

6 January 2009

REVIEW OF THE INTERNATIONAL ARBITRATION ACT 1974

DISCUSSION PAPER NOVEMBER 2008

INTRODUCTION

In my opinion the Discussion Paper appears in part premised on certain misconceptions and misunderstandings about broad scope of international arbitration. Many of the provisions appear to be proposed in the context of the common law.

The governing legal systems in international arbitration include, as well as the common law and its variants, the civil code and its variants and Arab State codes (generally civil code based but with influence or provisions derived from Sharia law).

Further, many international arbitrations arise from and/or are governed by trade or commodity organisation rules which in their context are apparently intended not to be subject to the Model Law or to particular national procedural law or rules.

Particularly para 4 "Promoting Australia as a place for international arbitration" exemplifies, by categorical statements read as justifying the review, is, in my opinion, reflective of a very myopic view of international arbitration.

That these discussion paper statements are in my view unsupportable does not, however, detract from the desirability of amending certain provision of the relevant Australian law and some other suggestions contained in the paper.

My views in respect of the rationale and justification as stated in para 4 of the paper may be simply stated as follows.

- (a) It is not correct to state that "Australia is an attractive venue for international arbitration". It may be that legal and arbitral practitioners in Australia think so, or would like to think so, but it is simply not the case.

The geographic isolation of Australia from the mainstream areas of arbitration and international trade and commerce in the USA, Europe, the Middle East and Asia of itself acts as a deterrent.

Non mainstream locations such as Canada, South Africa, Eastern Europe and Scandinavian countries (with the exception of Sweden and its specialised arbitration and relationship with the PRC) suffer the same disadvantage.

- (b) Whilst Australia's adoption of the UNCITRAL Model Law was and is essential to Australia's standing in transnational international trade and commerce, the now wide adoption by many nation states of the Model Law gives Australia no unique or strong advantage over other like nation states.

I include a copy of a paper published in 1994 titled "Australia, An Ideal Legal Environment for the Conduct of International Commercial Arbitration".

That Australian Courts may be perceived internally as having high integrity and quality, this is not seen as being so by many arbitration practitioners and arbitration lawyers around the world in common law countries and even less so in civil code and Islamic code countries.

Over past years some judgements out of Australian Courts are perceived outside (and in part inside) Australia as being from perverse to simply wrong¹.

- (c) It is correct that there are some Australian arbitrators and arbitration practitioners who have achieved prominence internationally but the pool is extremely small (probably less than five arbitrators) and their expertise is essentially in common law. To be an active arbitration practitioner internationally and to provide the appropriate expertise in the expansive international environment today, a knowledge and ability of the two other principal trade legal systems of the civil code (and variants) and Islamic codes as well as desirably language ability in other than English is necessary.
- (d) It is the individual international arbitrator that carries to the rest of the world the personal reputation and standing and ability that influences selection. It is for the most part not national arbitral institutions nor local laws that influence selection of the arbitrator or selection of situs.
- (e) No scrutinizable statistics or at all have been proffered to support assertions of numerical conduct of international arbitrations in Australia. The reality is that since the creation of ACICA the number of domestically located international arbitrations is very low, averaging less than one per year.
- (f) Some changes will be required to domestic arbitration Acts to bring consistency (see later). This should be done coincidentally with any changes to the Commonwealth Act.

¹For example, *Esso Australia Resources Ltd v Plowman (Minister for Energy & Minerals)* (1995) 183 CLR 10, 34 per Mason CJ, 34 per Brennan on "confidentiality"
Resort Condominiums International Inc v Bolwell and Another [1995] 1 Qd R 406; (1993) 118 ALR 655 on "jurisdiction"
SASFIT v Leighton Contractors Pty Ltd (1990) 55 SASR 827 (although domestic exemplifies the court's views on powers of intervention

Some recent examples in the past 12 months include – (1) *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255 (see attached paper); (2) *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Limited* [2008] FCA 551 in which the Court expressed obiter the view that the court's powers in respect of penalty for contempt of court in effect extended beyond Australia's natural boundaries and a non-Australian arbitrator sitting in London proceeding under the UK Arbitration Act with an arbitration that an Australian Court had injuncted would or could be subject to penalty.

As to the specific questions

Question A

- (i) Yes – for the purposes of modernisation and consistency
- (ii) Yes – for consistency.

Question B

Yes – the expansive jurisdiction proposed by some Australian courts (eg Resort Condominiums International v Bolwell and Another) is, in my view, inconsistent with the provisions of Art V and VI of the New York Convention.

A court complying with Section 8 of the International Arbitration Act will still have the power to apply considerations of public policy² to deny recognition and enforcement. Absent any definition or firm understanding of what constitutes the relevant public policy a court of itself can determine the applicable "Public Policy" thus establishing jurisdiction if it sees fit.

Question C

Yes - such provision will provide certainty, provided there is further some definitive provision on what does or does not constitute "opting out".

The term "contrary intention" provided in the Act construed as supporting or being "opting out" in my view needs some express definition (see for example commentary on Question E (ii)).

Question D

Yes - provided that the parties' adoption of rules (whether of non-Australian arbitral institute or of a non-Australian trade or commodity organisation or the UNCITRAL Rules or other international conventions or of their own creation) is not negated in any way – for example by the issues raised under Question G.

To create circumstances where the parties' autonomy to adopt particular rules or by the arbitral law to void particular provisions of any such agreed rules in my opinion will act to the detriment of the fundamental aim inferred from the discussion paper to make Australia an attractive situs for international arbitration.

In my view, parties adopting at the making of a contract a substantive law which, for example, precludes payment of interest arguably should not be construed as a conscious or deliberate "opting out" of the provision as proposed.

The Act should not encourage "forum shopping".

² New York Convention

Further, the procedural rules adopted by the parties can, in some jurisdictions, become the "law" of the arbitration as much as statutory procedural law. The position is not as clear cut as the discussion paper might infer.

Question E

- (i) Yes
- (ii) No - it is possible that the governing substantive law or applicable rules may preclude awarding of interest and/or costs. Thus the issue of whether by adopting a particular substantive law or rules constitutes "opt out" is open to creating uncertainty unless otherwise appropriately qualified.

The *Eisenwerk* judgement has been the subject of wide criticism within Australia.

In my opinion it was open to the court to find as it did and the judgement of itself does not warrant criticism.

If it is intended to provide by statute that the parties' selection of institutional rules or their own created rules do not constitute "opting out" of the applicability of the Model Law in my opinion this should be expressly provided.

Further, in my view, such a provision might arguably act as much in attracting international arbitrations to Australia as being detrimental to this aim (see also reference to "Contrary Intention".)

Subject to such clarification and qualification, my answer to II would be Yes.

Question F

- I agree with the adoption of a new Article 2A as stated.
- I agree with Option I but not Option II in respect of definition of an arbitration agreement
- I agree with the proposal for recognition and enforcement of interim measures but not the provision of a power in Arbitral Tribunals to issue *ex parte* preliminary orders (which being unenforceable by a court may have little or no effect but may create later problems for the Arbitral Tribunal. An unenforceable order is, in my opinion, an act of futility.)

Accordingly I answer

- (i) Yes – subject to above
- (ii) Yes – Option I only – in my opinion removing the writing requirement makes establishing the parties' agreement to arbitrate a possibly difficult and time consuming process.

Question G

If the intention is to give standing to an existing arbitral institute in Australia (such as ACICA referred to) it will likely have that effect. In my opinion, subject to some caveats relating to quality control³, ACICA is the only Australian organisation that should be considered.

³ For example, in my opinion, the ACICA "Panel of Arbitrators" is made up substantially of persons precluded from acting as an arbitrator because of position (government employees) or without any qualification relevant to appointment as an international arbitrator.

However, in the context of the Discussion Paper the thrust of which is perceived to be to advance international arbitration in Australia and the use of Australia as a situs or focus for international arbitration, in my opinion such a proposal will be unlikely to achieve those aims and may very well be deleterious to the aims.

Amendments to nation state or regional laws to like effect (for example in the PRC Special Administrative Region of Hong Kong in respect of the Hong Kong International Arbitration Centre and the Singapore International Arbitration Centre have anecdotally not of itself increased the international arbitration workload in Hong Kong or Singapore). Conversely, in recent times the PRC removed the monopoly of China International Economical and Trade Arbitration Commission (CIETAC).

Although not necessarily directly relevant, in passing I observe that some of the proponents for the changes in Hong Kong and Singapore are also proponents and beneficiaries of this provision in Australia and it may be argued as "empire building" and not to the benefit of Australia as a whole.

For convenience, some functions set out in the provisions of Arts II(3) and II(4) of the Model Law might be carried out by a designated arbitral institution, but in my view challenges to arbitrators should definitely not be placed in the hands of an arbitral institution for a variety of reasons including -

- (a) International arbitration is very competitive – valid arguments of bias or appearance of bias must arise if practising arbitrators as part of ACICA sit in judgement of other practising arbitrators. Presently (and likely to be so in the future) the governing body of ACICA has membership of practising arbitrators.
- (b) Those international institutions which do provide challenge provisions have over recent years found their decisions of themselves challenged in domestic courts (of the situs on the basis that such courts have jurisdiction as a consequence of the selection of the situs giving the procedural law – a proposition with which I do not agree despite its widespread acceptance).

Particularly certain legal practitioners in the UK have adopted this as a common tactical procedure when representatives of respondents..

I answer as follows:

- (i) Ambivalent subject to below
- (ii) No

Question H

In my opinion the most significant criticism in the overall administration of international arbitration is the conduct and decisions of domestic courts in most nation states when dealing with applications for recognition and enforcement and other challenges or interlocutory matters (see, for example, attached paper 'The New York Convention – 50 years on' published Mealeys October 2007).

The proposal inferred by Question H of the Discussion Paper for limiting jurisdiction on international arbitration matters to the Federal Court will significantly go to remedying this shortcoming provided well informed, well educated specialist judges of the Federal Court are charged with this role.

An example of a properly informed, competent court is the specialist Court of Cassation in Paris which deals with arbitration matters arising. The sitting judge is a past Secretary General of the ICC. Matters are dealt with expeditiously.

Answer – Yes for the reasons stated above and in the preamble.

Question I

In my view there is an opportunity for Australia to enact arbitration law which will be cutting edge and lead the world. There is, in my opinion, no such thing as "best practice" in international arbitration if all legal systems, arbitration and commercial law are considered.

To presume that we in the western common law world have all the answers is arrogant and indicative of lack of true catholic knowledge of international arbitration.

Australia can achieve much and by carefully developing its arbitration law be seen as empathetic to all codes.

If this can occur then the stated preamble aims may be achieved but over the long term.

AA de Fina

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Australia: An Ideal Legal Environment For The Conduct Of International Commercial Arbitration

By

A.A. de FINA

[Editor's Note: Mr. A.A. de Fina of Hampton, Victoria, Australia, is president of the Australian Centre for International Commercial Arbitration and president of The Institute of Arbitrators Australia.]

A recent published commentary in *The Report* suggests that there are serious legal impediments or inadequacies which mitigate against the conduct of international commercial arbitration in Australia (See April 1994, Page 14: "Institutional International Commercial Arbitration in Australia").

The commentary further suggests that these alleged shortcomings will be overcome by the adoption of the rules or administration of a particular arbitral institute.

The following commentary analyses the legal position in Australia in detail and concludes and recommends the following measures in cases where international commercial arbitrations are to be conducted in Australia:

COMMENTARY

- (a) Other than in exceptional circumstances and for good reason the facility for opting out of the applicability of the Model Law for international arbitrations in Australia should not be adopted.
- (b) Whether or not the Model Law applies, the rules of an arbitral institute can be adopted, where appropriate, to facilitate and control the establishment and conduct of an arbitration without prejudice to other legal rights or recourse.
- (c) Universally recognised and utilised neutral rules such as the *Arbitration Rules of the United Nations Commission on International Trade Law*¹, *International Chamber of Commerce Rules for Conciliation and Arbitration for International Arbitrations*, or the like are appropriate for adoption by parties.
- (d) The Australian Centre for International Commercial Arbitration (ACICA) is the recognised international arbitral organisation in Australia with the facility and capacity to advise, assist, facilitate and administer international commercial arbitrations, whether under Institutional rules or otherwise.

ACICA has offices and administrative facilities in Melbourne, Sydney, Brisbane, Darwin and Perth.

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DISCUSSION

I. Introduction

The legal framework governing international commercial arbitration in Australia is provided by both Commonwealth and State or Territorial legislation.

The precedent legislation is the *International Arbitration Act 1974 (Commonwealth)* (the Commonwealth Act). The Commonwealth Act incorporates and subscribes² to the *Convention on Recognition and Enforcement of Foreign Arbitral Awards*³. The Commonwealth Act was amended in 1989⁴ to incorporate the *UNCITRAL Model Law*⁵ and in 1990⁶ the *ICSID Convention*⁷.

Australia is a federation of States and Territories. Separate legislation has been enacted in the differing domestic jurisdictions, however a high degree of commonality exists between the various State and Territorial legislation variously described as the *Uniform Acts*⁸.

Where there is no or no inconsistent Commonwealth law, the law of a State or Territory applies⁹.

The Commonwealth and State or Territorial legislations provide only a general framework for the conduct of arbitrations, whether domestic or international.

Parties are not constrained from adopting arbitration rules of an arbitration institute¹⁰, or to agree their own rules¹¹.

Save for some limited provisions incorporated in the domestic *Uniform Acts* which have the effect of distinguishing between domestic and what may be categorised as forms of international arbitrations, and then only for particular aspects of curial intervention, no general distinction is drawn in these Acts between international and domestic arbitrations. The *Uniform Acts* include subscription to the *New York Convention*¹².

In subscribing to the *New York Convention*, Australia did not adopt either of the reservations available under the *Convention*¹³. Accordingly, to be capable of recognition and enforcement in Australia a "foreign award" is not required to be made in a convention country. For the purposes of application of the *Convention* a "foreign award" is an award made in the territory of a state other than where recognition and enforcement is sought, or arbitral awards not considered as "domestic" awards in such State¹⁴.

Recognition or enforcement of an arbitral award may be refused, inter alia, on the grounds that to do so would be contrary to public policy in Australia¹⁵.

II. Recognition and Enforcement

A. Commonwealth Act Provisions

The *Commonwealth Act* provides for interpretation of words or expressions used in the part relating to international commercial arbitration¹⁶ as having the same meanings as given by the *Model Law*¹⁷.

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Under the *Model Law* an arbitration is international if the parties to the dispute have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; have at the time of the conclusion of the arbitration agreement their places of business in different countries; where the place of arbitration is outside Australia; or where the place in which a substantial part of the obligations are to be performed or the place most closely connected with the subject matter of the dispute is outside Australia¹⁸.

In establishing that the *Model Law* has the force of law in Australia¹⁹ the term "state", as provided in the *Model Law*, is defined as meaning Australia and its external territories, and any foreign country²⁰.

The *Commonwealth Act* particularly provides that parties may agree in writing that a dispute between them or that may arise between them may be settled otherwise than in accordance with the *Model Law*²¹.

Whether or not the parties opt out of the *Model Law* under this provision, the definitions, including that of what constitutes an international commercial arbitration, still apply.

However if parties have so opted out of the *Model Law*, provisions for recognition and enforcement²² and grounds for refusing recognition and enforcement²³ cannot be relied upon. These otherwise provide a mechanism for enforcement of an arbitral award irrespective of the country in which it is made.

This may be clearly distinguished from the provision for enforcement of foreign awards²⁴ under the *New York Convention* contained in Part II of the *Commonwealth Act*.

By the definition of a "foreign award", enforcement of an award made in Australia would not be available under this provision.

No such question of recognition and enforcement of an award arises in respect of the *ICSID Convention* which, wherever made, is enforceable in any State or Territory of Australia as if the award had been made in and in accordance with the law of that State or Territory²⁵.

B. *Uniform Act* Provisions

The *Uniform Acts* do not define what constitutes an international commercial arbitration.

The term "domestic arbitration agreement" for the purposes of exclusion agreements²⁶ otherwise provided in the *Uniform Acts* is defined as an agreement which does not provide either expressly or by implication for arbitration in a country other than Australia; and where a party to the agreement at the time the agreement is made is a national of, or habitually resident in a country other than Australia; or a body corporate incorporated in or whose central management and control is exercised in any other country other than Australia²⁷.

Where a situs is not nominated or cannot be implied from the arbitration agreement and in accordance with general convention, the arbitral tribunal determines the situs as Australia, or an institution administering or governing an arbitration (whether by the incorporation of the rules of

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that institution or otherwise) nominates or appoints a situs within Australia, then such arbitration agreement does not assume the character of being a "domestic arbitration agreement."

To be an arbitration agreement to which the *Uniform Acts* apply, an agreement must be in writing and refer present or future disputes to arbitration²⁸.

A properly procured award made under an arbitration agreement may be enforced by a court by leave in the same manner and to the same effect as if a judgment of the court²⁹.

III. Court Intervention and Support

One of the fundamental rationales for the use of international commercial arbitration is the avoidance of submission of a dispute to the jurisdiction of a particular or, in some circumstances, any court.

However, the *Model Law* clearly contemplates and provides for curial intervention³⁰ and the *Commonwealth Act* provides power in a court to stay proceedings instituted before such court where there is an arbitration agreement and direct the matter to arbitration³¹ and for a court to make preservation or conservatory orders to protect the rights of parties³².

By amendment or adoption of the *Uniform Acts* variously commencing in 1990³³, the powers of the court to review awards³⁴ were significantly amended from those provided in earlier *Uniform Acts* by limitation and definition.

IV. Application when opting out of the *Model Law*

A conscious decision by parties to an arbitration agreement to opt out of the *Model Law* would ordinarily only be made in circumstances where an alternative process is put in place. Such alternative process may be the adoption of arbitral institute or other rules and may include exclusion agreements provided in the *Uniform Acts*.

In most instances arbitral institute rules would not, in any event, be inconsistent with the provisions of the *Model Law*.

However, absent *Model Law* applicability unless otherwise provided:

(a) Tribunal Jurisdiction.

The *Model Law* provisions of Article 16(1) to (3) giving competence-competence power to an arbitral tribunal will not be available under the *Commonwealth Act*.

If the parties have not adopted or established rules which appropriately provide this power for an arbitration conducted in Australia under Australian common law the principle of separability is established and available³⁵.

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(b) Appointment of Arbitral Tribunal.

Model Law procedures under Article 11(3) do not apply. The *Uniform Acts* allow for a court to fill a vacancy where there is no provision in the arbitration agreement, the method provided for filling a vacancy fails or cannot be followed, or the parties agree³⁶. The *Uniform Acts* further allow a court that has removed an arbitrator or umpire to appoint a person in place on application by a party to the arbitration agreement³⁷.

(c) Court assistance in taking evidence.

Model Law provision under Article 27 is not available. The *Uniform Acts* empower a party to an arbitration agreement to obtain from the court a writ of subpoena requiring a person to attend for examination before the arbitral tribunal and/or to produce documents³⁸. Unless a contrary intention is expressed in an arbitration agreement any person who fails or refuses to attend or produce documents or give evidence may be called before a court to give evidence, produce documents or do relevant things³⁹.

Parties may enter into a written exclusion agreement forming part of an arbitration agreement or submission to arbitration or otherwise and which relates to a non "domestic arbitration agreement".

Subject to non-applicability in very limited circumstances⁴⁰ such exclusion agreement precludes a Supreme Court of a State or Territory from

- (a) determining a preliminary point of law unless an application for such determination is made by all parties to the arbitration agreement⁴¹;
- (b) setting aside or remitting an award on the ground of error of fact or law on the face of the award⁴² or to determine an appeal on any question of law arising out of an award⁴³;
- (c) having jurisdiction in respect of an award or question of law relating to a contract expressed to be governed by a law other than the law of the particular State or Territory in which the proceedings for challenge or review are brought⁴⁴.

V. General Role of Courts

Applications under the *International Arbitration Act 1974* and the *Model Law* must be brought to a Supreme Court of a State or Territory as a court of unlimited jurisdiction by originating motion, whereas those brought under the inherent jurisdiction of the court are commenced by writ.

Such applications may relate to:

- (a) Challenge to an arbitral tribunal or member thereof for want of impartiality or bias or for failure to possess qualifications agreed by the parties⁴⁵.
- (b) The taking of evidence⁴⁶. In taking evidence the court must act within its competence and according to its rules.

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- (c) Correcting of a defective award⁴⁷.
- (d) Enforcement of award⁴⁸ unless it is capable of enforcement under the *New York Convention*. Requirements and grounds for refusal are similar to those prescribed for the *New York Convention*.
- (e) Impeaching an award by application to set aside⁴⁹. An application must be made in the State or Territory where the award is made. The grounds for setting aside are as set forth in Article 34(2) of the *Model Law*.
- (f) Stay of arbitration - where an arbitral tribunal has ruled against a challenge to its jurisdiction a party may request the Supreme Court to determine the issue of jurisdiction and there is no appeal from this determination⁵⁰.

VI. Summary

- (a) A properly procured commercial arbitral award not inconsistent with Australian public policy, is enforceable in Australia whether or not -
 - (i) made under the provisions of the *UNCITRAL Model Law*
 - (ii) made under the rules of an arbitral institute
 - (iii) made under any other rules
 - (iv) an "international" arbitral award
 - (v) a "foreign" arbitral award
 - (vi) made in Australia or elsewhere.
- (b) The legal framework in Australia is conducive to and does not impose restriction to arbitration, whether domestic or international, being conducted under the rules of arbitral institutes or any other rules agreed by the parties.
- (c) Parties may, by written agreement, restrict curial intervention in "international arbitrations" or have curial support or review, consistent with their requirements and agreements.
- (d) The Australian legal environment is appropriate to and supportive of the conduct of international commercial arbitrations within Australia.

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ENDNOTES:

- 1) Resolution 31/98 of 15 December 1976
- 2) International Arbitration Act 1974 (Commonwealth) Part II - Enforcement of Foreign Awards
- 3) United Nations Conference on International Commercial Arbitration made in New York 10 June 1958 (The New York Convention) [Treaty Series (1959) Vol 330 No 4739 at 38]
- 4) International Arbitration Amendment Act No 25 of 1989
- 5) United Nations Commission on International Trade Law Model Law made 21 June 1985
- 6) ICSID Implementation Act 1990
- 7) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) or Washington Convention) made in Washington March 18 1965
- 8) Commercial Arbitration Act 1984 (Amended) (Victoria)
Commercial Arbitration Act 1985 (Amended) (New South Wales)
Commercial Arbitration Act 1985 (Amended) (Northern Territory)
Commercial Arbitration Act 1986 (West Australia)
Commercial Arbitration Act 1986 (Amended) South Australia)
Commercial Arbitration Act 1986 (Amended) Tasmania)
Commercial Arbitration Act 1990 (Queensland)
Commercial Arbitration Act 1986 (Amended) Australian Capital Territory)
- 9) Commonwealth of Australia Constitution Section 109
- 10) For example, "International Chamber of Commerce Rules of Conciliation and Arbitration" for international arbitrations or the "Rules for the Conduct of Commercial Arbitrations" of The Institute Arbitrators Australia for domestic arbitrations
- 11) For example, arising out of the nature of the particular commercial transaction giving rise to the dispute, or agreed by the parties as applicable to the dispute.
- 12) "Uniform Acts" Part VII Recognition and Enforcement of Foreign Awards or Agreements
- 13) Convention on the Recognition and Enforcement of Foreign Arbitral Awards Article I Section 3 Reservation 1. Awards will be recognised and enforced only if made in the territory of another contracting state.

Reservation 2. The convention applies only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.
- 14) Convention on the Recognition and Enforcement of Foreign Arbitral Awards Article I Section 1

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- 15) Convention on the Recognition and Enforcement of Foreign Arbitral Awards Article V Section 2(b)
- 16) International Commercial Arbitration Act 1974 (Commonwealth) Part III - International Commercial Arbitration
- 17) International Commercial Arbitration Act 1974 (Commonwealth) Part III Section 15(2)
- 18) UNCITRAL Model Law Article 1(3)
- 19) International Commercial Arbitration Act 1974 (Commonwealth) Part III Section 16(1)
- 20) International Commercial Arbitration Act 1974 (Commonwealth) Part III Section 16(2)
- 21) International Commercial Arbitration Act 1974 (Commonwealth) Part III Section 21
- 22) International Commercial Arbitration Act 1974 (Commonwealth) Schedule 2 Article 35
- 23) International Commercial Arbitration Act (Commonwealth) Schedule 2 Article 36
- 24) See definitions International Arbitration Act 1974 (Commonwealth) Section 3(1)
- 25) International Commercial Arbitration Act (Commonwealth) Part IV Section 35(2)
- 26) "Uniform Acts" Section 40
- 27) "Uniform Acts" Section 40(7)
- 28) "Uniform Acts" Section 4(1)
- 29) "Uniform Acts" Section 33(1)
- 30) For example Article 11(3), Article 27, Article 34
- 31) International Commercial Arbitration Act 1974 (Commonwealth) Section 7(2)
- 32) International Commercial Arbitration Act 1974 (Commonwealth) Section 7(3)
- 33) Amendments
Commercial Arbitration (Amendment) Act 1990 (No 100) New South Wales
Commercial Arbitration (Amendment) Act 1991 (No 38) Tasmania

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Commercial Arbitration (Amendment) Act 1991 (No 32) Australian Capital Territory
Commercial Arbitration (Uniform Provisions) Amendment Act 1994 (No 25) South Australia
Commercial Arbitration (Amendment) Act 1993 (No 15) Victoria
Western Australian Act not yet amended

Adopted

Commercial Arbitration Act 1990 Queensland

- 34) "Uniform Acts" Section 38
- 35) *QH Tours Limited & Sazalo Pty Limited v Ship Design & Management (Aust) Pty Ltd and Charles Russell Gibbons*, Foster J (1991) 105 ALR 371
- 36) "Uniform Acts" Section 10
- 37) "Uniform Acts" Section 11
- 38) "Uniform Acts" Section 17
- 39) "Uniform Acts" Section 18
- 40) "Uniform Acts" Section 41
- 41) "Uniform Acts" Section 39(1)(b)
- 42) "Uniform Acts" Section 38(1)
- 43) "Uniform Acts" Section 38(2) and Section 38(4)(b)
- 44) "Uniform Acts" Section 41(e)
- 45) International Arbitration Act 1974 (Commonwealth) Schedule 2 Article 12(2)
- 46) International Arbitration Act 1974 (Commonwealth) Schedule 2 Article 27
- 47) International Arbitration Act 1974 (Commonwealth) Schedule Article 33(1)
- 48) International Arbitration Act 1974 (Commonwealth) Schedule 2 Article 35(1)
- 49) International Arbitration Act 1974 (Commonwealth) Schedule 2 Article 34
- 50) International Arbitration Act 1974 (Commonwealth) Schedule 2 Article 16(3)



THE INSTITUTE OF ARBITRATORS & MEDIATORS AUSTRALIA
ANNUAL CONFERENCE FREMANTLE 11 – 13 APRIL 2008

ADR – THE BOOM AND BEYOND

CONDUCT AND MANAGEMENT OF LARGE ARBITRATIONS
IN THE MINERALS AND ENERGY INDUSTRIES¹

AA de FINA OAM²

INTRODUCTION

No arbitration is ever the same as any other arbitration.

The issues, the facts, and the law may have some degree of commonality but where the dispute referred to arbitration arises in a specific industry which has of itself a certain uniqueness of terms and practices and ordinarily involves large quantum of claims, an arbitration should be tailored and conducted to accommodate the particular circumstances.

The minerals and energy, oil and gas, industries, either by the large cost of infrastructure and production facilities, or in claims such as those arising from lost or inadequate production, are perceived in common law practice to require and justify prolonged and intricate curial or arbitral proceedings.

Many disputes arising in the minerals and energy industries worldwide are dealt with by arbitration. Where the disputes are transnational, by international arbitration.

Rarely in international arbitration, whether dealing with claims of billions of dollars and whether governed by Common Law, Civil Code or Islamic Law, do such arbitrations involve arbitration hearings extending over 10 to 20 days or take in total from commencement to award more than 12 months. Such timing in a major dispute dealt with in Australia under common law and the domestic procedural law is almost unheard of.

It should not be so!

An obligation upon arbitrators must be to provide an enforceable award in a cost and time efficient manner.

Some Arbitral Institution rules provide time limits for dealing with cases³ and it is common in minerals and energy contracts for time limits to resolve disputes to be imposed.

¹ This paper is prepared for presentation within a limited time. It does not purport and is not intended to be an in-depth or wide ranging analysis of all aspects that might arise.

² Past President IAMA, Immediate Past President ACICA

Rarely in large and complex arbitrations can the contractually pre-allocated time limits be achieved and extensions of time become necessary.

However, that the extension of time facility is available should not be a reason for undue delay in rendering a final award.

In the minerals and energy industries the nature of contracts which may give rise to disputes vary from concession agreements made between a nation state and an exploiter (for example, rights to recover oil, gas and minerals owned by or over which the State has exclusive rights, or geothermal or hydro energy sources governed by the State) or between an exploiter and land owners (such as land title held by indigenous peoples) and contracts between exploiters and their contractors and suppliers.

Some common forms of agreements include

- Public Private Partnerships
- Engineering Procurement and Construct contracts (often with end performance obligations)
- Build operate and Transfer contracts
- Build Own Operate and Transfer contracts (often with collateral obligations on the State to take and pay for the resultant product such as electricity or gas for community consumption)
- Contracts to construct against a Principal's designs
- Fixed price against incompletely developed design and specification (fast track)
- Turnkey contracts
- Royalty agreements (long or short term)

Some of these forms of agreement require significant investment by the exploiter or provider and may be transnational in nature.

Additional to the contractual obligations, there may be considerations or application of international conventions on investment or bi-lateral investment treaties, funding agreements, insurance agreements including political risk, and currency protection.

The multiplicity and complexity of issues that may arise cannot be understated. In transnational agreements aspect of international private law and international public law may be relevant.

In such circumstances there are many aspects of conduct and procedure in an arbitration dealing with a dispute or disputes which may arise to achieve the ultimate aim in arbitration – justice to the parties and appropriateness of process.

SELECTION OF TRIBUNAL

Additionally to the desired requirements of a nationally, culturally and legally neutral tribunal, disputes arising in the minerals and energy industry bring with them, because of

³ For example ICC Rules of Arbitration Art 24 – 6 months.

their very nature and character, a requirement of knowledge of the industry and/or the terms and practices in the industry.

Recognising this, many dispute resolution clauses incorporated in agreements particularly related to oil and gas projects require, as a qualification as an arbitrator, substantial experience in the industry with only the chairman of a tribunal not conditioned by such a requirement.

The ability of one or more members of a tribunal to understand what may be highly technical and detailed evidence ensures avoidance of circumstances where a Tribunal or Arbitrator may be placed in a position of making a determination on matters which are not understood or completely understood.

A common practice in Australia today in selecting an arbitral tribunal is to appoint retired superior court judges who other than eminence of previous position might be quite inappropriate to form the tribunal for a particular matter.

The rationale appears not to be so much the appropriateness as a member of a tribunal, but to allow instructing solicitors to include on their resumes reference to involvement in an arbitration conducted by a legally pre-eminent tribunal.

CONDUCT

It is a fundamental characteristic of arbitration that the parties, by selecting rules, or imposing time limits, can do so as an expression of party autonomy.

This capacity has been interpreted as requiring an arbitrator to proceed only in accordance with the timetable desired or argued by the parties jointly.

It is normal that a Claimant will desire expeditious dealing with a dispute and a Respondent will seek delay, but this is not always the case. It is almost always the case that a claim will give rise to counterclaims.

Unfortunately there is a perception amongst practitioners in arbitration in Australia, both arbitrators and legal representatives, that where there is no party agreement or matters arising requiring the arbitrator to make a determination on conduct or procedure, the arbitrator is bound to follow court rules.

This is not so. An arbitrator may have regard to relevant court rules as a guide. Court rules have at least two purposes.

- (i) efficient conduct of the curial process overall in the administration of justice
- (ii) to provide procedural fairness.

Whilst procedural fairness is an essential component in the arbitral process and administration of justice under municipal law, the procedures established for the efficient conduct for the entire court process is not a factor to be considered by an arbitrator in conducting a private dispute resolution process.

Thus some Court Rules may be inappropriate for application in arbitration.

Whatever legal system is applicable to the conduct of an arbitration, there is commonality in application of the fundamental concepts of natural justice

- the Tribunal must be and must be seen to be disinterested and unbiased
- each party must be given a fair opportunity to present its case and to answer its opponent's case.

The tests for ascertaining each of the aims of natural justice can, however vary considerably.

In recent times an unfortunate and undesirable characteristic of arbitrations, particularly in common law countries or disputes governed by common law, mostly UK law, is the tactic of attempting to destroy or delay an arbitration by challenges to the arbitrators or, in the case of a tri-member tribunal constituted with two party appointed co-arbitrators, the other party's appointed co-arbitrator.

In most instances such challenges are without merit but may result in withdrawal of the arbitrator solely on the basis that a challenge has been mounted, or being dealt with by a court antagonistic to the arbitral process⁴.

It is important that the parties do not lose confidence in the Tribunal. Parties have a right to competence and efficiency.

Such things as reserving decisions on challenges to evidence, adjourning to consider relatively minor matters capable of being dealt with on the spot, uncertainty about fundamental aspects of the law and the like cannot only be a cause for lack of confidence, but might unduly and unnecessarily prolong proceedings by causing one or other or both of the parties to prepare for matters which ultimately are not admitted.

It is essential that where an arbitrator creates a reasonable expectation in the mind of a party or the parties that a particular procedure will be adopted, that procedure should not be varied save by giving reasonable notice of intention to do⁵.

THE ARBITRATORS OWN KNOWLEDGE AND EXPERIENCE

The obligation arising from principles of natural justice that a party must be aware of the case being put against it by the opposing party, applies just as much where the 'case' is not that of the opposing party but of the Tribunal. This applies whether the question is one of law, or of fact, or of expert opinion.

However, it may become evident to a Tribunal or through its own knowledge that a certain fact or facts which are logically probative of the issues before the Tribunal but are not being put by either of the parties. Such circumstances are not uncommon. Either

⁴ See, for example, arguably Supreme Court of Victoria *BHP Billiton Ltd and Oil Basins* [2006]VSC402 contra United States of America which is extremely supportive of arbitration.

⁵ *CCSU v Minister for Civil Service* [1984] All E.R. 395, per Lord Frazer at 943 contra *Luzon Hydro Corp v Transfield Philippines Inc* [2004] SG HC 204

the Tribunal must remain mute and have no regard whatsoever to this knowledge in their determinations or the Tribunal should advise the parties of the existence of this knowledge in the Tribunal and seek submissions on how it should be dealt with.

An arbitrator may have beliefs that conflict with the evidence, such that a conflict arises between the arbitrator's function to decide upon the material submitted by the parties and the obligation or desire to do justice. Similarly, an arbitrator may identify an important point overlooked or not submitted by a party. Essentially the arbitrator has a duty to disclose those beliefs or matters believed overlooked and to have a completely open mind to submissions by one or other or both of the parties that the arbitrator's beliefs or position is misconceived.

A further characteristic of minerals and energy arbitrations is the desire of the parties or a Tribunal, either because of knowledge and experience or in the absence of knowledge and experience, to require an inspection of the project or works, the subject of the dispute.

It is argued that the purpose of an inspection is to allow the arbitrator to understand the evidence being placed before the Tribunal. Unless the parties so authorize, the Tribunal should not use a view to add to the evidence unless with qualification by "thinking out loud" and then giving each party to test, then correct or amplify, the Tribunal's expressed views.

It is certainly not open to a Tribunal to make an inspection absent the parties⁶ whether before, during or after the conclusion of the parties' merits arguments, unless with the express approval or at the request of the parties.

JURISDICTION

An arbitrator must be satisfied that jurisdiction exists pursuant to the Dispute Resolution Clause of the relevant agreement or the submission to arbitration. This requirement exists whether or not a challenge to jurisdiction is made.

It is common for a recalcitrant party to challenge jurisdiction. Parties may disagree on the substantive issue of jurisdiction but nevertheless agree upon a procedure for dealing with jurisdiction. Whilst the doctrine of separability of a widely drawn dispute clause from a contract is now widely accepted⁷ this concept has not been extended to the issue of jurisdiction. Does a nominee arbitrator have the jurisdiction to determine jurisdiction to hear a dispute or must the nominee assume the formal role as arbitrator before being able to determine jurisdiction? Ordinarily challenges to jurisdiction will arise prior to or at commencement of an arbitration but can arise in running.

Whatever the position adopted, the arbitrator must make a declaration or ruling on jurisdiction. Contrary to the position in international arbitration and civil code arbitrations in Australia, an arbitrator's determination or jurisdiction is reviewable for error by a Court.

⁶ *Fox v Wellfair* [1981] 2 Lloyd's Rep 214

⁷ In Australia by *QH Tours Ltd and Szalo Pty Ltd v Ship Design & Management (Aust) Pty Ltd and Gibbons* (1991) 105 ALR 371

An objector to jurisdiction may refuse to further participate in proceedings where jurisdiction is maintained, or may participate subject to reservation or rights and maintenance of objection, for example, the Civil Code recognizes the principle as Kompetenz Kompetenz.

It may become apparently desirable or requested by a party that jurisdiction be expanded beyond that established by initial valid jurisdiction under a dispute resolution clause.

Whilst the parties by agreement can expand jurisdiction, it does not follow that an arbitrator can unilaterally expand the ambit of jurisdiction.

Governing rules or procedural law may separately empower an arbitrator but ordinarily with caveats.

In minerals and energy arbitrations, where a State or State instrumentality is a respondent party, a challenge to jurisdiction may arise on grounds of Sovereign Immunity. In modern arbitral jurisprudence, such challenges almost inevitably fail. Modern theory is that by entering into a commercial agreement a Nation State has waived Sovereign Immunity rights. However this argument occasionally finds favour either directly or indirectly when recognition and enforcement is sought in the courts of the subject nation state.

CONFIDENTIALITY

Minerals and energy projects may give rise to perceived needs of confidentiality. Such confidentiality may be in respect of processes, State payments or royalties, or political considerations.

Until the judgement of the High Court in *Esso Australia Resources v The Honourable Sidney James Plowman*⁸ there was in effect little dispute that arbitration was confidential.

The generally accepted view was that as arbitration was a private process of dispute resolution, as a consequence it must also be confidential. Confidentiality was promoted as one of the advantages of arbitration.

The *Esso* judgement was almost universally greeted with disbelief outside Australia.

The simple solution where confidentiality is a requirement is to expressly provide for confidentiality in the arbitration agreement.

But there are other aspects of confidentiality which apply in arbitration, those applicable to the Tribunal itself which demand non-disclosure of the existence of an arbitration, the conduct of the arbitration, the internal deliberations of the Tribunal, and the outcome.

⁸ High Court of Australia

BIFURCATION

There may arise circumstances which justify bifurcation of proceedings. The most common is a determination on liability by way of an interim award with a final award on quantum. However, there are considerations which may justify bifurcation, arguments in relation to time bars, consolidation (if available under the governing law or rules), separate issues which may not require oral hearings, preliminary questions of public policy immunity or privilege and the like.

DISCOVERY

Discovery in the Common Law systems is seen as ultimately going to assist a Tribunal establish issues of fact. Opposing parties hope through discovery to identify matters going to diminish or effect the opposing party's case or arguments. Discovery and pretrial or depositions of witnesses under American processes has, for the most part, been rejected as an appropriate process in arbitration, even when governed by USA law⁹.

Where disputing parties come from nation states with different legal systems, orders for discovery made by a Tribunal may be differently understood or applied with a consequence that the process becomes unfair. Tribunals must be particularly careful to ensure that orders for discovery and later inspection are positive, clear and limited, such that neither party is prejudiced by any such order.

It is also necessary for a Tribunal to understand the legal system under which orders for discovery are made or are governed. The concept of privilege against self-incrimination generally applies in most legal jurisdictions.

Aspects of some disputes arising from minerals and energy projects are allegations of fraud, corruption, bribery, money laundering, tax avoidance and the like which are ordinarily subject to criminal sanction.

An arbitrator has a wide discretion in ordering discovery but in exercising that discretion should have regard not only to the principles of natural justice but also the aims and philosophy of arbitration, particularly expedition.

IDENTIFYING ISSUES

Ordinarily the nature of minerals and energy disputes is that there are a multitude of issues, some clearly enunciated by the parties and others which are not so evident.

The common law practice of pleadings in curial proceedings has ordinarily been followed in common law governed arbitration. Pleadings may obscure rather than clarify the issues in dispute, and if curial procedures are adopted act counter to expedition and economy of procedure.

⁹ International Bar Association Supplementary Rules governing the Presentation and Reception of Evidence in International Commercial Arbitration

In international commercial arbitration the common practice is to plead in a narrative form, particularly complex cases, and avoids an extensive and time consuming procedure of further and better particulars, amendments, questions and answers, merely to get to an identification of the substantive matters at issue.

It may be possible to identify issues in a schedule or by settling an agreed "Terms of Reference" which economically sets forth each party's position and an agreed series of questions to be answered¹⁰.

WITNESS STATEMENTS AND EXPERTS' REPORTS

A common practice in arbitration, particularly international arbitration, is a requirement for testimonial evidence, to be submitted in writing prior to a hearing on the merits.

Rather than a witness statement being a summary of the evidence intended to be adduced, by a requirement that a witness statement be of such form and detail that it will stand as "evidence in chief" there is a considerable saving of time at hearing.

Similarly with experts' opinion reports, with the possibility of tribunal ordered caucusing of the experts for each side to prepare a series of answers to tribunal set questions stating either agreement or disagreement and reasons for agreement or disagreement. Following delivery of answers joint interrogation of the experts is carried out by the Tribunal.

Unless and until the Tribunal has a full and detailed understanding of the matters upon which conflicting expert opinion is being adduced, the caucusing and joint expert interrogation process should not be adopted. It is only with knowledge that the Tribunal can formulate questions to be referred.

TIME LIMITATIONS ON ORAL SUBMISSIONS AND EVIDENCE

An anathema to most common law lawyers is the time limits imposed upon counsel in opening and closing submissions, and in time allowed for adducing evidence from witnesses. Each party's conduct is timed and each party is given equal time in total.

Such limitations have the obvious advantage of controlling time in a hearing but the process is foreign to common law lawyers and arguably denies parties the full right to present submissions and evidence.

The balance is delicate but it is not the right of a party to unlimited time to present their case but a "reasonable opportunity" and "equality of treatment".

Pre-advised time limits concentrate the parties' minds to the issues and the presentation of their case and arguments. In conjunction with written submissions and witness statements, objections to the process are significantly diminished.

¹⁰ For example, ICC Court of Arbitration Rules of Arbitration Art 18

Imposed time limits are not uncommon in Superior Court jurisdictions¹¹.

This process goes significantly to reduce hearing time in arbitrations, but should not be imposed over objections by both parties or without prior notice.

TIMING AND SANCTIONS AVAILABLE TO ARBITRATORS FOR PARTY NON PERFORMANCE

Management of an arbitration requires the Tribunal to make orders as to timing or other matters.

Times set for delivery of pleadings, statements of case, or delivery of written submission should, where possible, be with the agreement of the parties. Absent agreement the times should not be so short as to deny a party a reasonable time to prepare and submit.

Ordinarily the only sanction available to a Tribunal for failure of a party to comply other than where the other party agrees to the delay is one of a cost order. Where failure to comply is without acceptable reason a cost order imposed immediately (and not reserved as a cost in the cause) will have the effect of future compliance.

Sanctions otherwise available in curial proceedings are not available to an arbitral tribunal.

RELOCATION OF SITUS

As far as practicable, the date and place of a hearing should be convenient to both parties. By the arbitration clause the parties may have agreed upon a situs with good reason.

Most institutional rules allow a Tribunal to sit other than that chosen by the parties as the situs.

Whilst modern common wisdom is that the parties' selection of a situs determines the procedural law to be applied by a Tribunal as that of the situs, this is not immutable¹². There is no prohibition, and under some institutional rules express provision, for a Tribunal to relocate the location of hearings to a more convenient place. Such convenience may arise from considerations of arbitration support facilities (ie transcription services), translation services, location of witnesses or the bulk of witnesses, political or legal instability or interference, safety or security. Under modern situs theory change of location still principally requires the Tribunal to apply and be bound by the procedural law of the nominated situs or the agreed procedural law.

¹¹ For example High Court of Australia, Supreme Court of USA

¹² J Paulsson, *Delocalization of International Commercial Arbitration – Why and When it Matters* 32 Int'l & Comp. L.Q.53 (1983)

ISSUES OF LAW

A characteristic of many projects in the minerals and energy industries is the adoption of a substantive law in contracts which may not be the legal system of either of the parties in dispute.

In particular the law of New York or Texas is chosen in a number of oil and gas projects on the basis that New York law has an extensive coverage of commercial contracts issues, and Texas law is extensive in oil and gas issues.

A Tribunal composed of arbitrators without a background in a particular legal system not the law of the agreement nevertheless has the facility of expert testimony on the governing law provided such testimony does not purport to determine the ultimate issue.

However some knowledge in a Tribunal as a whole of the substantive law can go favourably to the making of the final determination.

CONCLUSION

Disputes arising in the minerals and energy industries are nearly always complex and may span a variety of aspects, both common to disputes in other areas, or particularly and sometimes uniquely applicable to the industry.

Appropriate selection of an arbitral tribunal can aid significantly in achieving expedition, economy and a just outcome, enforceable by the award creditor.

Mirror image following of curial processes does no good service to the parties (but may to the lawyers) or to appropriate resolution of disputes in this specialized area of commercial activity.

THE NEW YORK CONVENTION – 50 YEARS ON

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1. INTRODUCTION

It is almost unarguable that the New York Convention is one of the most important international conventions of the 20th century.

The Convention and its application have been the steel cable supporting and encouraging transnational trade and commerce and the concept of autonomy of international arbitration.

Born in part to overcome perceived or actual weaknesses in the 1927 Geneva Convention¹ and going to support arbitration as a means of resolving international trade disputes, the New York Convention sponsored by the United Nations was adopted at the time of creation or shortly thereafter by, among others, importantly the two world's superpowers at that time, both of whom had not subscribed to the Geneva Convention, the United States of America and the USSR.

That after 50 years since its creation nation states continue to subscribe to and adopt the convention proves, if such proof were needed, that the convention is as relevant today as it was at inception.

As with most agreements settled by a committee, the New York Convention contained compromises, the most significant of which related to the provisions which effectively maintain or provide for a degree of independence and autonomy of a subscribing State.

With 142 signatories, as well as its importance by way of content and application, it is likely the most subscribed international convention ever and a remarkable success.

However, the world has changed dramatically in the past 50 years. The manner and composition of "transnational trade" itself has changed. Instantaneous in communication, concepts of foreign trade², together with the development of international public and private law, as well as change and development in respective national laws, has in one way challenged the concept of an unchanged and immutable 50 year old convention which is, in its terms was understandably created in the commercial and legal environment existing at that time.

Some commentators suggest that based on its age and subsequent developments in trade and law, the Convention should be reviewed and amended.

¹ Convention on the Execution of Foreign Arbitral Awards Sept 26, 1927

² Development of agency and distributorship, joint ventures infrastructure, technology transfer, finance, consultancy, patent and trademarks, insurance, acquisition and mergers and the like

Many aspects and some wording of the New York Convention have been incorporated in the UNCITRAL Model Law adopted by the United Nations Commission on International Trade in 1985 suggesting that at that time the duplicated wording and provisions drawn from the New York Convention were not perceived as outdated or inappropriate.

Whatever the situation, it is difficult to conceive of a review and amendment process which could be implemented without potentially affecting the support presently given to the Convention by all 142 signatories, and that it could be carried out in a reasonable time.

The Convention came into existence principally because of a perceived need because of inadequacies and limitations of earlier conventions having in part like effect, the international environment being receptive at the time, and the hard work, dedication and influence of its creators.

2. DISCUSSION

In the 50 years of its existence, the New York Convention has understandably and necessarily been the subject of interpretation by Courts of nation states worldwide, nation states with their own culture and legal regime, with, among other things, greater or lesser direct or indirect avenues for political interference in the judicial system, or potential bias against particular aspects of the Convention notwithstanding subscription to or adoption of the Convention.

Courts, particularly in nation states where applications for recognition and enforcement were and are relatively rare or where judiciary exposure to the theory and practice of international arbitration is limited, have sometimes dealt with application for recognition and enforcement in a manner which has disappointed the international arbitration community. There are exceptions.

More importantly, in nation states which regularly deal with applications for recognition and enforcement such as France and the United States of America, interpretations and exceptions applied by the courts, albeit with different emphasis, have given interpretations to the wording and effect of the Convention which arguably establish a wider more definitive international interpretation.

History has shown that the courts of certain nation states have regularly or consistently acted in a manner contrary to what is generally accepted as the proper or intended application and enforcement of the Convention.

3. REFUSAL TO ENFORCE

Particularly, a number of important nation states subscribing to the Convention, and not the rare exceptions of occasional refusal to enforce, have a history of regular and consistent refusal to enforce foreign arbitral awards.

That these countries are significant global transnational traders is a matter of concern.

Four countries, India, China, Indonesia and Thailand, are particular examples and some concerns have recently arisen in respect of some Middle East nation states.

That India and China are now major traders and will likely increase their international trade in the future, the bad experience of enforcement demands attention by the international arbitral community.

(a) Indonesia

Indonesia adopted regulations implementing the New York Convention in 1990 and a new arbitration law in 1999.

Where the state or a state owned entity is a party to an arbitration, courts have been reluctant to enforce arbitration agreements or awards. However this is not limited to state parties but to other international commercial arbitrations. Courts have taken positions against enforcing arbitration agreements and enforcing arbitral awards on grounds not contained in the New York Convention³. The action of the courts of Indonesia included injuncting the arbitrations from continuing and finding a truncated tribunal committed the tort of finding against the Republic of Indonesia. The Republic also attempted to prevent the arbitrations proceeding by taking unsuccessful action in the courts of The Hague to prevent the arbitrators entering the neutral venue of the Peace Palace and kidnapping the Republic's appointed co-arbitrator, Professor Priyatna, to destroy the function of the full arbitral tribunal.

Indonesian courts have shown a propensity for reopening the merits of final awards giving rise to annulment.

(b) Peoples Republic of China (PRC)

Enforcement of foreign awards in the PRC has been uncertain for a variety of reasons adopted by courts and apparently because of regulations enacted setting limits on enforcement and providing for defences to enforcement not available even under a broad interpretation of the New York Convention.

Particularly enforcement of an award may not be granted where it violates "the basic principles of law of the PRC or the national social interest of the PRC"⁴. The Central Supreme Peoples' Court in Beijing some 15 years ago through Supreme Justice Ren attempted to educate regional judges which are mainly responsible for dealing with applications for recognition and enforcement of the duties and obligations under the Convention. This essentially failed and the

³ An example of Indonesian courts' reticence or obstructionism and direct or clandestine interfering action by the Republic of Indonesia is in the cases of *Himpurna California Energy Ltd and Government of Indonesia; Patuha Power Ltd and Government of Indonesia* Mealeys International Arbitration Reporter – Lexus Nexus Feb 2003

⁴ See Sidel & Tong "Recognition and Enforcement of Foreign Arbitral Awards Under the Convention 10:5 Asian Exec. Rep 14 (1988).

policy relating to “national or social interest” as a defence against enforcement is both wide and indeterminate allowing courts to deny enforcement⁵. Such provisions are beyond the defences available under the Convention. Although not mandatory, the discretion provided by this reservation is advanced as being public policy under the Convention and almost universally adopted by courts as a rationale for denying enforcement.

A further difficulty arises because enforcement is often sought in relevant regional courts where considerations of deleterious affect on local communities and businesses become important, because of unfamiliarity of courts with the provisions and obligations under the Convention, and vagaries, uncertainties and express provisions of local laws.

Where the PRC government, or arguably PRC state owned entities, are the award debtor in a foreign arbitral award, a prohibition upon Chinese courts recognizing or enforcing awards favouring foreign investors creates likelihood of failure of enforcement applications.

China adopted the commercial reservation available under the convention but excluded from the definition of commercial “disputes between foreign investors and governments of host countries⁶. This reservation precludes a court recognising and enforcing an award on disputes between foreign investors and the PRC government.

Some difficulties have also arisen in respect of awards made in Hong Kong (as a special region of the PRC) since China resumed sovereignty over Hong Kong in 1997.

For example, the Indian Supreme Court relied upon the public policy reservation of the Convention as applying where an “error of law” occurred in an award⁷.

(d) India

The courts of India consistently set aside awards or refused to enforce awards citing grounds not provided by even a generous reading of the New York Convention but relying on the express wording of the Convention providing for refusal on public policy grounds⁸.

(d) Thailand

Enforcement of arbitral awards in Thailand has generally proved to be difficult, particularly when the award debtor is the state or a state owned entity.

⁵ Personal discussions with author

⁶ Sidel & Tong *supra* at 4

⁷ See Darwayeh & Linnane “Set aside and Enforcement Proceedings: The 1996 Indian Arbitration Act under Threat Int.A.L.R. 2004, 7(3) 81-87

⁸ *Sumitomo v ONI* (reported) Supreme Court of India; Substantive Law – London arbitration situs – English procedural law – when arbitration complete by publication of award Indian law permits Indian court to review entire award and proceed.

For example, a large award made over 10 years ago, has still not been satisfied and attempts at enforcement remain in limbo⁹.

(e) Middle East

The recent adoption of the New York Convention by a majority of Persian Gulf Arab nation states (excluding Kuwait which subscribed to the Convention in 1978) and the growing influence and importance of those states in world commerce together with the significant building, construction, and major infrastructure development in region, has given rise to many international arbitration.

Some of these have involved as a party, a government or a state owned enterprise.

Where enforcement is sought against a state or state enterprise, some courts have appeared reticent to enforce.

The attitude of the courts appears consistent not necessarily with the law, but with the traditional institution and practice of government and the cultural values of each community.

Alternatively, the position being taken by the courts may arise out of the relative newness of the adoption of the New York Convention and unfamiliarity with the obligations and internationally held interpretations.

An example of avoidance of enforcement of an award in favour of a contractor against a government department relied upon maladministration of witness oaths to invalidate the award¹⁰.

4. ARBITRABILITY

The New York Convention provides a limitation on the scope of an arbitration clause¹¹ by excluding application to disputes "not capable of settlement by arbitration". Thus, public policy of the jurisdiction applicable to the situs of the arbitration, or the jurisdiction in which enforcement is sought may allow that a narrowly drawn arbitration clause gives rise to unenforceability.

⁹ *Bilfinger Berger v Ministry of Transport*. (Bilfinger Berger GmbH re construction of Bangkok Expressway [unreported]) Award rendered in 1998 against the Thai Government for a sum in the order of USD 100 million – enforcement proceedings continuing.

¹⁰ *Bechtel International Inc v Department of Civil Aviation of the Government of Dubai*. (unreported) Dubai Court of Appeal 8th June 2003, Presiding Abdul Wahab Saleh Hamoodah, Members Ramadhan Amin Al Liboodi, Ahmed Mahammed Essa. By failing to administer witness oath in terms in accordance with the express requirements of the Evidence Code, the resulting award in favour of Bechtel was annulled by the Court of Cassation upholding a first instance judgement.

¹¹ New York Convention Art II(1) Art V(2)(a)(b)

The question of whether or not the question of arbitrability is of itself arbitrable has been addressed in the United States¹².

5. **FOREIGN OR DOMESTIC ARBITRATIONS AND AWARDS**

Where both enforcement of an agreement to arbitrate is sought or enforcement of an award is sought interpretation of what constitutes a foreign or a domestic arbitration or award interpretations in differing jurisdictions differ. The New York Convention, by its terms¹³, relies upon "nationality" of the arbitration or award which without further definition potentially gives rise to uncertainty.

6. **CHANGES TO NEW YORK CONVENTION**

The widely recognised expert and commentator on the New York Convention, Dr Albert Jan Van den Berg¹⁴, recently proposed amendments and changes to the New York Convention to overcome difficulties in interpretation and application that have become evident in the Convention since its inception¹⁵.

In part these proposals consist of wording change to remove uncertainty or improve clarity, but some are of a substantive nature which if adopted would likely add more certainty to the Convention and hopefully remove or diminish the power of courts such as those referred to above to avoid enforcement of arbitration agreements or awards. But not all of the proposals are of this character and in some instances the change may fly in the face of relevant domestic law provisions from some nation states.

Absent a degree of certainty in obtaining enforcement of an award, the whole purpose of an arbitration may be lost and engaging in an arbitration may be an exercise in futility.

The essential features of Dr Van den Berg's proposals are

Art I

- (a) The introduction of reference to an arbitration agreement in addition to the award as referred to in Art I(1) of the Convention. Necessary as the Convention obliges enforcement of agreements and is not limited to enforcement of awards. The proposed change defines an arbitration as international by reference to differing places of business or residence or

¹² See - First Options of *Chicago v Kaplan*, 514 U.S.938,944-945 in construing the U.S. Federal Arbitration Act .

¹³ Convention Art I(1)

¹⁴ Partner, Van den Berg & Hanitou, Brussels, Belgium

¹⁵ 2008 ICCA Conference Dublin Ireland

that the subject matter of the arbitration agreement related to more than State¹⁶.

The proposal also ties the award to the award to the arbitration agreement, avoids the provisions of Art I(2) of the Convention and also removes the provisions of Art I(3) and transfers these to a General Clause.

Art II

The proposals are for some word changing and reordering of Art II provisions, but introduces a new provision on grounds for refusing to refer a dispute to arbitration requiring assertion and proving by the objecting party, that include

- A procedural ground that the request for referral was made subsequent to the submission of a first statement on the substance
- That there is a *prima facie* valid arbitration agreement in the country where the award will be made
- The introduction of limitation on violation of *international* public policy in the country where the agreement is invoked (as opposed to [domestic] public policy referred to in Art III2(b) of the Convention) and empowering a court to act on its own motion relying on this ground to refuse reference of the dispute to arbitration

Art III

Apart from some reordering, Dr Van den Berg proposes a provision requiring courts to act expeditiously in dealing with a request for enforcement of an arbitral award.

Art IV

The changes clarify and specify requirements in respect of documentation and language of awards for which enforcement is sought.

Art V

The changes proposed seek to limit grounds for refusing enforcement solely to those set forth in the change draft which essentially replicate the grounds in the New York Convention but add a limitation on refusal to enforce "in manifest cases" only.

The change proposals also provide that a party against whom the award is invoked cannot rely on specified grounds for refusal if not raised in the arbitration expeditiously after the existence of such grounds became known.

Art VI

The change proposes relatively simple rewording and reclassification.

¹⁶ cf Art I(1) which refers to "recognition and enforcement of arbitral awards"

Particularly, the Van den Berg proposals include a series of general clauses adopting many of the provisions excluded from his adoption of New York Convention Articles.

The most significant being a requirement for designation of a [single] Competent Enforcement Court. Compatibility with other treaties, transitional clauses and language of authentic texts.

The proposals of Dr Van den Berg, among other things, go to overcoming some of the difficulties cited in this article, but a new or revised Convention of itself is unlikely to have the desired effects when the courts of the difficult nation states may still act in a manner to avoid a restated Convention as they do with the present Convention and with impunity.

There are no sanctions and it is doubtful that there could be sanctions enshrined in such a Convention.

Meritorious as the proposals of Dr Van den Berg are the greatest difficulty and the greatest danger in attempting a review as proposed is that some of the existing signatories to the New York Convention may take the opportunity of review and redrafting to either "drop out" or change the Convention in such a manner as to defeat in whole or in part the spirit of the Convention.

Education of judges on the obligations and benefits of the Convention might overcome some of the difficulties, particularly of enforcement but concepts of national sovereignty, individuality, and a belief in and reliance upon local laws are unlikely to be dismissed or affected by obligations under an international Convention whether or not there is familiarity and understanding.

The New York Convention achieved the almost impossible, compromise or not, and is not of itself through inadequacy or uncertainty the reason for difficulties in recognition and enforcement in some nation states. The solution may be in diplomatic pressure, or changes in economic circumstances, or great universality brought about by the expansion of global trade and trading power shifts.