to reformulate the measure to adapt it to its powers and procedures) (Article 17H(1)(b)(i)); and
- In determining whether to recognise and/or enforce the interim measure, the court shall not review the substance of the interim measure (Article 17H(2)).⁶⁵

The inclusion of Articles 17H and 17I will address the perceived gaps in the Act.

Conclusion

We recommend that the International Arbitration Act be amended to include Articles 2A and 17 - 17J of the revised Model Law.

⁶⁵ This is consistent with the position in English law. Note the recent decision in *John Forster Emmott v Michael Wilson & Partners Limited* [2009] EWHC 1 (Comm), 12 January 2009, where Teare J emphasised that "*the proper role of the court is to support the arbitral process rather than review it and that the circumstances in which the court can properly interfere with or review the arbitral process are limited to those within sections 67-69 of the Arbitration Act 1996 (challenges to the substantive jurisdiction of the arbitral tribunal, challenges based upon a serious irregularity and appeals on points of law)*" (para 58).

G. Court or other authority to perform functions under the UNCITRAL Model Law

- (i) ***Should the International Arbitration Act be amended to allow regulations to be made designating an arbitral institution to perform the functions set out in articles 11(3) and 11(4) of the UNCITRAL Model Law?***
- (ii) ***Would it be appropriate for other functions referred to in article 6 of the UNCITRAL Model Law, such as hearing challenges to arbitrators under articles 13(3) and 14, to be performed by an arbitral institution similarly designated under the International Arbitration Act?***

RECOMMENDATION:

We recommend that no amendments be made to s 18 of the International Arbitration Act or otherwise. It is our view that in practice the agreement of the parties will usually provide that the functions set out in Articles 11(3), 11(4), 13(3) and 14 of the UNCITRAL Model Law will be performed by the relevant arbitral institution or appointing authority (as the case may be), and that for this reason there is no need to amend the Act.

DISCUSSION:

These questions look to whether the Act should make provision for a designated authority to perform the functions of appointing an arbitrator and hearing the challenges of arbitrators. One should not assume however, that the issues generated by these questions are so narrow in scope. Aside from defining the role and functions of a designated arbitral institution, these questions provoke a more pertinent issue; the role and functions of the court. The approach adopted by the Act must reflect the degree to which the legislature wishes parties to have judicial recourse. A supportive, non-interventionist court system would at a minimum be reflected by providing alternative forums for appointing arbitrators, and for hearing arbitrator challenges. Should the legislature wish to follow the principle more rigorously, an express hierarchy should be provided, such that arbitrator appointments and challenges must first be directed through a designated arbitral institution, with court intervention only being permissible upon the exhaustion of this process. This latter approach is seen in the Model Law, and at various junctures of the English Act.⁶⁶

Agreement of the parties

At present, this hierarchy is followed at least in practice through the operation of the agreement of the parties, that agreement usually being manifest in the selection of particular arbitral rules, overriding the relevant provisions in the Model Law. In most arbitral proceedings, the arbitral rules provide for the resolution of issues relating to the appointment and challenge of the arbitrators. The arbitral institution usually appoints the arbitrators in default of party agreement/nomination. It is also the institution that usually determines a challenge to one of the arbitrators,⁶⁷ though some rules provide that the remaining members

⁶⁶ See, for example, s 24(2) Arbitration Act 1996.

⁶⁷ See, for example, Article 11 of the ICC Rules, Rule 10.4 of the LCIA Rules, Rule 12.1 of the SIAC Rules.

of the tribunal determine the challenge.⁶⁸ In ad hoc arbitrations conducted under the UNCITRAL Arbitration Rules, it is the appointing authority that deals with issues of appointment and challenge⁶⁹.

There are procedural and substantive reasons why a designated arbitral institution (or appointing authority as the case may be) should be mandated with these tasks.

- (i) Firstly, from a timing perspective, allowing a designated arbitral institution to appoint an arbitrator may be quicker than relying upon a national court. This may certainly help to mitigate the concern of a party stalling the arbitral proceedings by failing to appoint their arbitrator, forcing the other side to request that a national court remedy their error. It may also be a cheaper route.
- (ii) Secondly, it is self-evident that arbitral institutions are specialist arbitral bodies. Their experience and continual involvement in arbitrations makes them better placed to adduce the qualities required in arbitrators. This makes them a more suitable entity for appointing arbitrators.

Accordingly, it is only in limited circumstances that the parties will be able or required to refer these issues to the courts under the Model Law. For example, a party that has not succeeded in its challenge before the remaining members of the tribunal, the arbitral institution or the appointing authority (as applicable), may refer the challenge to the courts pursuant to Article 13(3) of the Model Law. Unlike the English Act, which provides limited scope for an appeal, there is no appeal from the court's decision.

In these circumstances, it is our view that there is no need to amend the Act so that these functions are performed by an arbitral institution rather than the courts. In practice, most of these functions will be performed by an arbitral institution. There is some merit in retaining some residual powers with the court. That is the approach which has been adopted in the Model Law.⁷⁰ It is also the approach of other national arbitration laws, such as the English Act.⁷¹

Comparison with Singapore, Hong Kong and England

It is possible to appoint an arbitral institution as an "authority" under Article 6 of the Model Law, this being the approach adopted by both the Singapore⁷² and the Hong Kong Acts⁷³ in relation to the appointment of arbitrators under Articles 11(3) and (4). However, the courts

⁶⁸ See, for example, ICSID Arbitration Rules, Rule 9.

⁶⁹ UNCITRAL Arbitration Rules, Article 11.

⁷⁰ Model Law, Article 13 though a State may appoint an arbitral institution as an "authority" under Article 6 of the Model Law.

⁷¹ English Act, s 24.

⁷² Singapore Act, s 8(2) provides that the Chairman of the Singapore International Arbitration Centre can make appointments under Articles 11(3) and (4).

⁷³ Hong Kong Act, s 34C(3) provides that the Hong Kong International Arbitration Centre can make appointments under Articles 11(3) and (4).

under both the Singapore and the Hong Kong Acts have a residual power to determine a challenge application under Article 13(3) of the Model Law.⁷⁴

In similar vein to the International Arbitration Act, the English Act allows any party to the arbitration agreement to apply to the court to exercise its powers to, amongst other things, make arbitrator appointments.⁷⁵ It also provides that a party to arbitral proceedings may apply to the court to remove an arbitrator,⁷⁶ subject to the parties first exhausting any available process provided for in the arbitral rules chosen by the parties.⁷⁷ This hierarchy is similarly reflected in the Model Law.⁷⁸

Conclusion

Whilst the Model Law allows the national legislature to specify an authority other than the court to deal with certain functions,⁷⁹ including the appointment and challenge of an arbitrator, it is our view that the existing hierarchy between arbitral institutions (or the appointing authority as the case may be) and the courts reflects an appropriate level of judicial intervention.

⁷⁴ See Singapore Act, s 8(1) and Hong Kong Act, s 34C(4).

⁷⁵ Section 18 Arbitration Act 1996. This right arises in the event that the parties cannot agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.

⁷⁶ See s 24 Arbitration Act 1996.

⁷⁷ See s 24(2) Arbitration Act 1996. See also DAC Report, para 107.

⁷⁸ Pursuant to Article 13(3) of the Model Law, the challenge of an arbitrator may only be referred to the court or other authority specified in Article 6 if "*a challenge under any procedure agreed upon by the parties... has not be successful*".

⁷⁹ See Article 13(3) of the Model Law which refers to "*the court or other authority specified in article 6*".

H. Jurisdiction for matters arising under the Act

Should the Federal Court of Australia be given exclusive jurisdiction for all matters arising under the International Arbitration Act?

RECOMMENDATION:

We recommend that the Federal Court be given exclusive jurisdiction for all matters arising out of the International Arbitration Act, provided that some sort of education programme is adopted to address topical issues and recent decisions in international arbitration as well as to revise the general principles of international arbitration.

DISCUSSION:

We accept that there is merit in giving exclusive jurisdiction to the Federal Court under the Act, thereby removing jurisdiction from the State and Territory Supreme Courts. As the Discussion Paper suggests, "*one advantage is that this may lead to more consistent jurisprudence in applying the Act*". It would also seem more likely that this jurisprudence will develop along the lines of other national legal systems as well as international practice.

Federal Court vs NSW Courts

However, we are also concerned that until recently the jurisprudence of the Federal Court did not reflect an enlightened understanding of arbitration law and practice. Some State courts, on the other hand, seem to have not only grasped and dealt with the issues arising out of arbitration proceeding in a more effective manner, but have also demonstrated a greater awareness of international practice. For example, the NSW courts have in general been more supportive of arbitration than the Federal Court. For example, the NSW courts have tended to adopt a more liberal approach to the construction of arbitration agreements.

Until recently, the Federal Court was bound by the 1985 decision of Beaumont J in *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc*.⁸⁰ Although Beaumont J acknowledged that "*arising out of or relating to the agreement*" was "*capable of the widest construction*", he found that the cause of action under the Trade Practices Act 1974 (Cth) (the "**TPA**") and the Patents Act 1990 (Cth) arose "*exclusively from the statutory provisions themselves*".⁸¹ Beaumont J considered that the agreement was merely part of the background and that, "*in the absence of any substantive nexus or connection*" with the contract, the statutory claims existed "*independently of contract*".⁸²

In the 1998 case of *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* ("*Hi-Fert*"),⁸³ Beaumont J sitting as a member of the Full Court of the Federal Court again confined the contract in question to the background of the dispute holding that the statutory claims under the TPA were "*independent and free standing*" and should not be referred to a tribunal sitting in London. The approach adopted by the Full Court was in stark contrast to the more liberal

⁸⁰ [1985] FCA 369.

⁸¹ *Ibid*, 34.

⁸² *Ibid*.

⁸³ [1998] 90 FCR 1.

approach that had been adopted by the NSW Court of Appeal in *IBM Australia Ltd v National Distribution Services Ltd*⁸⁴ in 1991 and followed in subsequent decisions, such as *QH Tours Ltd v Ship Design & Management (Aust) Pty Ltd*⁸⁵ and *Francis Travel Marketing Pty Ltd v Virgin Airways Ltd*.⁸⁶ Following the example provided by international practice, this line of decisions recognised that an arbitration agreement encompassed statutory claims such as that arising under the TPA and, more importantly that the parties were "*unlikely to have intended that different disputes should be resolved before different tribunals*".⁸⁷

In 2005, Allsop J felt bound by the Full Court decision in *Hi-Fert* when considering the construction of the arbitration agreement in *Walter Rau Neusser Oel und Felt AG v Cross Pacific Trading Ltd*.⁸⁸ Despite the fact that he felt that that decision was inconsistent with the approach of other Australian courts and international practice, Allsop J felt bound to exclude the claims under the TPA that related to pre-contractual representations from the arbitration agreement in the absence of linking words in the arbitration clause.⁸⁹

It was only recently in the *Comandate* case that Allsop J could, as a member of the Full Court, amend the restrictive approach imposed by *Hi-Fert*. Allsop J stated explicitly that he felt compelled to bring the Federal Court in line with modern authorities in Australia and overseas. He stated that *Hi-Fert* was "*wrong*" and "*inconsistent with modern authority*".⁹⁰

"Because of the importance of the issue to commerce in this country, my view is that I should not merely expose my disagreement, but should take the step so far as it is up to me to bring the views of this Court into conformity with the Court of Appeal of New South Wales and other decisions of courts in Australia and elsewhere concerning the approach to the construction of arbitration clauses."

It was only in this decision that the Federal Court was brought in line with modern Australian authorities and international practice. It is worth noting, however, that a subsequent decision of the Federal Court in *Seeley International Pty Ltd v Electra Air Conditioning BV*,⁹¹ Mansfield J endorsed the decision in *Comandate* but did not appear to consider the presumption in favour of one-stop adjudication.

Education programme

This brief survey⁹² of the approach of the Federal Court in contrast to the NSW Court of Appeal to the construction of arbitration agreements indicates that if the Federal Court is to be entrusted with exclusive jurisdiction under the Act, steps should be taken to ensure that it

⁸⁴ [1991] 100 ALR 361.

⁸⁵ [1991] 105 ALR 371.

⁸⁶ [1996] NSWSC 104.

⁸⁷ *Francis Travel* [1996] NSWSC 104 (Gleeson CJ).

⁸⁸ [2005] FCA 1102.

⁸⁹ *Ibid*, para 81.

⁹⁰ [2006] FCAFC 192, 184.

⁹¹ [2008] FCA 29.

⁹² For a more detailed discussion of this brief analysis see Delaney and Lewis.

has the legal knowledge, expertise and experience to face up to the task. Many judges sitting on the Federal Court (or indeed the State and Territorial Courts) may have little knowledge and/or experience of international arbitration matters. It would be in the interest of all concerned, but most importantly the parties involved in the potential or actual arbitration, that judges who do or may hear arbitration matters should undergo some sort of training or educational programme. This could involve a series of short seminars addressing current topics in arbitration and recent decisions of other national courts. A more intensive course could be provided to assist judges with revising the fundamental principles of arbitration and the general framework of arbitration law. By improving the general understanding amongst judges of arbitration issues, better decisions (at least in the sense of being consistent with other national courts and international practice) would be reached and a sophisticated and consistent body of jurisprudence on arbitration law in Australia would develop.

Conclusion

We agree that entrusting the Federal Court with exclusive jurisdiction to hear matters arising out of the International Arbitration Act may lead to more consistent jurisprudence and recommend that appropriate amendments be adopted. We also suggest that some sort of education or training programme be devised not only to address the general framework of international arbitration but also recent developments in international arbitration in Australia and other jurisdictions.

I. Other matters

Do you have any other comments or recommendations for improving the International Arbitration Act?

RECOMMENDATION:

We recommend that consideration be given to the following suggested amendments:

- (1) Express inclusion of the principle of confidentiality with appropriate exceptions;
- (2) Express stipulation of matters that cannot be referred to arbitration; and
- (3) Express stipulation of the appropriate test for determining whether an arbitrator is independent and impartial.

DISCUSSION:

(a) Confidentiality

We suggest that the Act be amended expressly to provide for the principle of confidentiality in international arbitration.

Position in England

The principle of confidentiality has long been recognised as a general principle of international arbitration in both common law and civil law countries (though there are exceptions to this general principle⁹³). For example, during the review of the English Act, the DAC decided against including the principles of privacy and confidentiality in the proposed English Act, not because the existence of the principles themselves was unsettled but because the scope and extent of the principles was unclear primarily due to the imprecise formulation of the exceptions and qualifications that had been articulated in the case law.⁹⁴ Nonetheless, the DAC confirmed the existence of the principles, leaving it to the courts to resolve the details:

"However, none doubt at English law the existence of the general principles of confidentiality and privacy (though there is not unanimity as to their desirability)... As to English law itself, whilst the breadth and existence of certain exceptions remains disputed, these can be resolved by the English courts or a pragmatic case -by- case basis."⁹⁵

⁹³ See Redfern and Hunter, 29; Galatas, 47-99, and *Michael Wilson & Partners Ltd v John Forster Emmott* [2008] EWCA Civ 184.

⁹⁴ See DAC Report, paras 11-18.

⁹⁵ See DAC Report, para 8.

One of the reasons that it was felt that English law should confirm the principles of privacy and confidentiality was the decision of the High Court of Australia in *Esso Australia Resources v Plowman*⁹⁶ ("**Esso**") in the previous year. As acknowledged in the DAC Report:

*"Last year's decision of the High Court of Australia in Esso/BHP v Plowman (see [1995] 11 Arbitration International 234) reinforced many people's interest in seeking to codify the relevant English legal principles in the draft Arbitration Bill. The implied term as the contractual basis for such principles was not in doubt under English law, and the English Courts were upholding these principles in strong and unequivocal terms. However, the Australian decision was to the effect that, as a matter of Australian law, this contractual approach was unsustainable as regards confidentiality. This has troubled users of commercial arbitration far outside Australia. The first response has been for arbitral institutions to amend their arbitration rules to provide expressly for confidentiality and privacy. The new WIPO Rules have sought to achieve this and we understand that both the ICC and the LCIA are currently amending their respective rules to similar effect".*⁹⁷

Indeed the LCIA amended its rules to include the principle of confidentiality in Article 30.

In response to the *Esso* decision, the DAC considered (though this was rejected) "*placing these general principles on a firm statutory basis in the Arbitration Bill*".⁹⁸

It seems that the DAC was correct in its approach; there was no need to confirm the principles of privacy and confidentiality in the English Act when they were being respected and applied by the English courts.⁹⁹ In the recent decision in *Michael Wilson & Partners Ltd v John Forster Emmott*,¹⁰⁰ the English Court of Appeal confirmed these principles and sought to set out in specific terms the four exceptions to the principle of confidentiality. The courts of other common law jurisdictions, such as Singapore,¹⁰¹ have also endorsed the principle of confidentiality.

Position in New Zealand

In 1996, the New Zealand Parliament adopted s 14 of the New Zealand Act to overcome the effect of the *Esso* decision. Recognising both the privacy of hearings and the confidentiality

⁹⁶ [1995] 183 CLR 10. For discussions of this case see (1995) 11(3) *Arbitration International* which was dedicated to the *Esso* case.

⁹⁷ Para 13.

⁹⁸ Para 14.

⁹⁹ For English cases on the principle of confidentiality, see for example, *Dolling-Baker v Merrett* [1990] 2 All ER 890 (CA) and *Ali Shipping Corp v Shipyard Togrir* [1998] 2 All ER 136 (CA).

¹⁰⁰ [2008] EWCA Civ 184.

¹⁰¹ See for example, *Myanma Yangon Chi Oo Co Ltd v Win Win Nu* (2003) discussed in 'Case Note: The Confidentiality of Arbitration Proceedings' Rajah & Tann newsletter, November 2004.

of information, the Government Administration Committee reporting to Parliament on the proposed s 14 stated that:¹⁰²

"[T]he privacy of the proceedings in an arbitration is a key advantage compared with litigation that is conducted in public. In selecting arbitration as their way of resolving disputes, parties would not contemplate that one of them might publicise or pass on information given in the course of the arbitration because such conduct would negate some of the advantages derived from arbitrating."

As a result, s 14 was introduced to prevent the parties from publishing, disclosing or communicating any information relating to the arbitration or the award, unless the parties had agreed otherwise, it had been contemplated by the New Zealand Act or if it was to a professional or other adviser of the parties.

Subsequently, however, it was found that the exceptions to the principle of confidentiality set out in s 14 were too narrow to accommodate the circumstances that could arise in practice.¹⁰³ The amendments in ss 14A to 14I of the Amendment Act 2007 widen the exceptions originally set out in s 14 and encompass the principle of "open justice" when parties to an arbitration have recourse to the courts. Whilst these provisions are extensive and very detailed, they cover the privacy of the proceedings and confidentiality of any information disclosed during the proceedings, the exceptions, i.e. the circumstances in which the tribunal may allow confidential information to be disclosed as well as the circumstances in which a court may allow disclosure whilst confirming that court proceedings must be conducted in public except in certain circumstances; and the facts that may be taken into account in determining whether court proceedings should be private and the effect of such an order.¹⁰⁴

Position in Australia

Although privacy in arbitration has been recognised by the Australian courts, it is precisely because the Australian High Court failed to endorse the principle of confidentiality in the *Esso* case that it is necessary to stipulate this principle in the International Arbitration Act. We do not disagree with the views expressed in *Esso* that there are circumstances where confidentiality cannot be justified, particularly where the case involves issues that are in the public interest. Indeed, such cases may be treated as an exception to the general rule.

Nonetheless, we consider that it would be beneficial to the practice of international arbitration in Australia if the underlying legal framework endorsed the principles of privacy and confidentiality. Without going into the details as to how these principles may be incorporated into the Act and the scope and extent of any exceptions and qualifications to those principles

¹⁰² Government Administration Committee Report, Arbitration Bill 1996, no 117-2, vi discussed in New Zealand Law Commission Report 83, *Improving the Arbitration Act 1996*, February 2003, 16 ("**Law Commission Report**").

¹⁰³ See Law Commission Report, 5-44; Kawharu, 405-411; Tomas Kennedy-Grant, 'The New Zealand Experience of the UNCITRAL Model Law: A Review of the Position as at 31 December 2007' (2008) 4(1) *Asian International Arbitration Journal* 1, 53 ("**Kennedy-Grant**").

¹⁰⁴ See Kawharu, 405-411 and Kennedy-Grant, 53.

(though we are happy to give further consideration to this if that would be helpful), we refer you to the provisions recently adopted in the New Zealand Act.¹⁰⁵

Conclusion

In conclusion, we suggest that given the decision of the High Court in the *Esso* case, it would be beneficial to the development of arbitration law and thus the development of Australia as a centre for arbitration if the principles of privacy and confidentiality were endorsed in the Act and the legitimate exceptions to these principles were clearly delineated along the lines of the New Zealand Act.

(b) Arbitrability

We suggest that the Act be amended to reflect the position in modern authorities and international practice that all matters, bar a few exceptional matters such as criminal, family and certain regulatory matters, be referred to arbitration pursuant to an arbitration agreement of the parties irrespective of whether they arise directly out of the contract or indirectly through, for example, a statutory cause of action related to the parties contractual relationship.

Matters that are not arbitrable

We saw above in the context of the construction of arbitration agreements the initial reluctance of the Federal Court to refer matters relating to the TPA that arose in a dispute where parties had agreed to refer disputes relating to the contract of arbitration.¹⁰⁶ Whilst it may be legitimate for the courts to refuse to refer matters that are not arbitrable, such as the validity or existence of a trade mark or patent under the Trade Mark Act or the Patent Act, or issues relating to the incorporation or deregistration of a company under the Corporations Law, there are other matters arising out of statutes that are arbitrable and that the courts (or other some form or tribunal) have refused to refer to arbitration.

Example - Industrial Relations Act

For example, the Industrial Relations Commission of NSW has been reluctant to refer the issue of whether a contract is "unfair" under s 106 of the Industrial Relations Act (NSW) ("**IR Act**") to arbitration despite the existence of an arbitration clause in the contract.¹⁰⁷ In *Metrocall Inc v Electronic Tracking System ("ETS")*,¹⁰⁸ the parties had entered into a license agreement that provided for arbitration in Texas, Texas law was to be the governing law. ETS contended that the license agreement was a contract under which work was performed and that it was "unfair" under s 106 of the IR Act. Section 106 empowers the Industrial Relations Commission to wholly or partly void or vary a contract that is unfair. The Commission refused to stay the proceedings in favour of arbitration on the basis that the

¹⁰⁵ We also refer you to Fernando Mantilla-Serrano and John Adams, 'UNCITRAL Model Law: Missed Opportunities for Enhance Uniformity' (2008) 14 *UNSW Law Journal Forum* 29 for a discussion of confidentiality under the Model Law as well as Spanish and New Zealand law.

¹⁰⁶ See the response to Question H.

¹⁰⁷ See Galatas, 39-41.

¹⁰⁸ [2000] NSWIR Comm 136.

matters arising out of s 106 were not capable of settlement by arbitration. Although in general, statutory claims such as that arising out of the TPA could be referred to arbitration and should be in order to facilitate the parties' agreement, these matters affected the public at large and should be dealt with by specialist courts and tribunals.¹⁰⁹

The undesirable result that decisions such as these may have on the arbitral process is that parties will easily be able to evade an arbitration agreement by pleading statutory causes of action that a court or quasi-judicial tribunal may find cannot be referred to arbitration. Not only is the arbitral agreement undermined but it adversely impacts upon the confidence and trust of the judicial system in the entire arbitral process.¹¹⁰

Conclusion

Accordingly, we suggest that the Act be amended to ensure that s 7 prevails over s 106 of the IR Act as well as other statutes unless the claim is not arbitrable. The most effective way of achieving this amendment may be to make a general statement and then list the specific exclusions for matters that are not arbitrable, such as criminal law, family law, the Trade Marks Act, the Patents Act and certain provisions of the Corporations Law.

(c) *Independence and impartiality of arbitrators*

It has been suggested that arbitrators are not held to the same standard of conduct as judges.¹¹¹ This suggestion is based on the misconceived understanding that:

*"While arbitrators are under a duty to make disclosure of certain matters and to avoid conflicts of interest, this duty is not placed as highly as the equivalent obligations of the judiciary. It is likely that this has the effect of reducing the status of arbitrators further in the eyes of judges who are expected to maintain the very highest standards of impartiality and avoidance of ever a perception of bias or a conflict of interest."*¹¹²

Perhaps it is due to the paucity of cases in Australian courts addressing issues of impartiality and independence that this misperception has evolved.

Position in England

The position in English law stands in stark contrast. It is now well established that there is no differentiation in the test for removing a judge or an arbitrator for a lack of impartiality. In *R v Gough*, Goff LJ stated:¹¹³

"I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices...or with jurors, or with arbitrators".

¹⁰⁹ See Galatas, 39-40.

¹¹⁰ See Galatas, 39-41.

¹¹¹ See Galatas, 57.

¹¹² See Galatas, 57.

¹¹³ [1993] AC 646 at para 670. See also *Laker Airways Inc v FLS Aerospace Ltd and another* [1999] All ER 410 per Rix J "indeed it would be strange if the test in arbitration were different from that which applies generally in the administration of justice".

In *Locabail (UK) Ltd v Bayfield Properties Ltd and another*,¹¹⁴ a case which concerned the removal of a judge on the grounds of bias, the Court of Appeal cited Goff LJ's formulation in *R v Gough* with approval and commented that "*this test appears to be reflected in s 24 of the Arbitration Act 1996*".

English law therefore does not differentiate between arbitrators and judges in the test for a lack of impartiality. The most recent and authoritative exposition of this test was provided by Hope LJ in *Porter v McGill*.¹¹⁵ In that case, Hope LJ adopted the formulation proposed by Phillips LJ in *Re Medicaments and Related Classes of Goods (No 2)*¹¹⁶ (albeit with a slight amendment¹¹⁷) and stated:¹¹⁸

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

This test, which is of application to both arbitrators and judges, equates directly with the Strasbourg jurisprudence which has arisen on account of parties challenging the independence and impartiality of judges under Article 6(1) of the European Convention of Human Rights.¹¹⁹ Subsequent cases in the New Zealand courts have also adopted the test in *Porter v McGill*.¹²⁰

Conclusion

In the absence of this issue being dealt with by the Australian courts, we suggest that it would be beneficial to the perception and practice of international arbitration in Australia if the Act was amended to reflect the *Porter v McGill* test. There is no doubt under Article 12(1) of

¹¹⁴ [1999] All ER 1279.

¹¹⁵ [2002] 2 AC 357.

¹¹⁶ [2001] (CA) 1 WLR 700.

¹¹⁷ *Ibid*, para 103. Hope LJ removed the words "*real danger*" after "*real possibility*".

¹¹⁸ *Ibid*.

¹¹⁹ Article 6(1) of the European Convention of Human Rights provides that "*in the determination of his civil rights ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

¹²⁰ Whilst the Court of Appeal in *Erris Promotion Ltd v Commission of Inland Revenue* [2003] 16 PRN2 1014 had reformulated the test, it was not until the decision in *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 that *Porter v McGill* was formally adopted. See the discussion in Kennedy-Grant, 29-35.

the Model Law that the arbitrator must be independent and/or impartial. However, it is the appropriate test that is to be applied if there is a question as to an arbitrator's independence or impartiality that is important in terms of the apparent perception of the arbitrator and the arbitral process. In order to promote trust and confidence in arbitrators and the arbitral process, we suggest that the *Porter v McGill* test be codified in the Act.

C L I F F O R D
C H A N C E

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