
SUBMISSIONS ON REVIEW OF
INTERNATIONAL ARBITRATION ACT 1974 (CTH)

Made to: The Honourable Robert McClelland MP, Attorney General of the Commonwealth of Australia

Made by: The Honourable Neil Brown QC FC Inst A, Arbitrator & Mediator, Owen Dixon Chambers, 205 William Street, Melbourne VIC 3000

And: Sam Luttrell, Solicitor, Law Lecturer, Murdoch University, Perth

Made on: 16 January 2009

Dear Attorney General,

We refer to your November 2008 call for submissions on the review of *the International Arbitration Act 1974 (Cth)* ('IAA', or 'the Federal Act') and make the same in order of your questions:

QUESTION A: AGREEMENT IN WRITING

ANSWER:

(i) Yes

(ii) Yes

Supporting remarks:

The requirement for an agreement in writing and the meaning of that expression are both important. That is so because Part 11 of the IAA, from which this question arises, is designed

to provide for the enforcement of foreign arbitration agreements and the recognition and enforcement of foreign arbitration awards.

The former is achieved by requiring a court before which a party to an arbitration agreement has brought proceedings to refer the dispute to arbitration rather than to persist with the court proceedings. The latter declares that foreign arbitration awards are binding and enforceable in Australia as if they had been made in Australia.

But both situations require there to have been an arbitration agreement, which is defined as

(i) an agreement in writing;

and an agreement

(ii) of the kind referred to in sub-article 1 of Article 2 of the New York Convention, meaning that it submits an arbitral matter to arbitration.

The expression 'agreement in writing' is therefore not defined, except that it clearly must be an agreement in writing of the kind referred to in the New York Convention 1958 ('NYC', or 'the Convention') in the above sense and also (because of sub-article 2 of Article 2 of the Convention) one that includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

It can therefore be said that these requirements still leave at large the precise definition of 'agreement in writing' (as is shown in the Discussion Paper) and it is submitted that there is a case for making it clearer in the IAA just what has to be established to satisfy the requirement of an agreement in writing. It is also submitted that the amended definition of 'agreement in writing' should be used (i.e. Option 1 of Article 7 of the revised Model Law).

That definition is a widening of the former definition and goes as far as declaring as adequate a 'record' of the agreement, whether the agreement had been concluded not in writing but orally, by conduct or by other means. So an oral or implied agreement would be covered by the definition if the agreement thereby reached was reduced to or formulated in a record of some form. For example, the form of contract currently used by telecommunications companies in Australia that is agreed to orally over the telephone between the customer and the agent and then tape recorded would be an agreement in writing because the agreement is presumably recorded on a magnetic tape, which by the definition in Article 7(4) is deemed to be 'in writing'.

The main reason for supporting this proposal is that the days of the traditional exchange of written or printed documents to constitute an agreement have passed. Contracts, including international ones, are entered into by an exchange of emails, after oral dealings and site visits by company representatives have taken place, with offers and counter offers and where some of the terms of the contract may not initially be embodied in writing. The proposed wider definition therefore helps to adapt to this modern way of doing business. On the other hand, there is a safety catch in the new definition in that oral terms of an agreement (and all of them, as it is the 'content' that must be in writing) will have to be at least recorded, either 'in writing' as traditionally understood, or in an electronic communication.

Accordingly, we are of the opinion that there seems to be a lot of sense in adopting the proposed Option 1 definition of agreement in writing and it is so recommended.

QUESTION B: GROUNDS FOR REFUSING TO ENFORCE A FOREIGN ARBITRAL AWARD

ANSWER: Yes

Supporting remarks:

We support this proposal because it is clear that the purpose of Part 11 of the IAA is to implement the Convention. The enabling legislation should be broadly in line with the Convention and should be consistent with the Convention's own purpose. That purpose is expressed to be in NYC Article 3 that contracting states '*...shall recognize arbitral awards as binding and enforce them...*' From this the inference may be drawn that the intention of those who drew the Convention and agreed to it was that arbitral awards would be enforced, that the presumption was that this would happen and that there was something of a responsibility on the enforcing state to ensure that it happened unless one of a limited number of declared objections was shown to exist.

It is submitted that it would be consistent with this objective and the wording of the Article for Australia to limit the grounds of objection to those stated in sub-articles 8(5), 8(7) and 8(8) and that it would be inconsistent with that objective to keep a residual discretion to refuse enforcement. Consistent with that interpretation, it is noted that NYC Article 5(1) provides that '*(r)ecognition and enforcement of the award may be refused... only...*' and that

Article 5(2) provides that they ‘...may also be refused...’ if the prescribed circumstances exist. These modes of drafting tend to suggest that the intention is to limit the grounds of objection to those stated rather than to give a general discretion to enforce the award. In any event, such a general discretion could have been so expressed if it were intended that there be one, as those who drew the Convention would have appreciated.

The interests of predicability and certainty would also be advanced by limiting as far as possible the more speculative possibilities of having an award rejected for enforcement on the basis of discretion, even although none of the established ground for rejection was present.

Additional remarks:

1. PUBLIC POLICY

We are of the opinion that the Commonwealth should amend IAA section 8(7)(a) to insert the word ‘international’ ahead of the words ‘public policy’, so that s.8(7)(a) reads:

(b) to enforce the award would be contrary to international public policy

If this amendment is made, IAA s.19 would need to be amended in similar terms, so that line 3 reads

...an award is in conflict with international public policy if...

International enforcement experience justifies our proposal: the record shows that the ‘public policy’ exception confers on a national court a *sua sponte* reserve power to refuse to enforce a judgment or award. In developing countries especially, this reserve power is sometimes invoked as a basis for otherwise unjustified refusal to enforce, thereby allowing aspects of ‘home town justice’ (including, at their worst, corruption and protectionism) to creep into the NYC enforcement model. The lack of definition of the expression ‘public policy’ poses a threat to the proper functioning of the NYC enforcement model. Developed trading nations like Australia must lead by example and take steps to define public policy in narrow, international terms.

When questions of ‘public policy’ arise in proceedings relating to international arbitration (be they for enforcement or other purposes), the proper approach is to treat the NYC Article V(2)(b) expression ‘public policy’ as meaning *international-* or *trans-national* public policy. The UNCITRAL Working Parties that advised on the drafting of the New York Convention

expressed support for this approach.¹ Today, the focus on ‘international public policy’ is favoured in the courts of many leading seats, including France², Switzerland³ and the United States⁴. Other states (including The People’s Republic of China⁵) take a similar approach by construing the expression narrowly. The reason the narrow/international approach is favoured by these states is that it reduces the grounds upon which the enforcement of foreign arbitral awards may be challenged under the public policy exception at NYC Article V(2)(b)⁶.

Amending IAA s.8 (7)(a) to narrow and internationalise the expression ‘public policy’ would therefore be consistent with ‘best practice’ developments in national arbitral law from overseas (IAA Review Object 2(c)). It would also agree with the objective of promoting Australia as a place for international arbitration (IAA Review, Introduction, Part 4) because it would show the world Australia has a pro-arbitration enforcement regime.

2. ADJOURNMENTS

Article 6 of the Convention allows the court of the enforcing state to adjourn enforcement proceedings if an application has been made for setting the award aside in the originating state. Section 8 (8) of the IAA legislates to that effect for Australia by providing that where the (Australian) court finds that that an application for setting aside ‘... *has been made...*’ in the originating state, ‘...the court may, if it considers it proper to do so, *adjourn the proceedings...*’ and order security to be given. What happens after the granting of the adjournment is not stated. No doubt the intention is that the court will have an implied power

¹ See *Statement of the Chairman of the Working Party No 3*, UN Doc. E/CONF.26/SR.17 (1958)

² Article 1502 of the French New Code of Civil Procedure allows appeals against the recognition or enforcement of arbitral awards in five circumstances only, one of which is where the recognition or enforcement would be contrary to ‘public international order’ (*ordre public atténue*). See for example the decision of the Cour d’appel Paris, 27 November 1987, *CCM Sulzer v Somagec & Ors* [1989] Rev Arb 62

³ In international matters, the Swiss reading of public policy is similar to the French. Purely Swiss notions of public policy, even international public policy, will not apply in international arbitration unless they are shared by other states. This is a *tronc commun* approach to NYC Article V(2)(b); see Petrochilos, G, *Procedural Law in International Arbitration* (Oxford University Press 2004), p.98

⁴ Examples of US superior courts interpreting NYC Article V(2)(b) narrowly can be found in *Parsons & Whittemore Overseas Co. v Societe Generale de L’Industrie du. Papier*, 508 F.2d 969 (2d Cir. 1974) *International Produce Inc. v A/S Rosshavet* 638 F.2d 548 (2nd Cir. 1981)

⁵ China Arbitration Law, p.41, cited in Kurkela, Matti S., *Due Process in International Commercial Arbitration* (Oceana 2005), p.11. The elucidation to the China Arbitration Law states “*Violation of rules of ‘public policy’ (public social interest) constitutes a ground for setting aside [an arbitral award], thus probably forming an exception to the rule ‘no control on the merits’.* The action relating to violation of rules of ‘public policy’ should always be in terms of an action for setting aside. However, it is generally understood that the terms ‘public policy’ should be construed narrowly to favour arbitration” [emphasis added]

⁶ The narrow/international reading tightens the expression ‘public policy’ dramatically because the common ground between the diverse states of the world is minimal, and only those policies or rules that inhabit this thin strip form part of *international public policy*.

to re-activate the enforcement proceedings at some time in the future. When this may happen and under what circumstances, however, is not stated.

Applications for adjournments are still the bane of court and arbitration proceedings and should be discouraged or made subject to much stricter controls. This is an opportunity to achieve that in at least one area. To discourage recalcitrant judgement debtors who might be minded to delay proceedings by lodging an unmeritorious application to set aside the award in their home countries and then sitting idle, to cause delay and increase the costs of the successful party, it might be useful to amend Section 8 of the IAA.

A similar provision is used under the ICANN⁷ Policy in the case of court proceedings brought to set aside orders made in arbitrations for the transfer of internet domain names. In that case, (to paraphrase the Policy⁸) action to enforce the order is deferred until evidence is received that the dispute has been resolved, the setting aside application has been 'dismissed or withdrawn' or the court has dismissed the application.

In other words, there should be machinery available so that the successful party may reactivate proceedings by bringing to the notice of the (Australian) court, evidence that the application to set aside in the originating state has been dismissed or withdrawn or, it is submitted, not been pursued with due diligence.

To avoid making things more complicated, an amendment along the following lines might be sufficient. We are of the opinion that the Commonwealth should amend section 8 (8) of the IAA by adding:

'(ii) If, at any time, the party claiming enforcement of the award shows to the satisfaction of the court that the party making the application for the setting aside or suspension of the award has not pursued the application with reasonable diligence or that the application has been withdrawn or dismissed, or that there are other circumstances showing that the proceedings for enforcement should proceed without further adjournment, the court may

⁷ Internet Corporation for Assigned Names and Numbers

⁸ <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>

make an order to that effect with such further or other order as to costs or otherwise as the court may deem appropriate.’⁹

QUESTION C: EXCLUSIVITY OF THE FEDERAL ACT

ANSWER: Yes

Supporting Remarks:

International commercial arbitration is essentially a national and international matter, especially where the Model Law is applicable. It is therefore appropriate that as far as possible the national law should apply which is the Federal Act.

Additional Remarks:

When we answer this Question ‘Yes’ we mean that the State and Territory Commercial Arbitration Acts should not govern international commercial arbitrations in Australia. In other words, our intention is that only the Federal Act should cover them. However, we wonder if the proposed drafting of the amendment does not create a bigger problem.

That is so because the notes in the Discussion Paper propose that the Federal Act should apply to those international commercial arbitrations ‘*to which the UNCITRAL model Law applies.*’

Amending the IAA in this manner could be interpreted as allowing the parties to contract out of the IAA entirely and that, presumably, is not the intention. This interpretation could arise because the UNCITRAL Model Law is part of the IAA and it applies to international arbitrations seated in Australia, for Section 16 provides that it has the force of law; the other provisions are ‘mechanical’ provisions to ensure the effectiveness of the Model Law in Australia.

The proposal, which we support, is that it is only the Federal Act that should apply (i.e. State and territory laws should not apply). That aim would be achieved by providing that the Act governs exclusively an international commercial arbitration in Australia. If it does, the Model Law applies to it, as it automatically applies to it, or, if you like, as a presumption. Most

⁹ with the current Section 8(8) becoming Section 8(8)(i).

arbitrations will therefore be subject to this new provision that the Federal Act will apply to them.

The parties, however, may agree under Section 21 that the Model Law does not apply to their dispute. An arbitration of that dispute then ceases to be one to which the Model Law applies and, as the amendment is drafted, the Federal Act would not apply to that arbitration at all. Such arbitrations would therefore not be arbitrations ‘to which the UNCITRAL Model Law applies’ and as such, would not be arbitrations governed exclusively by the Federal Act.

What law then applies to international commercial arbitrations in Australia where the Model Law does not apply? Do the State Acts revive for such an arbitration? Or may the parties contract to use some other and entirely different law?

To add the proviso ‘to which the UNCITRAL Model Law applies’, might imply that some *national* arbitration law other than the IAA can apply to an international arbitration seated in Australia.

Not many states allow full exclusion of their national arbitration law. This is because the power of state courts to supervise arbitral proceedings seated within their territory is closely linked to state sovereignty. Belgium, Switzerland, Tunisia and Turkey are exceptions to this rule – they allow the parties to agree that they will not be allowed to go to a state court to seek setting aside of the award.

To avoid these arguments, we would suggest, therefore that the words ‘*to which the UNCITRAL Model Law applies*’ be omitted or that a drafting change be adopted so that it is made clear what law will apply if the parties agree to exclude the Model Law.

QUESTION D: ADOPTION OF ARBITRAL RULES

ANSWER: Yes

Supporting Remarks:

This proposed amendment is supported because there is a difference between the law applicable and the rules that will govern the procedure in the arbitration. One would have to conclude that when parties agreed on the rules to be used, they knew that they were dealing

only with procedure and that no inference could be drawn from this that they wanted to opt out of the Model Law governing procedure.

An amendment such as the Singaporean provision would make this clear.

Additional Remarks:

Following on from the additional remarks to Question C above, we ask is it the Commonwealth's intention to allow full exclusion of Australian arbitration law, or just the IAA? If the Commonwealth intends to allow the parties to exclude the IAA in full (and thereby contract out of the right to apply to Australian courts for setting aside of the award under UNCITRAL Model Law Article 34) then this should be made clear. If this is *not* the Commonwealth's intention, then those provisions of the IAA which cannot ever be excluded by agreement should be identified as 'mandatory' (or 'non-waivable') in the IAA. It is submitted that a modern, best practice approach to party autonomy dictates that only Articles 18 and 34-6 of the UNCITRAL Model Law should be identified as mandatory.

QUESTION E: DRAFTING INCONSISTENCY

ANSWER

(i) Yes

(ii) No

Supporting Remarks:

The suggestion that the inconsistency be remedied is supported. However, it is doubtful whether the inconsistency should be removed by putting the three issues on an 'opt-out' basis and we would suggest that further consideration be given to this issue.

We are of the view that this amendment may conflict with the objective of promoting Australia as a place for the conduct of international arbitration (IAA Review, Introduction, Part 4). Making the 'costs' provisions of the IAA 'opt out' may scare off parties from Civil Law states (where costs orders are rare). 'Costs' are a distinctly Common Law procedural device – their purposes is to discourage the frivolous or vexatious claims which are more common in adversarial jurisdictional settings than Civil Law contexts.

The UNCITRAL Model Law was intended to be an international instrument: to make the costs provisions of the IAA applicable ‘unless the parties agree otherwise’ might overly anglicise the Australian enactment. Further, as a matter of policy, arbitration is already regularly accused of ‘becoming litigation’. If too many of the procedural features of litigation (such as ‘costs’) are transposed onto arbitral process, then users will lose confidence in it and return to courts with their disputes. This would not be in the public interest.

QUESTION F: 2006 AMENDMENTS TO THE MODEL LAW

- (i) Yes
- (ii) Option I

Supporting Remarks:

We caution the Commonwealth against the outright removal of the ‘in writing’ requirement by adoption of Option II. Whilst it is certainly possible to prove that an oral agreement to arbitrate has been made, the question for the legislator is not one of evidence but enforceability. The absence of an agreement in writing is an express basis for refusal to enforce under the Convention. If Australia flatly abolished the ‘in writing’ requirement, and became known as a jurisdiction where oral agreements to arbitrate were enforceable, then the exportability (enforceability) of Australian-rendered arbitral awards could well be adversely affected abroad.

QUESTION G: COURT OR OTHER AUTHORITY

ANSWER:

- (i) Yes
- (ii) Yes, subject to the Attorney being satisfied about certain other considerations.

Supporting Remarks

The matters covered by articles 11(3) and 11(4) relating to the appointment of arbitrators are matters where the skill and experience of ACICA would be invaluable and should be used in

resolving these issues. Moreover, the appointment of an arbitrator is an administrative act which will not affect property or personal rights or otherwise have the features normally associated with a judicial function.

The same can be said as a practical matter with respect to the matters covered by articles 13(3) and 14, namely challenges to arbitrators; the skills and experience of ACICA could again be put to good use in these cases.

However, legislative changes to the current provision in the IAA (section 18) may themselves be subject to challenge in the High Court. Accordingly, before deciding to legislate, you may wish to have your officers give some advice on whether:

- (i) ACICA or any similar body is an ‘authority’ within the meaning of the Convention, for the word ‘authority’ rather has the connotation of a government body, in contrast to ‘association’ or ‘organisation’;
- (ii) such a law would be conferring judicial power on a body which is not a federal court within the meaning of Section 71 of the Constitution;
- (iii) matters such as whether an individual arbitrator, (who may not be a member of whatever body is declared to be the ‘authority’) would be impartial or independent, should be determined by a body that is not a court, bearing in mind that an adverse finding may affect his career adversely and may affect the interests of the unsuccessful party.

Additional Remarks:

Article 12(1) of the UNCITRAL Model Law states that ‘An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence...’ At present Australian law prefers the test for bias laid down in *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 356 (followed by the High Court of Australia in *Webb v The Queen* [1994] 181 CLR 41), which is

whether a *fair minded lay observer might reasonably apprehend* that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide¹⁰.

¹⁰ *Grassby v The Queen* (1989) 168 CLR 1 at 20; applied in *DJC v Burg* [1998] VSCA 139 at 16

Australian courts use this test to determine bias challenges to arbitrators, including challenges brought under the IAA¹¹.

We suggest that the Commonwealth amend the IAA enactment of UNCITRAL Model Law Article 12(1) so that it reads

An arbitrator may be challenged only if, in the opinion of the court, there is a real danger that he is not impartial or independent...

This would enact the test applied by the House of Lords in *R v Gough* [1993] AC 646¹²; it would make it harder to challenge an arbitrator in Australia. Adopting a stricter test would be a positive step because bias challenges are an increasingly common procedural tactic in high value international arbitrations; limiting the prospect of bias challenge would make Australia more attractive as a seat for international arbitration.

We make the following arguments for the imposition of a higher bias threshold for arbitrators:

1. Arbitrators are not judges

Arbitration is a creature of contract and '*should be understood primarily through the lenses of contract rather than adjudication*'¹³. Using challenge to delay arbitral proceedings is a tactic that is made viable by the very personality of the arbitrator. Arbitrators are not public officials in Hobbesian social contract with a sovereign state like judges are, but rather 'commercial men' with private interests and lives. Unlike judges, who as a fundamental rule *cannot* be chosen by the parties and are allocated cases by peer committee, Arbitrators are appointed directly by the parties they are called upon to judge.

In international matters arbitrators are usually barristers, partners of large international law firms and elite academics. Contrast this with the traditional role of a judge as a cloistered

¹¹ See for example *ICT Pty Ltd v Sea Containers Ltd* [2002] NSWSC 77 (22 February 2002). See also *Ace Constructions & Rigging Pty Ltd v ECR International Pty Ltd* (Local Court of New South Wales, 26 October 2007)

¹² The full text of the *Gough* test is 'Having ascertained the relevant circumstances, the Court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him...'

¹³ Rau, A.S. 'On Integrity in Private Judging' (1998) *Arbitration International*, Vol 14, No.2, p.153.

‘oracle of a vague divinity’¹⁴ and the judicial practice of holding arbitrators to the same standard of impartiality as judges becomes harder to justify. The procedural legal fiction of the arbitrator as a judge has reached the end of its useful life. There is no good reason why a separate standard for apparent bias could not be adopted for arbitrators.

2. The Presumption of Competence

There is a presumption for the professional competence of the parties to an international commercial contract. The parties may therefore not argue that they were not aware of the significance of the contractual obligations to which they have agreed¹⁵. State courts are entitled to apply this principle of *lex mercatoria* and assume that parties who have signed an arbitration agreement have done so with full knowledge of the fact that they will get an arbitrator and not a judge. With this contractual backdrop it should be harder to challenge an arbitrator on the basis of apparent bias because when the parties agree to arbitration they are *de jure* aware that if a dispute arises they are not going to get a state appointed ‘neutral’ but rather an experienced ‘commercial man’ as their umpire.

3. The Privacy of International Arbitral Proceedings

The *Sussex Justices* test is predicated upon an acceptance of Lord Hewart’s dictum that ‘justice must be done and be seen to be done’. Lord Hewart was expressing a general community desire to maintain checks on public exercises of the judicial power. International commercial arbitration is private in both the theoretical-legal and practical-procedural senses of the word. It is not an exercise of decision making power that requires public confidence *per se*. In the absence of His Lordships policy premise there is no reason not to apply *Gough* and make it harder to challenge arbitrators.

This is especially so in international arbitration where the proceedings are confidential – how can there be a publicly held perception of impartiality when there is no substantive public adjudicatory process to observe? Even in Australia, where the confidentiality of arbitral proceedings is less certain than other jurisdictions, the legal fictional character of the notional ‘fair minded lay observer’ is deliberately locked out of private arbitral proceedings; they should be similarly excluded from the court. This one of the main reasons the *Gough* test

¹⁴ Learned Hand J described the role of the judge in the US system as a ‘kind of oracle, voicing the dictates of a vague divinity’. This quote is taken from Henry, G., ‘*Pinochet: In Search of a Perfect Judge*’ [1999] 21 Syd L Rev 26 at 5, cutting Learned Hand J in *The Spirit of Liberty* (3rd ed., 1970) at 130.

¹⁵ Berger, K.P., *The Creeping Codification of the Lex Mercatoria* (Kluwer, 1999), p.301

should be used for arbitrators: *Gough* uses a 'reasonable court' vantage point rather than a 'reasonable' or 'fair minded' hypothetical observer. A court applying *Sussex Justices* in the context of a private arbitral proceeding is granting hypothetical admission to a hypothetical person. Applying a 'fiction on a fiction' is unsatisfactory legal reasoning. Without the public perception imperative of Lord Hewart's dictum there is no jurisprudential foundation upon which to object to *Gough*.

4. Waiver of the Public Adjudicatory Standards

The Doctrine of Party Autonomy is well established in municipal and international commercial law. It is central to arbitration. The absolute requirement of impartiality and independence which applies to state court judges should be treated as waived by parties who agree to arbitrate. In return for waiving the benefit of this public adjudicatory principle the parties obtain a considerable benefit they would not otherwise have: they get to choose their judge. The concept of procedural waiver is well developed in arbitration law¹⁶. Leading scholars of international commercial arbitration have expressed the opinion that only those parts of the Model Law that concern non-arbitrability or are expressive of public policy cannot be waived by the parties¹⁷. The equal treatment provision of the Model Law is generally treated as mandatory¹⁸. Whilst the rule against bias is certainly expressive of procedural public policy¹⁹ it only needs to be varied (rather than waived) in order for *Gough* to apply. In a Model Law state it would appear open to the parties to expressly agree that *Gough* will apply in the event an allegation of bias is made against their arbitrator. A court faced with such an agreement would not be asked to condone unequal treatment (which is a mandatory provision of the Model Law) because the parties are both subject to the same standard of procedural fairness. Even in the EU – the strictest jurisdiction in matters of

¹⁶ Model Law Article 4 provides that the parties can only waive those provisions from which the parties may derogate. The Article 34 right to apply for vacatur where 'the arbitral procedure was not in accordance with the agreement of the parties' is accepted as non-waivable. The *travaux préparatoires* to the Model Law are silent on what other articles are mandatory. The Article 18 'equal treatment' provision of the Model Law is generally accepted to be non-waivable

¹⁷ See for example Petrochilos, G, *Procedural Law in International Arbitration* (Oxford University Press 2004), at p.120.

¹⁸ That Model Law Article 18 is mandatory and is supported by the fact that it uses the word 'shall' twice. Article 18 reads 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'.

¹⁹ See for example the decision of the Cour d'appel Paris, 27 November 1987 in *CCM Sulzer v Somagrec & Ors* [1989] Rev Arb 62, cited in Liebscher, Christoph, *The Healthy Award: Challenge in International Commercial Arbitration* (Kluwer 2003), p.255. See also *Corporacion Transnacional de Inversiones, SA v Stet International SpA* (1999) 91 ACWS 3d 520.

procedural public policy – such arrangements seem possible from the decision of the European Court of Human Rights in *Osmo Suovaniemi & Ors v Finland*²⁰.

5. The Finality of Arbitration as a Countervailing Public Policy Consideration

Public policy has substantive and procedural dimensions²¹. There is an undisputed procedural public policy in favour of procedural fairness in legal proceedings. There is also a substantive public policy in favour of arbitration as a means of settling international commercial disputes²². Efficiency and finality are key features of this pro-arbitration policy. Frivolous bias challenges cause delay, increased costs and enforcement risks. The finality of the arbitral process requires that measures be adopted which limit the right of challenge to situations where there is a real danger of injustice. This is what the *Gough* test does.

6. Adopting *Gough* Has No Effect on the Rule in *Dimes*

It is and must always be the case that *no man may be a judge in his own cause*. This fundamental rule of procedure is known in the common law world as the Rule in *Dimes*. It is a rule of automatic disqualification which applies to judges and arbitrators alike. It is subject only to *de minimis*. A judge or arbitrator will not be disqualified for a mere trifling interest in the cause before them. Since *Pinochet (No.2)* it has been clear that an interest does not need to be pecuniary to trigger its operation. Where there is actual bias the Rule in *Dimes* will function to automatically disqualify a decision maker or, where they have already made a decision, render their judgment or award null and void. The rule of disqualification for the appearance of bias – be it as expressed in *Sussex Justices* or *Gough* - is entirely separate. It can be modified without affecting the fundamental procedural rule of automatic disqualification for non *de minimis* interest in the cause. Whatever risk *Gough* poses to the procedural public policy of a state must therefore be seen as offset by the continued operation of the Rule in *Dimes*.

QUESTION H: Yes

²⁰ *Osmo Suovaniemi & Ors v Finland*, decision of EHR Court of 25 February 1999 (No.31737/96)

²¹ Mantilla-Serrano, F, 'Towards a Transnational Procedural Public Policy', in *Towards a Uniform International Arbitration Law?*, Gaillard, E. (ed.) (JurisNet 2005) at p.164.

²² In Australia this was confirmed by Allsop J of the Full Court of the Federal Court in *Comandate Marine Corp v Pan Australia Shipping Inc* [2006] FCAFC 192 where His Honour noted at 194 'the national interest in fostering and support of arbitration'. His Honour also referred to the text of the United National General Assembly Resolution A/40/72 of December 11, 1985 (transmitting the UNCITRAL Model Law) as evidence of the importance of commercial arbitration to the international community.

Supporting remarks:

Due to its nexus with international trade and commerce, international arbitration is essentially a Federal matter and there should be jurisdiction in the Federal Court of Australia. It should also have exclusive jurisdiction, as this would enable a dedicated number of Judges of the Federal Court of Australia to develop a consistent jurisprudence for the whole of Australia on this important issue.

We trust that these ideas may be of assistance to you in your deliberations.

Yours sincerely,

The Hon Neil Brown QC FC Inst A

Sam Luttrell

16 January 2009