AUSTRALIA -
AN IDEAL LEGAL ENVIRONMENT FOR THE CONDUCT OF INTERNATIONAL COMMERCIAL ARBITRATIONS

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Recent published commentary suggests that there are serious legal impediments or inadequacies which mitigate against the conduct of 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 that where international commercial arbitrations are to be conducted in Australia

(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.

DISCUSSION

1. 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 subscribes[2] to the *Convention on Recognition and Enforcement of Foreign Arbitral Awards*[3]. The *Commonwealth Act* was amended in 1989[4] to incorporate the *UNCITRAL Model Law*[5] and in 1990[6] 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 applies[9].

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 institute[10], or to agree their own rules[11].

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 State[14].

Recognition or enforcement of an arbitral award may be refused, interalia, on the grounds that to do so would be contrary to

public policy in Australia[15].

2. 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 arbitration[16] as having the same meanings as given by the *Model Law*[17].

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 Australia[18].

In establishing that the *Model Law* has the force of law in Australia[19] the term "state", as provided in the *Model Law*, is defined as meaning Australia and its external territories, and any foreign country[20].

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 enforcement[22] and grounds for refusing recognition and enforcement[23] 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 awards[24] 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 Territory[25].

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 agreements[26] 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 Australia[27].

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 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 arbitration[28].

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 court[29].

3. 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 intervention[30] 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 arbitration[31] and for a court to make preservation or conservatory orders to protect the rights of parties[32].

By amendment or adoption of the *Uniform Acts* variously commencing in 1990[33], the powers of the court to review awards[34] were significantly amended from those provided in earlier *Uniform Acts* by limitation and definition.

4. 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 available[35].

(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 agree[36]. 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 agreement[37].

(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 documents[38]. 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 things[39].

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 circumstances[40] 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 agreement[41];

(b) setting aside or remitting an award on the ground of error of fact or law on the face of the award[42] or to determine an appeal on any question of law arising out of an award[43];

(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 brought[44].

5. 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 parties[45].

(b) The taking of evidence[46]. In taking evidence the court must act within its competence and according to its rules.

(c) Correcting of a defective award[47].

(d) Enforcement of award[48] 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 aside[49]. 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 determination[50].

6. **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.

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 (Western 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 of 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

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 Co: ercial 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 Commercial Arbitration Act 1974 (Commonwealth) Section 3(1)

25 International Commercial Arbitration Act 1974 (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
Commercial Arbitration (Amendment) Act 1991 (No 32) Australian Capital Territory
Commercial Arbitration (Uniform Provisions) Amendment Act 1992 (No 25) South Australia
Commercial Arbitration (Amendment) Act 1993 (No 15) Victoria
Western Australian Act not yet amended
Adopted
Commercial Arbitration Act (No 75) 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 2 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)

INTERNATIONAL ARBITRATION REPORT

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Institutional International Commercial Arbitration In Australia: Why Consideration Should Be Given To Choosing The London Court Of International Arbitration

by

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Under §21 of the International Arbitration Act, 1974 the parties may opt out of the UNCITRAL Model Law, which would ordinarily provide the regime under the Act for such an arbitration.

COMMENTARY

An election to opt out of the UNCITRAL Model under §21 may result in the following difficulties, which naturally must be borne in mind by the draftsperson of an international commercial arbitration clause in Australia.

(i) Definitional problems

A consequence of the way in which the UNCITRAL Model Law was grafted on to the *International Arbitration Act* 1974 (Cth) is that the only definition of an international arbitration that is contained in Article 1 does not apply where parties opt out of the UNCITRAL Model Law under §21.

No assistance can be obtained from §21 of the *International Arbitration Act*, which refers to "an arbitration agreement" rather than an "international arbitration agreement," as in Article 1 of the UNCITRAL Model Law.

> There are no other sections in the *Act* defining the concept of an international commercial arbitration, apart from those provisions of the *Act* which deal with the New York and ICSID (International Centre for the Settlement of Investment Disputes) Conventions.
>
> The parties are then without any statutory definition of an "international commercial arbitration" for the purpose of the *International Arbitration Act* or otherwise.
>
> It could hardly have been the intention of the Commonwealth Parliament to allow parties who have opted out to include their own definition of international commercial arbitration in their arbitration rules. This would lead to chaotic litigation and widespread forum-shopping.
>
> (ii) Enforcement problems
>
> If parties opt out of the UNCITRAL Model Law, they thereby also opt out of Articles 35 and 36, which deal with the recognition and enforcement of awards. There is therefore no statutory enforcement procedure under the *International Arbitration Act* 1974 (Cth) for an Australian international commercial arbitration award in Australia, except for an ICSID award: see the definition of "foreign award" in §3 of the *Act* insofar as the enforcement of an award under the New York Convention is concerned. (It is unclear but doubtful whether the domestic legislation can be used for this purpose.[1]) A foreign arbitral award is enforceable under Part 1 of the Act, which takes up in modified form the relevant recognition and enforcement procedures under the New York Convention: see below, Chapter 43.

An Australian ICSID award may be enforced under §35(2) of the *Act*, which reads:

> "An award may be enforced in the State Supreme Court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of the State or Territory."

Parties cannot confer jurisdiction upon a court by an agreement between them (Re Aylmer; Ex parte Bischoffsheim (1987) 20 QBD 258 at 262 per Lord Esher MR; Re Hooker's Settlement; Hervon v. Public Trustee [1955] Ch 55; Heyting v. Dupont [1963] 1 WLR 1192; article by Cole J, a judge of the New South Wales Supreme Court, "Awards under the Uniform Commercial Arbitration Acts 1984" [1990] Australian Construction Newsletter 25-29).

An arbitral award made in Australia, even between parties with no connection to Australia, may not be considered as a foreign arbitral award (see the definition of "foreign award" in §3(1)

of the *International Arbitration Act*[2]) under the New York Convention. Consequently, the enforcement procedures under that Convention do not assist in the enforcement of an Australian award in Australia.

Unless the successful claimant in an international commercial arbitration in Australia not governed by the UNCITRAL Model Law (or the ICSID Convention) moves to have the award recognised and enforced under common law, the successful party would have to consider the following circuitous route to effect enforcement.

The successful party should obtain a judgment on the award in a foreign court, outside the jurisdiction of the Australian judicial system. The feasibility of this would depend on the central provisions of the governing set of rules, and the various conventions between Australia and the state concerned.

Then, under the Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments (See Caffey, International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in the Lawasia Region (1985), p 349 et seq), the party would seek to make the foreign judgment a judgment of an Australian State that is a party to the Convention.

(iii) Problems concerning interim measures

The opt-in provision found in §23 of the *International Arbitration Act* 1974 (Cth), which provides that the enforcement of interim measures of protection shall be the same as awards under Article 17 of the UNCITRAL Model Law, would not apply.

(iv) Status of alternative rules

It should be borne in mind that under §16 of the *International Arbitration Act* 1974 (Cth), the UNCITRAL Model Law has the force of law in Australia. Section 16 states:

"(1) Subject to this Part, the Model Law has the force of law in Australia.

(2) In the Model Law:

'State' means Australia (including the external Territories) and any foreign country."

Other arbitral rules, whether ad hoc or institutional, do not enjoy this status, except perhaps for the arbitration articles in Chapters II-VII of the ICSID Convention. (The ICSID Arbitration Rules are not discussed in this section.)

(v) Procedure for recourse

The procedures under Article 34 for recourse against an award would not apply to non-UNCITRAL Model Law awards. It is doubtful whether the parties can legally agree on their own procedure, as this would require the parties, in effect, to confer jurisdiction on a court by agreeing to propagate their own rules of court.

(vi) Evidentiary problems

Curial assistance under Article 27 would not be available for the taking of evidence. The problems of obtaining evidence when the parties, witnesses and documents are located in several jurisdictions may be insurmountable without court assistance.

(vii) Jurisdiction and curial assistance

The parties will not have the benefit of the kompetenz-kompentenz provisions found in Article 16(1)-(3) of the Model Law. These provisions enshrine the principle of separability (See Jacobs, Commercial Arbitration Law and Practice (Law Book Co., Looseleaf Service, Vol. 1A, para. [5.220]) in international commercial arbitrations under the UNCITRAL Model Law in Australia, and will be lost in non-UNCITRAL Model Law arbitrations. They provide that if the arbitral tribunal so decides, it may either rule on its jurisdiction as a preliminary question or reserve its decision until it gives an award on the merits.

(viii) Curial assistance for appointment of members of arbitral tribunal

The parties will not have the benefit of curial assistance under Article 11(3) of the UNCITRAL Model Law for the appointment of members of the arbitral tribunal in those circumstances set out in Article 11(3)(a)-(c). The consequences of this might be that the entire arbitration agreement may fail if no alternative mechanism has been agreed on for the appointment of a substitute arbitral tribunal.

In the circumstances, great care must be taken at the drafting stage not to lose any of the facilitative provisions of the UNCITRAL Model Law in international commercial arbitrations with their situs in Australia, thus avoiding the difficulties that may arise by opting out.

The issue which is immediately thrown up is whether or not there is a major international commercial arbitration association in Australia that will allow an arbitration to take place under its auspices, but nevertheless with the UNCITRAL Model Law as the curial law of the arbitration.

The London Court of Arbitration, one of the oldest and most respected international commercial arbitration associations in the world and with its registry in care of the Australian Commercial Disputes Centre (ACDC), 50 Park Street, Sydney, offers a full range of arbitration services including an arbitration under the UNCITRAL Model Law. Other international commercial arbitration associations such as the International Chamber of Commerce (ICC) compel the user to arbitrate under their special rules, with the result that in an ICC arbitration in Australia, the parties may suffer the disadvantages referred to above.

Consequently, when drafting an international commercial arbitration clause for Australia serious consideration should be given to using the London Court of International Arbitration (LCIA). ■