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ARBITRATION LAW
"Perimeters and Parameters"

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FOREWORD

by

THE HONOURABLE MR JUSTICE R.I. BARKER
PRESIDENT OF THE LEGAL RESEARCH FOUNDATION

The Foundation in association with the Law Commission is pleased to present its third seminar for 1989, this time on the topic of arbitration law. Such a seminar is timely. It arises from the work initiated on the topic by the Law Commission with a view to a formal report. Already the Law Commission has published a discussion paper and legislative reform may well occur. It is against this background that the Foundation, with considerable pleasure, has for the first time collaborated with the Law Commission in presenting a seminar. Given the eminence of the panel of speakers, it is likely that the papers presented to this seminar will be of some significance when the content of any legislative reform becomes settled.

New Zealand is not alone in addressing the topic of legislative reform of arbitration law. Canadian and Australian jurisdictions have recently enacted amending legislation. For this reason, the Foundation and the Law Commission are delighted that papers will be presented by leading commentators in this field from both of those countries. The New Zealand panelists are leaders in the field of arbitration law here from both the academic world and the practising bar. Together the panelists are well placed to address issues of the relevance of the UNCITRAL model law, the interface between arbitration and the Courts and, generally, the manner in which New Zealand arbitration law might be reformed.

The Foundation and the Law Commission are grateful to the panel of speakers for their time and effort in preparing and presenting papers which are substantial works of scholarship. The Foundation, as ever, is grateful for the ongoing support of Qantas Airways.

Judge's Chambers
High Court
Auckland

20 September, 1989
THE INTERFACE BETWEEN ARBITRATION AND THE COURTS

The Hon. Evan Prichard
THE INTERFACE BETWEEN ARBITRATION AND THE COURTS

In the discussion paper published last year the Law Commission says: "A recurring theme in this paper is the tension between party autonomy and judicial intervention."

No doubt such tension exists; but it is also a fact that there is a symbiotic relationship between the Courts and the arbitration system. The two systems co-exist - and they do so to their mutual benefit.

Lord Donaldson M.R. said recently that "arbitrators and judges are partners in the business of dispensing justice".

Arbitrations would be wholly ineffective - and arbitrators an edentate species - if it were not for the fact that the High Court will enforce the awards of arbitrators as though they are judgments of the Court (Arbitration Act 1908 S.13 and Arbitration Amendment Act 1938 S.12). (It was held by the Court of Appeal in A.G. v. Offshore Mining Co Ltd (1983) NZLR 418 that in the case of an arbitration which did not expressly invoke the Arbitration Act, the successful party
must bring an action to enforce the award.)

Section 10 of the Arbitration Amendment Act 1938 enables the High Court to make orders for security for costs in arbitration proceedings and for the detention, preservation, interim custody or sale of any goods which are the subject matter of a reference to arbitration, and for the issue of injunctions and the appointment of receivers in arbitration proceedings. Section 19 of the Arbitration Act 1908 enables the Court to issue subpoenas to witnesses in arbitration proceedings.

And the Court will appoint arbitrators and umpires when the parties cannot agree on appointments (Arbitration Act 1908 S.6) or when arbitrations or umpires are removed by the Court (Arbitration Amendment Act 1938 S.8). The Court will, if necessary, fix the remuneration of an arbitrator (Arbitration Act 1908 S.22).

Importantly, the Court has a discretionary power to stay Court proceedings if one party to an arbitration agreement attempts to litigate a matter which is within the scope of an arbitration agreement (Arbitration Act 1908 S.5). Except for good reason, the Court will exercise its discretion so as to give effect to the agreement to arbitrate. In Bristol Corporation v. Aird (1913) AC241 Lord Moulton said:-
"... I think the Courts have acted quite rightly in requiring good reason to be shown why this part of a contract should not be strictly performed... Although the Court has a discretion there is a prima facie duty on the Court to give effect to an agreement to arbitrate."

The other side of the coin is that the Courts not infrequently make use of the arbitration system. Section 15 of the Arbitration Act 1908 empowers the Court to order that "the whole cause or matter or any questions arising therein" be tried before an arbitrator in cases where the dispute involves matters of account or requires a prolonged examination of documents or a scientific or local investigation. There is a corresponding provision in Sections 61 and 62A of the District Courts Act - although the District Court can make such an order only by consent. A reference to arbitration under order of the Court does not have the consensual elements of a reference by agreement; the reference is to be conducted according to the Rules of Court "and subject thereto as the Court directs". However, apart from a compulsory order under Section 15, Judges not infrequently persuade the parties to an action to agree to an arbitration - especially in those repellent cases which occasionally emerge in Court when badly drafted building contracts go wrong.
These machinery provisions form part of the interface between the Courts and the arbitration system. They are essential to the effectiveness of the system and contain no trace of the "tension" to which the Law Commission refers.

The tension lies in another area - the balance between party autonomy and judicial intervention.

In New Zealand the law affecting arbitrations is not codified. The Court retains, at common law, a residual supervisory jurisdiction over the conduct of arbitrations - and historically both the Judiciary and the legislature have long been inclined to the view that in the interests of justice the proceedings and awards of arbitrators must be subject to the supervision and scrutiny of the Courts - even though the parties themselves have chosen to refer their differences to their own appointees and agreed to be bound by the determinations of those appointees.

There used to be a district in London which was a legal sanctuary for debtors and a notorious hideout for all sorts of nefarious characters. The district, Whitefriars, was also known as "Alsatia". (It was abolished in 1697).

Czarnikow v. Roth Schmidt & Co (1922) 2 KB 498 was a case in which the English Court of Appeal had to consider an agreement which contained a provision that neither party
would make any application to the Court or require the arbitrators to state a case for the opinion of the Court. Holding that the provision was invalid as being contrary to public policy Lord Justice Scrutton said:

"... There must be no Alsatia in England where the King's writ does not run"

It is not clear from the judgment whether his Lordship intended to characterise all arbitrators as scoundrels such as those who used to hide out in "Alsatia". But it is possible.

Although the practice of agreeing to have recourse to private arbitrators as an alternative to the State Court systems has a long history, it was only late in the 17th Century that the English Courts would enforce voluntary arbitration agreements. The first English Arbitration Act was passed in 1698. It had the effect of making written submissions to arbitration enforceable by the Courts. Thereupon the Courts held that at common law they had an inherent power to set aside the awards of arbitrators whenever it appeared, on the face of an award, that the arbitral tribunal had proceeded on an erroneous understanding of the law. That inherent power still remains in effect in New Zealand.

At common law a contract which purports to preclude one or both parties from submitting questions of law to the Courts
is contrary to public policy and is, pro tanto, void.

Section 11 (1) (b) of the Illegal Contracts Act 1970 reads:—

"11 (1) except as provided in Section 8. of this Act, nothing in this Act shall affect the law relating to:
(a) ...
(b) contracts or provisions in contracts which purport to oust the jurisdiction of any Court, whether that Court is a Court within the meaning of this Act or not."

Arbitration clauses, in the usual form do not offend that principle. In Lee v. Showmen's Guild of Great Britain (1952) 2 Q.B. 329, 342 Lord Denning said:—

"Parties cannot by contract oust the ordinary courts from their jurisdiction... They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the Courts. If the parties should seek, by agreement, to take the law out of the hands of the Courts and put it into the hands of a private tribunal, without any recourse at all to the courts in cases of error of law, then the agreement is to that extent contrary to public policy and void."

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It is to be noted here that although the Courts in New Zealand retain jurisdiction to set aside an award which discloses on its face that it is founded on a mistaken view of the law, the Court will not invoke that power when the issue submitted to arbitration is a pure question of law with no facts in dispute. (Europa Oil (NZ) Ltd v. Auckland Regional Authority (1968) NZLR 991, A.G. v. Offshore Mining Co Ltd (1983) NZLR 418.)

The presence of an arbitration clause in a contract does not provide a defence to an action on the contract — with the one exception of a "Scott v. Avery" clause. If one party to a contract containing the usual arbitration clause commences an action instead of going to arbitration, the action will proceed as though the arbitration clause does not exist — unless the Court exercises its discretionary power to stay the action. If a claimant begins arbitration proceedings and the other party later commences an action, any award by the arbitral tribunal will be wholly ineffective — again, unless the Court relinquishes jurisdiction by staying the action. Moreover, when a Court exercises its right (which is sometimes a duty) to renounce jurisdiction over a dispute which falls within an agreement to arbitrate, such renunciation is only provisional. Until a valid award is published the Court retains its underlying jurisdiction (see Mustill & Boyd on "Commercial Arbitration" P123).
As to "Scott v. Avery" clauses: in *Scott v. Avery* (1856) 5 HLC 811 it was held that agreements to refer disputes to arbitration are not to be regarded as ousting the jurisdiction of the Court. And this applies even to a provision making it a condition precedent to the enforcement of any claim under the contract that the claimant take the matter to arbitration and obtain a favourable award. Such a provision does afford a defence to any action on the contract and might, at first sight, appear to be an ouster of the jurisdiction of the Court.

However there is no reason why the parties to a transaction should not agree that the transaction will not give rise to any obligation binding in law (*Rose and Frank v. Crompton* (1923) 2 KB 261, (1923) A.C. 443). It follows that there is no reason why the parties should not agree that no actionable obligation will arise unless upon the happening of a specified event - for example the obtaining of an arbitrator's award. That, anyhow, is how I understand the rationale of *Scott v. Avery*. Until the award is published there can be no obligation for the Court to enforce. After the award is published, however, the Court (in New Zealand) may set it aside on the ground that there is an error in law on the face of the award.

In the years - in fact centuries - following the English
Arbitration Act of 1698, the English legislation tightened the grip of the Courts upon the conduct of arbitrations. The Common Law Procedure Act, 1854, the Arbitration Act 1934 and the Arbitration Act 1950 had the effect of giving the Courts statutory powers which enabled the Judiciary to adjudicate on any point of law arising in the course of arbitration proceedings.

The English Common Law Procedure Act of 1854 introduced a procedure by which the arbitral tribunal could be directed to state a case on any preliminary point of law. The English Arbitration Act of 1934 empowered the Court to compel the arbitral tribunal to state its award in the form of a special case.

These provisions enabled the Courts to intervene in arbitration proceedings much more extensively (and effectively) than the common law right to look at an award and to set it aside only if an error of law is apparent on the face of the document. The statutory powers meant that arbitration proceedings could be interrupted from time to time on application to the Court. And arbitrators, however reluctant, could be compelled to state for judicial decision special cases both on preliminary points of law and in their awards. That is how it was in England until 1979.
I have referred to the development of English Statute Law prior to 1979 because, up to that point, the New Zealand legislation followed the course set by England.

The new Zealand legislation contains provisions corresponding to the English legislation which was in force prior to 1979.

S.11 (1) of the New Zealand Arbitration Amendment Act 1938 provides that an arbitrator or umpire may, and shall if so directed by the Court state—

(a) Any question of law arising in the course of a reference, or

(b) An award or any part of an award—

in the form of a special case for the decision of the Court.

S.11 (2) provides that a special case may be stated, or may be directed by the Court to be stated, notwithstanding that proceedings under the reference are still pending.

And, of course, the common law power to set aside awards which are manifestly erroneous in law still exists. There was a change of emphasis in English law with the passing of the English Arbitration Act 1979. This came about because of the delays experienced with the special case procedure, and followed the recommendation of the report of a committee chaired by Lord Donaldson. Section 1 of the English

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Arbitration Act 1979 says that the section of the 1950 Act providing for cases to be stated for the opinion of the High Court, shall cease to have effect and, further, that the High Court shall not have jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award. Instead there is a right of appeal, subject to the leave of the High Court, on questions of law, with power for the Court to order the arbitrator or umpire to give reasons for the award if it gives no reasons or only insufficient reasons. There is also provision in the 1979 Act for "exclusion agreements" excluding the right of appeal.

This, obviously, was an important change. It is not reflected in the law of New Zealand as it now stands. We have carried on for two decades under the system which prevailed in England before 1979.

What is exercising the Law commission at the present time is the question whether our legislation should give greater emphasis to party autonomy than it does at present and, if so, whether it should be based on a model law (the UNCITRAL model) which was adopted by the United Nations Commission in International Trade Law on 21 June 1985 or, alternatively, on the reforms of the English Arbitration Act of 1979 or on some other basis. The Law Commission has expressed a tentative preference for adopting the UNCITRAL model with possibly some minor modifications. The advantage of the UNCITRAL model is
that it has already been accepted by several countries in relation to international arbitrations.

Article 5 of the UNCITRAL model reads:

"In matters governed by this Law, no Court shall intervene except where so provided in this Law."

Article 34 of the model says that recourse to a Court against an arbitral award may be made only by an application to set aside the award, and then only if:

"(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters
submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the Court finds that:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State"

The UNCITRAL model was designed to apply to international arbitrations but in the view of the Law Commission its provisions might well be applied to all arbitrations, both domestic and international.

I must not leave this topic without referring to the judgments of the five judges who sat in the Court of Appeal in CBI New Zealand Limited v. Badger BV - a case which is a
landmark in the development of the law of this country as it affects international arbitrations — with a potential spin off in the direction of domestic arbitrations. The hearing was on 12 and 13 October 1988, the judgment was delivered on 8 December 1988.

Before the Court was an application by CBI to set aside an award of Sir Graham Speight, sitting as an Arbitrator, on the ground that there were errors of law on the face of the award. By consent the proceedings were removed from the High Court to the Court of Appeal.

This was not a domestic arbitration. It was a transnational — or international — arbitration. The parties had agreed, as one term of a major construction contract, that all disputes in connection with the contract should be settled by arbitration in New Zealand under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. They agreed also that their contract should be construed in accordance with the laws of New Zealand. It was accepted by both parties that New Zealand law governed the arbitration proceedings.

The ICC Rules contain provisions to the effect that "the arbitral award shall be final" and that the parties shall be "deemed to have waived their rights to any form of appeal in so far as such waiver can validly be made". Clearly, that was
void if the Czarnikow doctrine applied.

Each of the five judges - Cooke P and Richardson, McMullin, Bisson and Barker JJ - gave a separate judgment. They were unanimous in their conclusion that there are no public policy reasons which would justify the Court intervening, contrary to the original agreement of the parties, where it is alleged, in an international arbitration such as that before the Court, that there are errors of law on the face of the award.

It is not possible in a paper such as this to embark on a close analysis of the reasoning of each of the Judges. As might be expected from the composition of the Court, they are masterly judgments, tracing the history of the residual common law jurisdiction to set aside awards for manifest errors of law, the principle, founded on public policy, that agreements purporting to oust that jurisdiction are void, and moving to modern developments in the field of international arbitrations.

As to Czarnikow, that case was distinguished on the basis that it related, not to the common law jurisdiction to set aside awards for manifest error in law, but to the statutory jurisdiction to require a case to be stated. Moreover, as Cooke P pointed out, Czarnikow must be of limited application because, clearly, there are methods, which are countenanced
by the Courts, whereby the common law jurisdiction can be excluded - for example if the parties agree to arbitrate a pure question of law (the Offshore Mining case), or agree that any reasons given by the Arbitrator shall not be part of the award, or that no reasons be given.

All judges considered that Czarnikow did not extend to an international arbitration under the ICC Rules and, further, that it would not be contrary to public policy to give effect to the provision in the ICC Rules as validly and effectively ousting the jurisdiction of the Court to review an award for error of law on the face of the award.

The judgments do not mention Section 11 (1) (b) of the Illegal Contracts Act. That provision has no bearing on the proposition advanced in CBI New Zealand v. Badger because the section says no more than that the Illegal Contracts Act is not to affect the Common Law relating to agreements purporting to oust the jurisdiction of the Courts. What the Court of Appeal has said in CBI is that in the context of an international arbitration the Common law, founded on public policy, does not preclude an agreement to oust the jurisdiction of the Court.

It has to be born in mind that CBI New Zealand v. Badger related to an international arbitration conducted under the rules of a recognised international arbitral organisation.

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Whether the case opens the door to a successful attack on the sanctity of the Czarnikow principle in the context of domestic arbitrations in New Zealand remains to be seen — there are dicta in the judgment of Cooke P which suggest that Czarnikow has no foundation except a concept of public policy which is now outdated.

It is likely, however, that before an occasion arises to use CBI New Zealand v. Badger as a spring board for an attack on the Czarnikow doctrine in the domestic context, the whole matter will be resolved by legislation which will either abolish or severely restrict both the statutory provisions for cases stated and the common law jurisdiction of the Court to set aside awards on grounds of manifest error in law.
JUDICIAL INTERVENTION IN INTERNATIONAL COMMERCIAL ARBITRATION IN BRITISH COLUMBIA

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Over the past two years, in an uncharacteristic display of uniformity, the provinces (together with Parliament) have all enacted legislation based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law). At the same time, Canada has, as last, signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and that Convention has been implemented by federal and provincial legislation. During this time a small but growing number of countries have joined Canada in implementing the Model Law or amending their existing laws in light of its provisions.

A basis principle of the Model Law and the British Columbia International Commercial Arbitration Act (the Act) is limited court intervention. This paper will explore the extent to which the British Columbia Act has been effective in achieving one of its primary stated objectives and the likelihood that courts in British Columbia, and elsewhere in Canada, will be willing to compromise their own role in order to enhance the effective resolution of international disputes.

The statement of the fundamental principle of limited court intervention is set out in section 5 of the Act which provides:

"In matters governed by this Act,

(a) no court shall intervene except where so provided in this Act ..."
The UNCITRAL background papers on the Model Law reveal that the intention of Article 5 was to achieve certainty as to the maximum extent of judicial intervention under the Model Law. There was a general concern that with judicial control and assistance would come the opportunity to the protraction of dispute resolution - contrary to the needs of the international business community. The limitations of section 5 are best comprehended by assessing what matters are not governed by the Act. The analytical commentary on the Model Law by the Secretary-General of UNCITRAL cites such matters as state immunity, the contractual relations between the parties and the arbitrators or arbitral institutions, fixing of fees and other costs, adoption of contracts, and the capacity of the parties to conclude their agreement to arbitrate, as not being dealt with by the Act. In these areas, if the necessity of judicial assistance arises its scope is not compromised by the Act.

Woven into the principle of limited court intervention is another tenet of the Model Law - that of party autonomy. Even where there is scope for judicial intervention it may be preempted by the parties having resolved the issue for themselves. The limitations the Act places on judicial intervention will only be effective if the courts also recognize the parallel need to preserve the party autonomy enshrined in the Act.

Before examining the ways in which the Act allows scope for judicial intervention some reference should be made to the situation prior to the passage of present law. Like the situation that prevailed in the United Kingdom, British Columbia allowed scope for appeals to the courts on questions of law and for misconduct by an arbitrator. To an extent this situation still prevails for arbitrations that are not international commercial arbitrations. For domestic commercial arbitrations
there is still considerable scope for judicial intervention and conflicting interpretations. While section 18 of the Act (which provides that the parties shall be treated with equality and each party given a full opportunity to present his case) may encompass some of the grounds for review that previously amounted to misconduct on the part of the arbitrator, it has been argued that it is likely to be more limited. Many of the grounds which were formerly included under the heading of misconduct of the arbitrator are now grounds for setting aside an award under section 34 of the Act — such as an award not dealing with a dispute within the terms of the submission to arbitration. The Act (and the Model Law) have precluded judicial intervention for misconduct during international commercial arbitral proceedings but retained some types of misconduct as grounds for setting aside an award.

Under the British Columbia Act the issue of judicial intervention may rise at three distinct stages. The question of the role of the courts may arise before the arbitration proceedings commence, such as when one party argues that the dispute is not subject to the arbitration clause. Second, it may arise during the proceedings, such as when an arbitrator became incapable of performing his functions or withdraws. Finally, judicial intervention also arises after an award has been rendered in connection with its setting aside or enforcement.

For reasons of space, this discussion will largely concern itself with judicial intervention prior to and during arbitral proceedings.

1. JUDICIAL INTERVENTION PRIOR TO THE COMMENCEMENT OF THE ARBITRAL PROCEEDINGS

(a) Stay of Legal Proceedings; s.8
Section 8 of the Act provides a procedure whereby a party to an arbitration agreement may seek a court order staying legal proceedings brought by another party to the agreement respecting a matter agreed to be submitted to arbitration. The court is obliged to order a stay of proceedings unless it determines that the arbitration agreement is "null and void, inoperative or incapable of being performed". Subsection (3) of section 8 provides that an application under the section does not prevent the commencement or continuation of an arbitration. This last feature reflects a recurrent concern of UNCITRAL with the use of recourse to the courts for the purpose of delay. Section 8(1) would preclude a defendant from seeking a stay after filing a notice of defence but American courts have held that the onus on the party seeking a stay should be a heavy one so as to enhance arbitration as an alternative to litigation. On the other hand, a challenge to jurisdiction is not a "step in the proceedings". However, a demand for particulars of the statement of claim has been held to constitute a step in the proceedings.

How courts in British Columbia interpret the words "void, inoperative or incapable of being performed" will determine, in large measure, the scope for judicial intervention under the Act. The expression "null and void" would seem to refer to the issue of whether an arbitration agreement exists at all or is void ab initio on such grounds as duress, fraud, mistake or misrepresentation. The word "inoperative" has no established meaning at common law but probably includes a case where an agreement to arbitrate has expired or been ended by agreement between the parties. "Incapable of being performed" has been interpreted as referring to questions of impracticability such as arise when an agreement is too vague or ambiguous to be susceptible to any reasonable interpretation.
It has been pointed out that the introduction of new terms such as those in section 8 will demand new approaches on the part of British Columbian courts to the issue of arbitrability and that, given the preamble of the Act they would fail to give effect to a clear legislative signal if they did not foster a bias in favour of arbitration rather than against it.\textsuperscript{17} This has been the evolving position in the United States since the decision of the Supreme Court in \textit{Scherk v. Alberto-Culver Co} where an arbitration agreement was upheld over attempts to bring suit in the United States regarding the application of the \textit{Securities Exchange Act of 1934} and the infamous Rule 10b-5 promulgated under that law.\textsuperscript{18} Similarly, the Supreme Court of the United States in \textit{Mitsubishi Motors v. Soler Chrysler-Plymouth} found that claims arising under federal anti-trust laws were susceptible to arbitration. In the opinion of the Court:

As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration ..." To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration.\textsuperscript{19}

(b) Appointment of Arbitrators: S.11
Both the Model Law and the Act give a role to the courts in connection with the appointment of arbitrators. Section 11 of the Act provides for statutory appointment procedures when the parties fail to agree on a procedure for appointing the arbitral tribunal. If either procedure fails a party may request the Chief Justice of the Supreme Court of British Columbia or his designate to make an appointment or take a necessary measure. The decision of the Chief Justice is final and not subject to appeal and the Act sets out matters the Chief Justice must take into account in appointing an arbitrator.

The content of section 11 reflects a somewhat inevitable tension between two Model Law priorities. On the one hand there is concern with not allowing judicial intervention to override the private agreement the parties have reached. On the other hand, there is concern with realizing the parties' desire to arbitrate their differences without undue delay. Judicial intervention becomes essential, even when the parties have set up their own procedure to settle a disagreement as to who will arbitrate their substantive lis if the person or persons in control of that procedure fail or are unable to act as was envisaged. 20

Judicial appointment of arbitrators has recently been the subject of a ruling of the former Chief Justice of British Columbia. The request arose out of an arbitration agreement contained in a long-term contract to sell coal between Quintette Coal Limited (Vendor) of British Columbia and a number of Japanese steel companies (Purchasers). Since the contract was signed, the world price of coal has declined significantly and the Purchasers sought a variation of the price pursuant to the price review provisions contained in the contract. The Purchasers, as petitioner, applied to the Chief Justice under section 11 of the Act for an order appointing a third arbitrator to an arbitral tribunal set up under the arbitration
agreement between the parties. Under that agreement each side had appointed one arbitrator but these persons had been unable to agree on a third arbitrator.

In their petition, the Purchasers stated that since both sides' nominees were British Columbia residents, the third arbitrator "should be someone independent and impartial who will bring an international dimension to this international dispute" and that no further provincial representation was needed. This argument drew support from the Act since two of the three factors the Chief Justice was required to have regard to in ordering the appointment of the third arbitrator were (1) matters likely to ensure that such person was independent and impartial and (2) the advisability of appointing a neutral arbitrator whose nationality was other than that of the parties. Despite these considerations, the Chief Justice chose to appoint as third arbitrator the retiring Chief Justice of British Columbia, The Honourable Chief Justice N.T. Nemetz. In so ordering, the Chief Justice expressed the view that it would "be both inconvenient and unfair to the parties and to the arbitrator to expect anyone of international repute to spend the length of time this case will require away from his home and other interests" when someone of international reputation and experience was available locally.

While the personal qualifications of the former Chief Justice of British Columbia are beyond criticism, the appointment of an all British Columbia tribunal is hardly likely to dispell allegations of parochialism. While an international commercial arbitration must inevitably have a specific situs, it is clearly the intention of parties, who have chosen to avoid any particular legal system, that their dispute appear to be resolved by persons independent of a particular nation. The credibility of Vancouver as an international commercial dispute resolution centre would have been enhanced by the choice of a non-Canadian
with the appropriate qualifications. These concerns would seem to have prompted a recent amendment to section 11 of the Act. Section 11(9) now provides as follows:

(9) Unless the parties have previously agreed to the appointment of a sole or third arbitrator who is of the same nationality as any of the parties, Chief Justice shall not appoint a sole or third arbitrator who is of the same nationality as that of any of the parties.

It could be said, however, that there might be situations where all the arbitrators should all be of the same nationality (even where the subject matter of the dispute was truly international) and that section 11(9) eliminates this option.

(c) Interim Measures of Protection: S.9

Both before and during the arbitration a court may grant interim measures of protection (s.9) unless otherwise agreed between the parties. This is a power concurrent to that possessed by the arbitral tribunal (ss.17 and 31(6)). There is no limit from whose countries' courts interim protection may be sought since the Act uses the word court in a general sense.

The scope of such judicial relief is best gauged by comparing it to similar relief at the instance of the arbitral tribunal. Interim relief offered by the tribunal cannot be enforced under the provisions of the Act as an arbitral award unless it comes within the definition of that term in section 2(1) of the Act. The Act originally deemed the term "arbitral award" to "include an interim arbitral award". The Act was recently amended to deem arbitral award to:
Include(s) (a) an interim arbitral award made for the preservation of property, and (b) any award of interest or costs.

It is puzzling that the phraseology used in section 17 of the Act describing the scope of interim measures by the tribunal ("any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute") was not adapted into the wording of section 2(1). The new amendment creates an ambiguity which could be the basis of an argument that the enforcement of tribunal-ordered interim measures of protection is limited to those described in the section 2(1) definition of "arbitral award". That definition does, however, contain the word "includes" whose presence could be argued not to have diminished the scope for enforcement of tribunal interim awards. Moreover, the Act's policy of limited court intervention would hardly support any interpretation which made recourse to the court for interim relief more attractive than the seeking of such assistance from the tribunal.

In the Quintette Coal Limited arbitration, referred to earlier, the Purchasers next sought an order for an interim measure of protection, under section 17 of the Act, from the arbitral tribunal. The Purchasers sought an order that a portion of the moneys paid for coal shipments received during the arbitration to be paid into trust. The Seller argued that the tribunal lacked jurisdiction to make an order. The tribunal ruled that the parties had evinced an intention to be bound by the Act and that the tribunal itself was bound by the statute. In upholding its jurisdiction to rule on interim measures of protection the tribunal found that:

This statute, in its preamble, speaks of reflecting a consensus of view on the conduct of, and the degree

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and nature of judicial intervention in, international commercial arbitrations. A review of the Act indicates the consensus is that in international commercial arbitrations disputes should be resolved, subject of course, to jurisdiction, whenever possible by arbitration tribunals rather than by the Courts.

The tribunal takes a purposive view of the statute. As the statute aims at resolving disputes within the framework of the arbitration, the tribunal will hear the application for an interim measure of protection ...

The tribunal thus concluded that, in its view, the parties had not shown an intention to exclude the granting of interim relief by the tribunal established by their agreement. A subsequent challenge to the ruling of the tribunal was dismissed by the Supreme Court of British Columbia - both the tribunal and the court showing a willingness to uphold the scope of the tribunals' power to provide ancillary relief.

Should a party seek interim relief from a court it remains unclear how such requests will be responded by Canadian judges. Article 9 of the Model Law was broadly phrased to make it clear that it did not seek to regulate which measures of protection were available to a party but merely expressed the principle that a request to a court for any interim measure is not incompatible with the fact that the parties had agreed to settle their dispute by arbitration. Th Analytical Commentary of the UNCITRAL Secretary General on the Model Law expresses the view that the scope of interim relief pursuant to Article 9 is wider than that retainable from the tribunal in that it would extend to orders affecting third parties as well as orders sought from foreign courts. This contrast between judicial and tribunal interim relief may be undermined by section 31(6) which provides that the
tribunal may, at any time during the arbitral proceedings, make an interim award on any matter on which it may issue a final award. Section 31(6) is not contained in the Model Law but resembles Article 32.1 of the UNCITRAL Arbitration Rules. When read with section 17 of the Act section 31(6) reveals that the scope for tribunal interim relief is very wide as well.

Given the fact that the Act establishes a principle for its own construction, that reference be made to and due weight given UNCITRAL documents and working group papers regarding the preparation of the Model Law, it is likely that the above analysis would be given special weight in fashioning interim relief. On the other hand, court-ordered interim relief is perhaps less likely than tribunal orders under section 17, to be based on principles of granting relief developed in international law. It could be argued that to the extent that customary international law is part of Canadian law it should apply, especially where the statute under which such relief is granted reveals a transnational bias. In any case, it would appear that the principles for granting interim relief under public international law and Anglo-Canadian common law are remarkably similar — apparently because of the incorporation into the former of municipal legal principles by the World Court. The International Court of Justice now appears to regard interim measures as available even where damages would be an adequate remedy as long as "irreparable prejudice" would be sustained by the applicant if such relief were to be refused. Similarly, Anglo-Canadian courts will grant injunctive relieve even when future losses can be calculated. It seems that Canadian law has now reached the stage where damages will be seen as adequate only where a plaintiff may not be significantly prejudiced by a denial of interim protection.
2. JUDICIAL INTERVENTION DURING THE ARBITRAL PROCEEDINGS

In addition to ancillary relief, there are at least five express instances where the Act allows scope for court intervention during the course of arbitral proceedings to which the Act applies. These instances are:

(a) Resolving challenges to arbitrators: s.13;

(b) Termination of the Mandate of an Arbitrator: s.14;

(c) Rulings by the Arbitral Tribunal on its jurisdiction: s.16/

(d) Court assistance in taking evidence: s.27(1).

(e) Judicial Consolidation: s.27(2) and (3).

(a) Resolving Challenges To Arbitrators: s.13

Like section 11(5), which prevents disagreement over composition of the tribunal from unduly delaying the arbitral proceedings, section 13 also enables access to the Supreme Court in the event that a challenge to an arbitrator is rejected by the arbitral tribunal. Like judicial resolution of disagreements over tribunal composition, determinations under section 13 are not subject to appeal.38

There is support for the view that court proceedings, though rarely successful in practice, is often taken advantage of for delaying purposes.39 At least three features of judicial access under section 13 tend to minimize this risk. First, the challenging party has only 30 days, after notice of rejection of the challenge, to request the Supreme Court to decide on the challenge.40 Second, as mentioned the decision of the court is final.
and not subject to further appeal. Third, while the request for judicial review is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration and even make an award. The Act includes a further provision, not contained in the Model Law, which further reduces the risk of dilatory tactics. Section 13(5) provides that where the Court is asked to rule on the challenge to an arbitrator, it may refuse to exercise its jurisdiction to do so if it is satisfied that the petitioner had already had an opportunity to have the challenge ruled upon, by other than the arbitral tribunal, under the procedure agreed upon by the parties.

(b) Termination of the Mandate of an Arbitrator: s.14

The act allows the Supreme Court of the province to rule on the termination of the mandate of an arbitrator on the basis that:

(a) He becomes de jure or de facto unable to perform his functions or for the reasons fails to act without undue delay, and

(b) He withdraws from office or the parties agree to the termination of his mandate.

This jurisdiction only arises if the parties cannot agree upon a termination on the above grounds. Unlike section 13, the parties cannot agree on termination by an alternate procedure. The decision of the court is final and unreviewable.

In his analytical commentary on the Model Law, the UNCITRAL Secretary General suggests that, in considering an arbitrators' failure to act, the following may be relevant:
(i) what action was required or expected of him in light of the arbitration agreement;

(ii) has the delay been so inordinate as to be unacceptable in the circumstances, including technical difficulties and the complexity of the case, and

(iii) has his conduct fallen below the standard of what may reasonably have been expected from a person with his qualifications and experience. 45

(c) Rulings by the Arbitral Tribunal on its own jurisdiction: s.16

Section 16 of the Act confers on the arbitral tribunal the power to rule on its own jurisdiction, including rulings on the existence and validity of the arbitration agreement. If the tribunal rules as a preliminary question that it has jurisdiction, then any party may request the Supreme Court to decide the matter. 46

The earlier version of Article 16 in the Model Law allowed positive rulings by the tribunal on its own jurisdiction to be contested only in court action to set aside the award. 47 The view which prevailed allows for judicial review of any rulings by the tribunal on its jurisdiction as a preliminary question. The major concern, as with other questions of judicial access, was with the potential for delay to the arbitral proceedings. As with judicial review of challenges to arbitrators under section 13, court decisions on preliminary jurisdictional rulings by the tribunal are subject to three factors ameliorating the risk such redrrew might pose to the expedition of the proceedings. First, the request to the Supreme Court must be made within 30 days of the
tribunal's ruling on its own jurisdiction.\textsuperscript{48} Second, the decision of the Supreme Court is final and not subject to appeal.\textsuperscript{49} Third, the arbitral proceedings may continue and an award delivered while the request to the Court is pending.\textsuperscript{50} The possibility of delay arose in the Quinette Coal Ltd. arbitration when the seller argued that the tribunal lacked jurisdiction to make an interim order under sections 17 and 31(6) of the Act. After deciding that it had such jurisdiction, the tribunal ruled that it would continue the proceedings while the seller applied to the Court under s.16(6).

Another limitation on the role of the courts arises if the facts upon which a party challenges the jurisdiction of the tribunal are inseparable from the merits of the case. In such instances, the tribunal may continue with the proceedings and make a final award dealing with both issues simultaneously. Without a preliminary ruling on jurisdiction, a party is deprived of recourse to the courts during the proceedings under section 16 of the Act. It will only be after the award has been delivered that it can be sought to be set aside on the ground that it contains rulings on matters beyond the scope of the submission to arbitration.\textsuperscript{51} The Act leaves it to the tribunal, in such cases, to decide whether it should rule on jurisdiction as a preliminary issue or in the final award on the merits.\textsuperscript{52}

Any concern that jurisdictional rulings by the courts are too narrowly defined under the Act is also allayed by the existence of another method of obtaining judicial rulings relating to jurisdiction.\textsuperscript{53} Proceedings can be commenced, outside of the Act, based on the arbitrator having no jurisdiction because there is no agreement between the parties to arbitrate their differences. If these proceedings succeed, the court will assume jurisdiction over the dispute.\textsuperscript{54} The notes accompanying Article 16 specifically recognise that the
Model law does not preclude access to a court on the issue of whether a valid arbitration agreement exists.\(^{55}\)

(d) Court Assistance in Taking Evidence: s.27(1)

Under section 27(1) the court may only provide assistance in taking evidence if requested to do so by the arbitral tribunal or by a party with the approval of the arbitral tribunal. The UNCITRAL Working Group believed it should be left to each state to decide whether to place the ultimate authority over court intervention in the court itself. Consistent with the principle of limited court intervention, British Columbia believed it necessary to preclude court intervention where the tribunal did not request it. On the other hand, it is accepted that a court can play a vital role in aiding an arbitral tribunal in taking evidence. The tribunal has no power over persons who are not parties to the arbitrator agreement. Perhaps the main weakness in the theory of court intervention in section 27 is the likely reluctance of the arbitral tribunal to decline a party's request for judicial assistance.\(^{56}\)

It remains unclear how the phrase "taking evidence" in section 27(1) will be interpreted. From the UNCITRAL Working Papers it is clear that the phrase applies to oral testimony from a person required to be examined as a witness as well as documents to be produced or property to be inspected.\(^{57}\) Such powers would include the obtaining of evidence with the assistance of a foreign court. The local court might execute the request by taking evidence itself, communicating the result to the tribunal, or it might order that the evidence be provided directly to the arbitral tribunal.

It is also not clear whether the phrase "taking evidence" gives the Supreme Court the power to order an
examination for discovery. American courts allow the use of examination for discovery in commercial arbitrations only in exceptional circumstances. In Recognition Equipment, Inc. v NCR Corporation an issue was whether, assuming the court were to stay proceedings, the court should allow discovery under the Federal Rules of Civil Procedure, pending arbitration. After a careful review of apparently conflicting case law, the court found no "exceptional circumstances" that would justify the cost of pre-arbitration discovery, particularly when there existed the possibility of "dual discovery" by arbitral, as well as, judicial order. An interpretation of section 27(1) that excludes the use of examination for discovery is consistent with the object of arbitration as avoiding litigation procedures that can be seen as oppressive and counter-productive.

(e) Judicial Consolidation: s. 27(2) and (3)

The Supreme Court of British Columbia has powers under section 27(2) of the Act in connection with the consolidation of two or more arbitrations when the parties have already agreed that their arbitrations will be consolidated. Since the jurisdiction of the court is predicated on consensus, the section should not be a vehicle for delay. Judicial consolidation as a dilatory tactic has been well established by American experience.

Consolidation of arbitral proceedings seeks to save the delay and expense of separate proceedings and avoid the possibility of conflicting awards. Experience suggests, however, that consolidations are often more complicated and costly than unconsolidated proceedings where parties are not forced to assume the additional burdens of hearing claims, giving evidence and discussing issues with all other parties.
It is important to realize that the scope of the courts power under section 27(2) is limited to ordering the terms on which arbitrators are to be consolidated, appointing an arbitral tribunal in accordance with section 11(8) where the parties cannot agree on its composition and making any other order it considers necessary. The court does not, it seems, have the power to order consolidation because it considers it "just and necessary" if the parties have not agreed to consolidation amongst themselves. At the same time, the court might well be reluctant to allow consolidation of all aspects of a dispute when the delay and expense of doing so would only be justified for certain parts of the parties' disagreement.

Section 27(2) and (3) are not contained in the Model Law but were based on section 6B of the Arbitration Ordinance of Hong Kong. In its recent Report on the Adoption of the UNCITRAL Model Law of Arbitration, the Law Reform Commission of Hong Kong recommended against a compulsory consolidation procedure on the ground that inter alia, it is more difficult in an international context to devise a workable procedure for consolidation, than in a domestic context where the parties are usually all subject to the jurisdiction of the local courts. The Hong Kong Report is critical if the British Columbia Act for including a provision which operates only by consent and therefore seems to not justify court intervention. While the judicial intervention provided for in section 27(2) may expedite the process of consolidation by specifying the terms on which it is to occur, it is arguable that this has been achieved at the high cost of risking the level of judicial intervention in consolidation which has occurred in the United States.

3. JUDICIAL INTERVENTION SUBSEQUENT TO THE ARBITRAL AWARD

(a) Application for setting aside an arbitral award: s. 34
Section 34 is the exclusive basis for recourse against an international commercial arbitration award under the law of British Columbia. The grounds the section sets out for setting award aside are the same as those contained in Article 34 of the Model Law and Article V of the New York Convention (for refusal of recognition and enforcement).

There is general consensus amongst experts that the grounds set out in section 34 - which are the exclusive basis for recourse against awards under B.C. law - place strict limits on the scope for judicial intervention in international arbitrations. For instance, an award can no longer be annulled on the ground of mistake or fraud or because fresh evidence has been discovered since the conclusion of the arbitral proceedings. Despite such limitations, section 34, as worded, is not only consistent with the presumption in favour of strict limits on judicial intervention but also with a policy of ensuring, whenever possible not only the uniformity of domestic legislation but consistency between the provisions of the new York Convention and the Model Law.

While judicial interpretation of section 34 is still awaited it is unlikely that the provision will be seen as not excluding appeal on points of law altogether - consistent with notions of certainty and finality of the arbitration. Section 34 does seek to ensure certain minimum standards of procedural fairness have been met but it sets these grounds out, rather than leaving them to the courts to devise. Some of the grounds set out come close to the common law concept of "misconduct" by the arbitral tribunal and it is to be hoped that they will not be interpreted solely in the light of that former basis for review. On the other hand, the public policy ground for setting aside an award (section 34(2)(b)(ii)) may include not only substantive standards but procedural ones as well - closer to the civil law concept of "ordre publique".

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This was the view adopted in the Analytical Commentary on the Model Law and the Australian report on the Model Law has recommended, in its recommendations for legislation implementing the Model Law in Australia, that it be explicitly set out in the definition of "public policy".62

(b) RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS; SS 35 AND 36

While closely-related in several respects to judicial recourse against the award, recognition and enforcement requires judicial intervention since the tribunal lacks the powers available to the courts (such as the contempt power). Because new grounds (from those for setting aside an award) are not introduced for enforcing an award, a party should not be prejudiced by not having actively sought to have an award set aside.

Section 36 lists the only grounds on which the Supreme Court of British Columbia may refuse to recognise and enforce an award. These, as mentioned, are the same grounds as are set out in the New York Convention and in section 34 for setting aside an award. This part of the Act needs to be read along with the Foreign Arbitral Awards Act, which implements the New York Convention into the Law of British Columbia and differs from the enforcement provisions of the Act in that it also deals with the recognition of arbitration agreements and foreign awards whose subject-matter is domestic, as distinct from international in scope.

4. THE BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION ACT AND S.96 OF THE CONSTITUTION ACT 1982; THE ARBITRATOR AS "UNWELCOME GUEST".63

In Quintette Coal Limited v Nippon Steel Corporation et al the petitioner contested the validity of sections
16, 17 and 31(6) of the Act under section 96 of the Constitution Act 1982. As one of the authors of the report to the Attorney-General of British Columbia on which the Act was based, the writer was aware of earlier concern about this issue. It was surprising, however, that the question arose so early on in the history of the new legislation.

In Quinette, the contract between the Vendor and the Purchasers provided for arbitration of all disputes between the parties. The law governing the Interpretation of the parties contract was stated to be the law of British Columbia. The tribunal having determined that it would hear the Purchaser's application for an interim measure of protection, the Vendor applied for a review of that ruling under section 16(6) of the Act and for declarations in respect of the constitutional issues.

Section 96 reserves to the Governor-General the power to "appoint the judges of the Superior, District, and County Courts in each province" and has been construed as preventing provincial legislatures from creating tribunals and tribunal personages with the powers of section 96 judges. In Reference Re Residential Tenancies Act Dickson, J. (as he then was) stated the scope of section 96 as:

... limiting provincial competence to make appointments to a tribunal s.96 judicial powers and therefore as implicitly limiting provincial competence to endow a provincial tribunal with such powers.

Mr Justice Gow determined that nothing turned on whether it was argued that the tribunal created by the provincial law was a section 96 Court, or whether the tribunal was conceded to be valid but the legislation conferring certain powers on it was not. In his view, the tribunal
established pursuant to the parties' agreement was not a creature of the Act. Though the Act provided a procedural structure for international commercial arbitral tribunals established in British Columbia this did not convert them into statutory tribunals'
awaits comment from constitutional scholars, there is no doubt that it sends out a very welcome signal both inside and outside Canada. Mr Justice Gow, is clearly cognizant of the change in outlook towards the private resolution of international commercial disputes in recent years and in this respect he is clearly not alone among his judicial brethren in the province. In *Century 22 Vernon Lowe Realty Ltd v Royal Le Page Real Estate Services Ltd* Madam Justice Proudfoot states:

"Finally, the most compelling reason why the court should not intervene is simply the (sic) legislation sets up a mechanism to expeditiously and inexpensively resolve these types of dispute which occur from time to time. This process should be allowed to continue. If the courts are to become involved by way of granting leave each time an Award is made and a party is not happy, the objectives and intentions of the legislation will never be fulfilled. Everyone talks today of mechanisms for "alternative dispute resolution", here is just such a mechanism; that scheme should be allowed to flourish."68

Her Honour's remarks were made in the context of an application for leave to appeal on a question of law pursuant to British Columbia's domestic arbitration statute, the *Commercial Arbitration Act*, but they are equally persuasive in the context of private international disputes. Such reluctance to intervene in arbitrations of domestic commercial disputes is evidenced by other recent decisions in British Columbia; *Southmark Vancouver Corporation v Wosk's Ltd* (1987) 21 B.C.L.R. (2d) 348 (B.C.S.C.); *Domtar Inc. v Belkin Inc.* [1988] B.C.D. Civ.240-03 (B.C.S.C.) and *Crown Forest Ind. Ltd v Commonwealth Construction Co.* (B.C.S.C.) Vancouver Registry A.861085.
5. CONCLUSION

British Columbia's enactment of the UNCITRAL Model Law has been praised for not containing extensive variations which might have interfered unduly with the policy priorities of the uniform code on international commercial arbitration that it closely reflects. This means that judicial intervention in international commercial arbitrations taking place in the province should be strictly limited. While it is too early to make firm conclusions about the effect the new legislation is likely to have on private international commercial dispute resolution in British Columbia, there have already been some troubling developments.

British Columbian judges have shown an encouraging level of support of arbitration over adjudication for private commercial disputes but there has been no unqualified statement that this preference is elevated when the subject-matter of the dispute is international, rather than domestic, in character. The preamble to the British Columbia statute makes clear the level of legislative support in the province for arbitration of international commercial disputes. Further, the British Columbia law which regulates the arbitration of domestic commercial disputes, the Commercial Arbitration Act, clearly tolerates a higher level of judicial interference than does the International Commercial Arbitration Act. It will be crucial to the success of the B.C. Act that it is recognised as upholding a stronger bias against judicial intervention.

Another concern arises from the risk posed to the original Act through the process of legislative amendment. While no legislation can be immune from change, there is an enhanced risk of injury to delicately balanced policy priorities when those are contained in what is really an international uniform law. The
amendment already referred to, the definition of "arbitral award" in the Act, is an example of the danger local amendments pose to the central principles of the Model Law contained in the Act - including limited court intervention.

In the writer's view it is important that scepticism regarding judicial intervention in international commercial arbitral proceedings be maintained. It is well documented that such intervention poses risks in the form of increased costs and delay. Recent experience in British Columbia also suggests that it may undermine the level of confidentiality expected through a choice of a private means of dispute resolution. The most serious risk posed by judicial intervention, however, may be the likelihood that courts are less able to make findings that give effect to the parties' original expectations.

NOTES

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1 The last two Canadian jurisdictions to enact the Model Law were Saskatchewan and Ontario with their International Commercial Arbitration Acts, S.S. 1988 c. 1-10.2 and S.O. 1988, c. 30, respectively.

2 See Paterson & Thompson (eds), UNCITRAL Arbitration Model in Canada (Carswell, 1987), 165-166.

3 Among these are Cyprus and Nigeria (and Bulgaria). Australia, Hong Kong and New Zealand have examined implementation by amendment to existing legislation.


See Herrmann, "The British Columbia Enactment of the UNCITRAL Model Law", in Paterson & Thompson, supra, n.2, 65, at 67.

See Alvarez, "Judicial Intervention & Review Under the International Commercial Arbitration Act", in Paterson & Thompson, supra n.2, 137.

These are governed by the new Commercial Arbitration Act, S.B.C. 1986, c.3.


GATES ENERGY PRODUCTS INC. v. YUASA BATTERY CO. LTD (1986) XI Year. of Comm. Arb. 566.

HOWAY AND REID v. DOMINION PERMANENT LOAN CO. 6 B.C.R. 551.


See JAMES SCOTT & SONS LTD v. DEL SEL (1923) 14 Lloyds' Rep. 65 (H.L.).

Infra, n. 17, at p90.

Graham, "International Commercial Arbitration: The Developing Canadian Profile", in Paterson & Thompson, supra, n. 2, 77, at 90-91.

417 U.S. 506; 41 L. Ed. 2d 270; 94 S. Ct 2449 (1974).

473 U.S. 614; 87 L. Ed. 2d 444; 105 S. Ct 334 (1985), L. Ed. at 462-463. The trend of Supreme Court decisions preferring arbitration over regulatory codes was further exemplified in SHEARSON-AMERICAN EXPRESS INC. v. McMAHON 55 L.W. 4757 (1987) (Securities Exchange Act and Racketeer Influenced and Corrupt Organisations Act).

See NATIONAL ENTERPRISES LTD v. RACAL COMMUNICATIONS LTD [1975] Ch. 397 where the Court held it had no jurisdiction, under the U.K. Arbitration Act, to appoint an arbitrator where a third party agreed upon by the parties to make such an appointment had failed to act, but cf. Re P.Z. Resort Systems Inc. et al (1987) 39 D.L.R. (4th) 626 (B.C.C.A.) where the court refused to appoint a new arbitrator when the agreement to arbitrate was held to be a specific agreement to refer a dispute to a named individual.
and was no longer capable of enforcement since the award of the sole arbitration had been set aside (Commercial Arbitration Act, S.B.C., 1986, c. 3, s. 17).

21 Re an Arbitration between NIPPON STEEL CORPORATION et al V. QUINTETTE COAL LTD, Petition to the Supreme Court of British Columbia, No. 880290, Vancouver Registry, p12.

22 Act, supra, n. 4, s. 11(8) (as originally enacted).


24 See Miscellaneous Statutes Amendments Act (No. 2) S.B.C. 1988, c. 46, s. 35.

25 Act, s. 2(1).

26 Act, s. 17.

27 See s. 2(1) definition of "arbitral award", as amended by Miscellaneous Statutes Amendment Act (No. 2) S.B.C. 1988, c. 46, s. 34.

28 Act, s. 2(1), as originally enacted.


30 Id.


33 Act, s. 6.


38 Act, s. 13(6).

Act, s. 13(4). This is consistent with the common law: JOHNSON v. KORN 117 S.W. 2d 514 (1938). See also Domke on Arbitration (1968), pp332-333.

Act, s. 13(6).

Act, s. 13(5).

Act, s. 14(2).

Act, s. 14(3).


Act, s. 16(6).

Act, s. 34 and U.N. Doc. A/40/17, at 157.

Act, s. 16(6).

Act, s. 16(7).

Act, s. 16(8).


Act, s. 34(2)(iv).

Redfern and Hunder, supra, n. 39 at pp.215-216.

Graham, supra, n. 17, at 87-89


See Kerr, supra, n. 10.


See Re Burmah Oil Tankers Ltd., 454 U.S. 966, CP, Weyerhaeuser Co. v. Western Seas Shipping, 743 F. 2d 635 (9th Cir. 1984).

This is an elliptical reference to Mr. Justice Gow's reference in Quintette (infra, n. 64) to the Canadian "house of disputes resolution" now being inhabited by the arbitrator.


Id., at p. 566.

Supra, n. 64, at p. 23.

THE AUSTRALIAN PERSPECTIVE

Patrick Brazil,
Consultant to Macphillamy, Cummins and Gibson
Canberra.
"I yield to no-one in my view that arbitrations are a useful weapon in dispute resolution".  
(Judge Rogers, Supreme Court of New South Wales, Dupas v Packett & Son Constructions Pty Ltd 21 July 1983)

BRIEF SUMMARY

This paper deals firstly and mainly with the legislative options on both domestic and international arbitrations that have recently been taken, or that are now being considered, in Australia and some issues relating thereto. It goes on to refer to a recent Australian survey on arbitration, and other Australian developments. It concludes with a comment on harmonisation between Australia and New Zealand in this area of business law.

A. LEGISLATION

Commercial arbitration in Australia has been regulated by both State and Commonwealth legislation.

(a) Earlier Federal Legislation

The Arbitration (Foreign Awards and Agreements) Act 1974 gave effect within Australia to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Foreign Immunities Act 1985 removed immunity in supervisory court proceedings in relation to local
arbitrations to which a foreign State is a party unless a contrary provision is contained in the arbitration agreement (s.17(1)). In addition, unless there is a contrary provision in the arbitration agreement, a foreign State is not immune in proceedings for the enforcement of an arbitral award if the arbitration concerns a matter in respect of which the foreign State would not have been immune in court proceedings, (s.17(2)). This includes in particular matters concerning a commercial transaction. Awards for this purpose include awards made outside Australia.

(b) State Legislation

Domestic commercial arbitrations are now governed by recent State and Territory Acts, which as is pointed out in the leading text (Commercial Arbitration, by Sharkey and Dotter, 1986) seek not only to blend a number of different philosophies, but also to codify the laws and practices of Australian jurisdictions progressively on a uniform basis. The particular Act referred to in this paper as the "uniform Commercial Arbitration Act 1984" is the New South Wales Act. There are some differences in the Acts of other States and the Territories, mainly in the case of Queensland which had moved earlier to update its law in 1973.

Many of the changes made by the uniform Commercial Arbitration Act 1984 to the previous law (which was modelled on the English Arbitration Act 1889) related to the concept of party autonomy and the role of the courts in the arbitral process. The following is a list of some of the matters that needed attention in relation to the latter:

- The jurisdiction of the arbitral tribunal was regarded as a question of law, which could never be determined finally by the arbitral tribunal.
A party had the right at any time to request the arbitral tribunal to state a case on a question of law for the opinion of the court. Thus a party wishing to prolong the arbitration or impede it had a ready made device as it was easy to find such a question. It was considered misconduct on the part of the arbitrator to refuse to state a case when requested to do so.

Further, the court could set aside an award on the basis of an error of law apparent on its face at the suit of a party, even though the original intention of the parties may have been to exclude the courts from the process of dispute settlement to the greatest extent possible.

Under the uniform Commercial Arbitration Act 1984, the "stated case" procedure no longer exists. Nor is there a right of appeal to the Supreme Court on a question of law arising out of an award unless both parties give their consent or the Court grants leave (s.38(2) and (4)). Furthermore, the Court cannot grant leave "unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement" (s.38(5)). Similar considerations apply in relation to whether the Supreme Court will entertain an application to determine a preliminary point of law (s.39).

The English provision corresponding to s.38 was given a very restricted meaning in The Nema (1982) AC 724 and The Antios (1985) AC 191. This approach has been mainly followed in Victoria (see Karen Ice Nominees Pty Ltd v Robert Salger Constructions Pty Ltd, 19 May 1987), although a different approach was taken in New South Wales (Qantas Airways Ltd v Joseland & Gilling (1986) 6 NSWLR 327). However, appeals from arbitrators awards have
nevertheless been reduced. Also if there is any evidence to support a factual finding by the arbitrator, the finding is unreviewable as no question of laws is involved (see on this SRA of NSW v Bauldenteone Hornbrook Pty Ltd, 14 December 1988).

Also s.40 enables the parties, by an "exclusion agreement" to exclude these forms of court supervision. But in the following situations such an agreement is effective only when the agreement is entered into after the commencement of the arbitration proceedings, or the contract relates to a contract which is expressed to be governed by a law other than that of New South Wales (s.41). The situations in question are:

- a question or claim coming within the Admiralty jurisdiction of the Supreme Court
- a dispute arising out of a contract of insurance
- a dispute arising out of a commodity contract of a type specified by regulation.

Similarly, where the arbitration agreement is purely "domestic" in character (defined to mean an agreement which does not refer to arbitration in an overseas country or involve any overseas party), an exclusion agreement must be entered after the commencement of the arbitration proceedings (s.40). This provision was recently considered by Judge Yeldham of the NSW Supreme Court (Corner v C & C News Pty Limited, 28 April 1989) who pointed out that the exclusion clause contained in the arbitration agreement in that case had clearly not been entered into after the commencement of the arbitration. He went on to comment, however, on what is meant by an "exclusion agreement", observing that the use of words "final, conclusive and binding" were not sufficient to constitute such an agreement; more explicit language was
required and the safest course was to refer to the specific wording of s.40(1).

On the whole, the uniform Commercial Arbitration Act 1984 gives greater scope than the previous legislation to the expressed intentions of the parties (i.e. to party autonomy), both in relation to the arbitration agreement and subsequently during the conduct of any proceedings. Most of the provisions are expressed to be subject to a contrary intention expressed by the parties. However there are other exceptions additional to those relating to exclusion clauses:

- Thus, the existing provisions which prevent recourse to arbitration in certain classes of contracts (mainly insurance and credit contracts) have been expressly preserved (s.3(7)).

- Section 55 operates to defeat the effect of any Scott v Avery clause in any agreement (i.e. a clause which makes the delivery of an award a condition precedent to the bringing of any legal proceedings).

- However, s.55 only applies where all the parties to the agreement are domiciled or ordinarily resident in Australia (s.55(2)).

The manner of conducting proceedings is made more flexible. Thus:

- Subject to the Act and the arbitration agreement the arbitrator may conduct proceedings in such manner as he thinks fit (s.14).

- The parties are enjoined to "at all times do all things" which the arbitrator requires to enable a just award and to avoid wilfully doing any act to delay or prevent an award being made (s.37).
If the parties agree, he may determine any question as amiable compositeur or ex aequo et bono (s.22).

(c) Federal Legislation Adopting UNCITRAL Model Law


The Model Law provides an internationally agreed legal framework for the conduct of international arbitrations. The Model Law covers the arbitration agreement, the composition of arbitral tribunals, the conduct of arbitral proceedings, court supervision, the recognition and enforcement of awards, and recourse against arbitral awards. Widening international recognition of the Model Law means that its adoption should assist Australia's efforts to establish itself as a centre for international commercial arbitration.

International arbitrations are defined to cover a number of situations that have an international element, including first of all the case where the parties to the arbitration agreement had, at the time of the agreement, their places of business in different countries. In particular the Model Law addresses the balance between party autonomy and the need or desire for some judicial intervention, assistance or control of the arbitral proceedings.

One such area concerns the arbitral tribunals' competence to rule on its own jurisdiction. The Article in question is Art. 16. Although it deals with a number of important
issues, I will, for present purposes, concentrate on the
issue of court control in relation to the exercise of the
competence expressly conferred upon the arbitral tribunal
by Art. 116 to rule on its own jurisdiction (including
objections to the existence or validity of the arbitration
agreement).

An earlier draft of the Model Law provided that a ruling
by the arbitral tribunal that it has jurisdiction can only
be contested in court when the final award on the merits
is made. After much debate, UNCITRAL finally included a
power of the court to intervene where the arbitral
tribunal first has made a ruling as a preliminary question
that it has jurisdiction. In that case a party may
request the specified court, within 30 days or receiving
notice of the ruling, to decide the matter in a decision
which is expressed by the Article to be not subject to
appeal. (Hence, the use of the term "instant" court
control for this procedure.)

As a result, a balance is drawn between parties using
court proceedings merely as dilatory tactics and parties
seeking court intervention at an early stage in a case
where the arbitral tribunal has arguably made a mistake.

The International Arbitration Act applies the Model Law on
an "opt out" basis (s.21). This means that it will apply
to all international arbitrations (as defined) unless the
parties agree, in writing, to exclude its operation.

However, the Act also contains optional provisions not to
be found in the Model Law. These apply only on an "opt
in" basis. They are designed to clarify and increase the
powers of arbitral tribunals in respect of such matters as

- payment of interest (ss. 25, 26)

- costs (s.27)
consolidation (s. 24).

Where the power to allow consolidation is opted for either in the arbitration agreement or subsequently, the arbitral tribunal would be able, at the request of a party, to consolidate proceedings where, for example, they deal with a common question of fact or law or where the relief claimed arises out of the same transaction.

Court assistance is provided for under the Model Law. The court may grant interim measures of assistance including pre-award attachment of assets at the request of party (Art.9). Assistance is also provided in Art. 27 whereby the arbitral tribunal or a party with the approval of the arbitral tribunal may request court assistance in the taking of evidence. On the other hand Art. 8(1) obliges a court to refer the parties to arbitration if a claim is brought before it on a matter which is the subject of a binding arbitration agreement. This may be compared with the approach in s.55 of the uniform Commercial Arbitration Act 1984 (see also s.53 of that Act) to Scott v Avery clauses.

B. SOME OPTIONS AND ISSUES

(a) Representation of Parties

Section 20(1) of the uniform Commercial Arbitration Act 1984 provides that the leave of the arbitrator is required for a party to be represented by a duly qualified legal practitioner or other representative. That is to say there is no right to representation.

On the other hand, a late addition to the International Arbitration Amendment Act 1988 allows parties to an international arbitration to be represented by any person of their choice, including a legal practitioner not admitted in an Australian jurisdiction (s.28A). This
addition was put forward in particular to allow foreign lawyers to appear in international arbitration proceedings under the legislation. (The Shadow Attorney-General also commended the provisions because "contrary to popular belief lawyers in these matters are much briefer in their submissions" than others - H of R Hansard. 2 May 1989.)

Changes in the uniform Commercial Arbitration Act 1984 in the direction of giving some rights to representation under that legislation are under consideration following on a Working Group Report on the operation of the legislation.

(b) Consolidation

The optional facility under the International Arbitration Act 1984 under which the arbitral tribunal can consolidate arbitrations has been referred to above. The uniform Commercial Arbitration Act 1984 required all the parties to apply to the court for consolidation to take place (s.26(1)).

The Working Group Report has recommended that an arbitration should be able to consolidate on request by one party and where there is more than one arbitration and the parties cannot agree, the court may decide to consolidate and give direction as to the conduct of the consolidated proceedings.

(c) Settlement by Means Other than Arbitration

Section 27 of the uniform Commercial Arbitration Act 1984 enables an arbitrator (unless otherwise agreed to by the parties) to order the parties to take such steps (including attendance at a conference conducted by the arbitrator) as the arbitrator thinks fit to achieve a settlement of a dispute. Attendance at such a conference does not, in itself, disqualify the arbitrator from
moving on to arbitration proceedings if the conference does not produce a settlement (s.27(2)).

The Working Group Report indicated concern that attendance by the arbitrator at an unsuccessful conference may, notwithstanding the sentiments underlying in s.27(2), constitute a difficulty. Different views are possible. I have always been inclined to think that the arbitrator in undertaking a conciliation or mediation role places himself in a difficult position. The Working Group's solution - namely that the power to order settlement discussions be conditioned on the agreement of the parties may solve the problem as far as attendance by the arbitrator himself is concerned. However, it could be argued that, so far as ordering a conference attended by other persons by way of conciliators or mediators, a requirement of prior specific agreement would be going in the wrong direction in view of the increasing support for alternative dispute (ADR) such as conciliation or mediation.

3. EXPERIENCE IN AUSTRALIA

(a) Recent Survey

The Institute of Arbitrators, Australia, recently conducted a survey of 14 senior arbitrators practising on the east coast of Australia. They were asked to complete a questionnaire dealing with arbitrations handled by them over the past three years, totalling 336.

The following is taken from comments by the President of the Institute on the results of the survey:

"1. The average sum using a 90% median in dispute was in excess of $1,000,000."
2. 37 of the arbitrations were settled prior to a preliminary conference.

3. 264 arbitrations were settled after the preliminary conference but prior to the commencement of the formal hearing.

4. 13 were settled during the hearing.

5. Only 22 proceeded to a formal Award by an arbitrator.

6. For the 37 disputes settled prior to a preliminary conference, the arbitrator's fees were approximately $300.00 each dispute.

7. For the 264 disputes settled prior to a formal hearing, the arbitrator's fees including room hire and appointment fee were approximately $1,000.00 each.

These figures speak for themselves. Over 300 of 336 arbitrations were resolved very quickly and very cheaply. Only approximately 7% of the disputes proceeded to a formal Award. In all other cases, the parties themselves resolved their dispute. The survey also indicated that most of the cases settled prior to hearing had not been the subject of extensive preparation by the parties' lawyers so that costs there were kept to a minimum.

One factor which contributed greatly to the excellent results is the uniform Commercial Arbitration Act which have come into force around Australia over the last few years. These have established arbitration as a genuine alternative to Court proceedings and strongly encourage the arbitrator to use innovative means to effect a fast, low cost resolution of disputes. The Institute strongly supported the new legislation and made many submissions to Government during the drafting of the legislation. One interesting development in recent times is the use of
arbitration to settle retail tenancy disputes in Victoria. Under the relevant legislation, most disputes relating to retail tenancies are to be resolved by arbitration. In a period of less than two years of the legislation being operative, over 160 disputes have been heard under the Act by Institute members."

(b) Fast Track Arbitration

There is increasing interest in Australia in the possibilities of expediting arbitrations. In this regard the Institute of Arbitrators Australia published in August, 1988 Expedited Commercial Arbitration Rules with the active encouragement of the Australian Federation of Construction Contractors and the National Building and Construction Council. These rules consist of the existing Institute Rules for the Conduct of Commercial Arbitrations. To these have been added rules specifically related to expedited or "fast track" arbitrations. These additional rules include the following:

"RULE 18

The arbitrator may conduct the arbitration proceedings in such manner as he thinks fit and, in particular, he may in his absolute discretion direct that:

- there be no pleadings;
- there be limited pleadings;
- there be limited discovery;
- there be no opening address by the parties or that opening addresses be limited in time;
- there be no final addresses or that final addresses be limited in time;
- pre-hearing submissions be lodged by the parties accompanied by sworn statements of witnesses and documentation upon which the parties wish to rely with the parties having a right of reply and require that any deponent of a sworn statement attend for cross examination;

- the number of expert witnesses to be called be limited in number;

- the reports of experts to be relied upon in the arbitration be exchanged at least seven days prior to the hearing commencing;

- there be no oral evidence;

- the above steps to be taken within strict time limits."

(c) Australia as a Dispute Resolution Centre

The Australian Centre for International Commercial Arbitration (ACICA) in Melbourne and the Australian Commercial Disputes Centre (ACDC) in Sydney have been established to promote arbitration and other additional means of dispute settlement. The former Centre has been involved in major international arbitrations. The latter has focused on assisted or structured negotiation, independent expert appraisal, conciliation, mediation and mini-trials, and also assisted in setting up fast-track arbitrations. It claims an almost 100% success rate in achieving a result.

C. CER and All That

Commercial arbitration has been identified as one of the specific areas in which Australia and New Zealand are committed to examine the harmonisation of their laws under
the Memorandum of Understanding on the Harmonisation of Business Laws signed on 1 July 1988. Obviously the greatest prospect of achieving harmonisation in this area would be for New Zealand were to more or less adopt the UNCITRAL Model Law, for international arbitrations. The Model Law also constitutes a sound model towards which the law relating to domestic arbitrations in both countries may move. There are some early small signs of that in Australia.
ASPECTS OF ARBITRATION: REGULATION OF PROCEDURE AND ENFORCEMENT OF PRE-HEARING ORDERS

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Aspects of Arbitration:  
Regulation of Procedure and Enforcement of Pre-hearing Orders

Paper prepared by Tómas Kennedy-Grant for a Legal Research Foundation/Law Commission Seminar on Arbitration Law held in Auckland on 20 September 1989

... but man, proud man,  
Drest in a little brief authority,  
Most ignorant of what he's most assur'd,  
His glassy essence, like an angry ape,  
Plays such fantastic tricks before high heaven,  
As make the angels weep.  
W.Shakespeare, Measure for Measure  1.ii.114

or

How to avoid making an ass of yourself!

A Introduction

1 An arbitrator has authority and should not be afraid to use it. The parties have appointed him to adjudicate between them and he has a duty to do so which is discharged only by consensual or curial termination of his authority or by the publication of his award.

2 An arbitrator's authority may be unfettered except as to the obligation to publish a binding award or it may be fettered by detailed agreement between the parties as to timetable, procedure and evidence.

3 This paper is concerned with:

(a) the position regarding regulation of procedure where the arbitrator's authority is not fettered or to the extent that it is not fettered;

(b) the position regarding the enforcement of pre-hearing orders.

B Preliminary Matters

(i) Inception of arbitrator's authority
The first point to be noted is that an arbitrator has no power until the dispute has been referred to him.

A dispute may be referred to an arbitrator in any one of three situations:
- under an arbitration clause in an agreement in which he or she is named as arbitrator by name or office
- under an arbitration clause in an agreement in which the arbitrator is not named
- under an ad hoc submission to him or her as a named arbitrator

In the first and second situations the arbitrator has no authority until the dispute in question has been referred to him in writing in an additional document known as a reference. In the third situation, the submission also operates as a reference.

In the first situation (that of an arbitration clause naming an arbitrator) a dispute may be referred to the arbitrator unilaterally. In the other two situations the reference must be bilateral.

The lack of co-operation where a bilateral reference is required does not leave the party wishing to proceed remediless. That party has available the powers of acting unilaterally or applying to the Court contained in sections 7 and 6 respectively of the Arbitration Act 1908 ("the 1908 Act"),¹ The latter power but not the former is preserved by Article 11 of the Model Law.²

(ii) Fundamental principles underlying exercise of arbitrator's authority

Identification of the fundamental principles on which an arbitrator should act is essential in order to define the limits of his powers in relation to the regulation of procedure and the enforcement of his pre-hearing orders.

The 1908 Act does not define the fundamental limits of an arbitrator's powers in relation to procedure. The Model Law does do so.
The 1908 Act contains two relevant provisions: section 4, which provides that a submission should be deemed to include the provisions specified in the Second Schedule to the Act, so far as they are applicable to the reference under the submission, unless a contrary intention is expressed in the submission. The relevant provisions of the Second Schedule in the present context are paragraphs 6 and 7. The section 8, which empowers the arbitrators or umpire acting under a submission to administer oaths to the parties and witnesses appearing, unless the submission expresses a contrary intention.

The Model Law contains the following relevant provisions:
- Article 18. Equal treatment of parties
- Article 19. Determination of rules of procedure
The other Articles in the Model Law dealing with procedure (Articles 20 and 22-26) are similar to the provisions of the 1908 Act in that they are specific provisions rather than statements of principle.

The question arises of how the principles enunciated in Articles 18 & 19 of the Model Law compare with the common law rules which apply to arbitrations under the 1908 Act.

Under the Model Law the parties or, in the absence of agreement between the parties, the arbitrator are empowered to fix their own procedure subject to two requirements ...

(a) "the parties shall be treated with equality";
and
(b) "each party shall be given a full opportunity of presenting his case".

The same is true under the common law. See, for example, the following passages in Walton and Vitoria: *Russell on Arbitration* (20th ed, 1982):

... an arbitral tribunal (like any other tribunal performing judicial functions) has the duty of
acting in accordance with the essential rules of "natural justice" 7

and:
Not only will express and clear agreement between the parties justify any departure from ordinary rules of procedure and the like, but an express agreement between the parties will in general bind the arbitrator to act as the parties have agreed.

The principles just stated are subject to this exception, that it is possible for an agreement between the parties as to the conduct of an arbitration to be "so contrary to fundamental principles that it is treated as contrary to public policy" and so is unenforceable. 8

and:
The first principle is that the arbitrator must act fairly to both parties, and in the proceedings throughout the reference he must not favour one party more than the other, or do anything for one party which he does not do or offer to do for the other. He must observe in this the ordinary well-understood rules for the administration of justice. 9

and:
An arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents. 10

C Regulation of Procedure

(i) General Approach

16 It is my view that an arbitrator, while being sensible and not seeking to impose on the parties to the arbitration a regime neither of them wants, should take hold of the matter and, for example, on the receipt of the reference should:

(a) diarise the agreed timetable (if any) and draw to the attention of the parties any omissions in the agreed timetable, for example a failure to
provide for the filing of a reply where there is provision for points of claim and points of defence to be filed;

(b) in the absence of an agreed timetable, call a preliminary conference to fix a timetable for interlocutory matters and for the hearing;

(c) on completion of the interlocutories call a preliminary conference to fix a date for a hearing if that has not already been fixed; and should subsequently draw to the parties' attention any failure to comply with the timetable on the part of either party.

17 I am of this view for the following reasons:

(a) the parties have agreed to submit disputes between them to arbitration and have done so;

(b) on the authority of the Bremer Vulkan case\(^{11}\) the parties to an arbitration have a mutual obligation to progress the arbitration;

(c) the arbitrator (where there is a single arbitrator) can be said to be the agent of the parties for this purpose;

(d) the same can be said of an umpire (or a third arbitrator under the Model Law\(^{12}\));

(e) although the position is not as simple in respect of arbitrators appointed by the individual parties to an arbitration rather than jointly, they can be seen as acting as the individual party's agent in the discharge of the mutual obligation imposed on those parties;

(f) such an active role for an arbitrator is consistent with the move towards an active role for the Courts in litigation;

(g) unless, therefore, neither side, having referred the matter to arbitration, wishes to proceed with the arbitration, the arbitrator has, and
should exercise, the power to move the matter along.

(ii) **Type of Procedure**

18 The full potential of arbitration as a dispute resolution procedure has not been achieved in New Zealand because the lawyers involved in arbitration have tended to conduct arbitrations like litigation. Arbitration is a flexible process and should be kept so. The litigation mode is appropriate in some cases but by no means in all.

19 What is appropriate in any case should be determined by reference to:

(a) the fundamental principles already discussed;

(b) the requirements of the particular case.

20 From the point of view of procedure, there are, broadly speaking, three types of arbitration:

(a) those in which the arbitrator receives neither evidence nor submissions from either party but decides the matter purely on the basis of inspection and the exercise of his own professional or otherwise qualified opinion (eg quality disputes);

(b) those in which the arbitrator decides the matter on the basis of documents supplied by the parties with or without written submissions;

(c) those in which the arbitrator decides the matter on evidence and/or oral submissions.

21 Even in the last type of arbitration, which is that which most nearly approximates to litigation, it is not necessary that the full panoply of Court procedure be adopted.

(iii) **Matters for Regulation**

22 The following matters may require regulation in the course of an arbitration:
(a) initial statements of case;

(b) interlocutories such as discovery and inspection of documents, interrogatories and particulars;

(c) the attendance of witnesses and the obtaining of evidence *aliunde*;

(d) the form of presentation of evidence for hearing and the procedure at hearing.

The above list comprises matters which are within the competence of an arbitrator under the 1908 Act and/or will be so under the Model Law if adopted in New Zealand. Matters such as security for costs, securing of the amount in dispute, interim injunctions and the appointment of receivers which are peculiarly within the competence of the High Court are not dealt with in this paper; but it should be noted that Article 9 of the Model Law, which provides:

> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

may not be wide enough to cover all the present powers of the Court. If it does not, then, as a result of Article 5 of the Model Law, which provides:

> In matters governed by this Law, no court shall intervene except where so provided in this Law

some of the Court's present powers (which duplicate as well as supplement those of the arbitrator) may no longer be exercisable.

2.3 Initial statements of case.

In the third type of arbitration referred to in paragraph 20, the practice is generally to adopt forms of pleading similar to those used in Court. Even when drawn properly (which is very often not the case), pleadings of this kind do not amount to a full statement of a party's case but only to a statement of the facts necessary to be proved in order to establish the party's case or defence as the case may be.
It is not clear from the wording of Article 23 (1) of the Model Law14:

... the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars ...

whether the initial statements of case required under the Model Law (in the absence of agreement to the contrary - Article 23(1)) are any fuller than the customary pleadings under the 1908 Act. However, Article 23(1) of the Model Law provides the flexibility required in this and other types of arbitration by allowing the parties to agree otherwise "as to the required elements of such statements". It will therefore remain competent for the parties to submit full statements of their respective cases rather than pleadings in, for example, the second type of arbitration referred to in paragraph 20.

24 Interlocutories.
Interlocutories fall into two categories:

(a) those directed to the discovery of evidence;

(b) those directed to the particularisation of the parties' cases.

Discovery of evidence takes two forms:

(a) discovery of documents (discovery usually so called);

(b) discovery of oral evidence (obtained by means of interrogatories or questions required to be answered on oath).

An arbitrator may make orders for both kinds of discovery. The jurisdictional basis for this power under the 1908 Act is paragraph 6 of the Second Schedule to the Act which, in terms of section 4 of the Act, is deemed to be included in a submission unless a contrary intention is expressed therein.15 The paragraph reads, so far as relevant:
The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, .... do all such other things as during the proceedings on the reference the arbitrators or umpire may require.

The related power to order inspection of documents discovered derives from the same source.16

The position under the Model Law is uncertain. Whereas the 1908 Act provides 17 that the procedural provisions contained in the Second Schedule to the Act shall apply unless excluded, Article 19(2) of the Model Law18 (which might be seen as giving the arbitrator the same wide power) operates only to the extent that the parties have failed to "agree on the procedure to be followed... in conducting the proceedings." If, therefore, the parties agree on a procedure which does not provide for discovery, it may be that there is no room for an argument that the arbitrator has the power to order discovery of either kind.

The purpose of particulars being to state the matters to be proved in order to establish the claim or defence, as the case may be, and to define the issues between the parties, there is obviously scope on occasion for further and better particulars of a pleading. An arbitrator has the power to order such particulars in arbitrations under the 1908 Act not because of any provision of the Act itself but because of an implied power to do whatever is necessary to enable him to adjudicate on the issues between the parties.19

It is suggested that the position will be the same under the Model Law if adopted. This suggestion is made in reliance on the definition of "arbitration agreement" in Article 7(1):

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise.
between them in respect of a defined legal relationship, whether contractual or not. ...

(underlining added). The arbitrator must clearly have the power to ensure that the disputes submitted to him are clearly defined.

These powers may, of course, be expressly conferred by agreement of the parties.

25 Attendance of witnesses and obtaining of evidence

An arbitrator has no power over third parties. If, therefore, a party wishes to call a witness who declines to attend, the assistance of the Court must be invoked. There is provision for this under the 1908 Act. There are also occasions on which it is necessary to obtain the examination on oath of a witness before an officer of the Court or any other person or the issue of a commission or request for the examination of a witness out of the jurisdiction. Provision is made for this in the Arbitration Amendment Act 1938 ("the 1938 Act")

Article 27 of the Model Law is apt to cover the second of these requirements but may not be apt to cover the first. It provides:

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

The present power of the Court to assist by procuring the attendance or production of a witness is derived from the provisions of the 1908 Act. If provision is not made in the Act adopting the Model Law for the preservation of this power, there will be a serious gap in the new law.

26 Form of presentation of evidence and procedure at hearing

The 1908 Act does not explicitly require oral presentation of evidence. The provisions of the Second Schedule to the Act, which are the only provisions apart from section 8 of the Act which
refer to the manner in which evidence shall be given, are:

(a) subject, in terms of section 4 of the Act, to a contrary intention in the submission; and

(b) expressed, at least so far as paragraph 7 of the Second Schedule is concerned, in permissive terms.

The 1908 Act is silent as to the manner of presentation of oral evidence where that method of presentation is adopted. It has been common for many years in the construction field, at least, for the evidence in chief of witnesses to be prepared in writing, read on oath and subjected to cross examination in the normal manner rather than being presented entirely by viva voce examination.

The position is likely to be the same under the Model Law if adopted. Article 24(1) provides:

Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

D Enforcement of Pre-hearing Orders

27 At common law an arbitrator has power to enforce his pre-hearing orders.

28 This power may be summarised as follows:

(a) Procedural Orders

(i) to dismiss a claim where there has been default in filing a statement of case;
(ii) to debar a defendant from defending a claim where there has been default in filing a statement of defence;

(iii) to debar a party from relying at the hearing on any part of his case in respect of which he has committed a procedural default, for example failing to give particulars or discovery;

(iv) to dispense with all or the remaining pre-hearing stages and fix a prompt date for the hearing;

(b) Orders relating to the hearing:

(i) to dismiss the claim of a claimant who fails to appear at the hearing;

(ii) to proceed in the absence of a defendant who fails to appear at the hearing. 

It is necessary, in each case, that the order be made after notice to the defaulting party.

29 The powers of an arbitrator under the Model Law are more limited. Article 25 provides:

 Unless otherwise agreed by the parties, if, without showing sufficient cause,
 (a) the claimant fails to communicate his statement of claim in accordance with Article 23(1), the arbitral tribunal shall terminate the proceedings;
 (b) the respondent fails to communicate his statement of defence in accordance with Article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimants allegations;
 (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.
The power under (a) corresponds to the present power to dismiss the claim where there is default in filing a statement of claim (see para 28(a)(i) above) but does not go as far. Termination of the proceedings could occur without the making of an award.

The power under (b) above has no equivalent in the existing law but is unexceptional.

The power under (c) above corresponds broadly to the power to proceed ex parte in default of compliance with an order regarding a hearing (see para 28(b)(i) & (ii) above) but does differ in requiring the tribunal to "make the award on the evidence before it" both where the claimant is in default and where the defendant is in default.

The conclusion must be that the Model Law represents a serious weakening of the present powers of an arbitrator.
References

1 Law Commission Preliminary Paper No 7: Arbitration A discussion paper, (NZLC PP7) pp 80 and 79 respectively.
2 NZLC PP7 p155
3 NZLC PP7 p82
4 NZLC PP7 p157
5 Ibid.
6 NZLC PP7 pp157-158
8 Walton & Vitoria: op cit, p 209
9 Walton & Vitoria: op cit, pp 213-214
10 Walton & Vitoria: op cit, p 217
11 [1981] 2 All ER 289
12 Article 11(3) - see NZLC PP7, p155
13 For a treatment of these matters see the author's paper "Attachments and other Interim Court Remedies in support of Arbitration - The New Zealand Position" published in the IBA volume "Interim Court Remedies in Support of Arbitration A Country by Country Analysis" (1987).
14 NZLC PP7 p157
16 Walton & Vitoria, op cit, p225
17 s4
18 NZLC PP7 p157
19 Mustill & Boyd, op cit, p319; Walton & Vitoria, op cit, p255
20 Sections 9, 16 & 19 - see NZLC PP7 pp80 & 81
21 Section 10 & First Schedule para (4) - see NZLC PP7 pp89 & 91
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ASPECTS OF ARBITRATION:
JOINER, CONSOLIDATION AND REMEDIES

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Introduction

This note concerns two matters which have not been canvassed in the Law Commission's preliminary paper No 7, Arbitration. These are matters upon which, it is respectfully suggested, some view needs to be evolved prior to a final scheme for a reviewed Arbitration Act being brought down by the Commission.

The first concerns the ability - or the lack of it - of an arbitrator or the parties to join into the arbitration other parties who were not signatories to the contract containing the submission.

The second concerns the possibility of consolidation of arbitrations.

I will also make some comments on a third matter - the kinds of remedies an arbitrator may award - which has been discussed by the Law Commission.

The note is not intended as a review of the existing law. This is clearly set out in standard texts such as Mustill and Boyd, Commercial Arbitration (2nd ed 1989) and Russell on Arbitration (20th ed 1982). The note is intended rather as a basis for discussion and where solutions are put
forward they are suggested with due diffidence. The views of seminar participants are encouraged.

The nature of an arbitration

The foregoing issues can only be reviewed against an appreciation of two essential conceptual features of arbitration law as it has evolved in the common law jurisdictions. First, an arbitration is consensual in nature. Second, an arbitration is subject to judicial control.

As to the first matter, under our law an arbitration can only arise when the parties to a contract have included in it a submission to arbitration. There must be an agreement to refer some or all matters which may become in dispute between the contracting parties to an arbitrator rather than to the regular courts of law. Where there is a submission the parties will - if necessary with the assistance of a court - be held to the submission unless there are relatively exceptional circumstances which make it more appropriate that the matter in dispute be dealt with in a court of law.

And, once there is a submission courts will, in the most general terms, not interfere unless an arbitrator is acting outside the scope of the authority conferred upon him or fails to have proper regard to some applicable principle of law. That is, arbitrators are in a position closely analogous to that of administrative tribunals in that courts exercise a "lawfulness principle" to confine the arbitrator to the four corners of the document creating his "jurisdiction" and require him to act lawfully.
Joinder of parties:

As Mustill frankly acknowledges (143) "one of the weakest features of [present] arbitral procedure is its inability to deal with third party situations: i.e. those in which a party against whom a claim is made seeks to recover from someone else an indemnity in respect of his liability. In such a situation the defendant wishes above all to avoid fighting the same claim twice. He does not want to incur the cost of two actions, nor to run the risk that the two different tribunals will reach different conclusions on the facts or the law - for if they do he may find himself with a liability to the claimant which he cannot pass on to the third party. He also wishes to avoid the inconvenience of having to put forward diametrically opposed contentions in the two hearings. For if (for example) the claimant maintains that goods sold to him by the defendant were defective; the defendant will answer the claim by saying that they were sound; whereas if the defendant loses against the claimant, he will have to advance the opposite view in his own claim upon the third party. This is bound to place his witnesses in difficulty. Moreover, he will not wish to wait until he has been held liable to the claimant before he prosecutes his claim against the third party." Mustill goes on to observe that "in few jurisdictions has [this] problem been faced, and in fewer still (perhaps in none) has a satisfactory solution been achieved." (143, fn 10).

The position in a court action is of course quite different. It is possible to join further plaintiffs or defendants and in particular to issue third party proceedings to see that all necessary parties and all proper issues are before the court for determination at the one time.
In an arbitration, as the law stands, this is not possible. One or more parties may object that they agreed to arbitrate only with the other party to the contract. And even if all parties to a submission were agreed on the desirability of bringing in a third party, that third party can object that he was not a party to that contract and that its provisions are not of the slightest interest to him.

It is possible that there may be an arbitration clause in the contract between the defendant and the potential third party and the parties might then agree to a tripartite arbitration before the same arbitrator. I doubt if that fact pattern would occur very often.

In reality, in a situation where there is a potential third party the "defendant", as Mustill properly notes, is in a difficult situation. If the claimant institutes proceedings in the High Court the defendant can institute third party proceedings. But the defendant - or potential defendant - cannot take the initiative. The claimant in these three cornered disputes is in a very strong tactical position. If the claimant insists on arbitration the defendant has no way of joining the third party into the arbitration. Perhaps the best the defendant could hope for would be to provoke litigation in some form and to persuade a court under its statutory discretion (see Section 5 of the 1908 Act) to stay the arbitration. The third party might then be joined in the litigation. And if the defendant were to threaten such a course it is possible that a potential arbitral claimant might be persuaded to drop the notion of arbitration and to proceed via the courts. But in reality the use of the stay power seems both an indirect and highly problematic control vehicle for this kind of problem.
Another possible solution, where there are two parties who are prepared to arbitrate and a recalcitrant third party, would be for the two parties who wish to arbitrate to commence proceedings, join the third party, and then invite a judge to exercise the powers under s 14 or s 15 of the Arbitration Act 1908 to refer the dispute to an arbitrator with the third party now safely aboard as a party. But this procedural route suffers from the deficiencies that ss 14 and 15 of the Arbitration Act are constrained in some respects. A Judge might not be prepared to so exercise that power. And this would be a most cumbersome and expensive way of reaching the desired result.

If the problem of joinder is thought to be sufficiently significant to warrant a statutory solution, one possibility would be to give the High Court an explicit statutory discretion whereunder the Court, on the application of any party or the arbitrator, could order the joinder of the third party into the arbitration. This notwithstanding that the third party was not a party to the original submission. From the point of view of the compelled third party the objections in principle to such a reform would presumably be that the third party is being compelled to become part of a contractual "deal" to which he, she or it, never belonged; that the terms of the submission were wider or narrower than he, she or it would have been prepared to agreed to; and that the third party is being forced into an arbitration rather than allowed a day in court, and hence is in a very direct way being denied due process of law. Moreover, the costs of an arbitration fall substantially on the parties rather than being supported (at least to some extent) by the State. Thus this recalcitrant third party to the arbitration could be heard to say, that he, she or it had got the
worst of all possible worlds. The reply to these kinds of concerns would presumably have to be of a fairly robust variety: that a dispute has in fact broken out; that the third party in any event will be engaged in litigation and that the preferable means of resolving the particular dispute is, in the view of the Court, in all the circumstances, arbitration. And it is quite possible that the mere existence of such a power and the knowledge that a court could exercise it would force a third party to pay far more attention to the possibility of resolving the dispute by arbitration than is presently the case. The role of the court under such a discretion would be like that of a half back in a football game - that is, to deliver the ball to the most appropriate quarter.

Finally, a more radical proposition again would be to empower a Judge to refer an entire dispute to arbitration (on such terms as may be ordered by the Courts) notwithstanding the objection of all or any parties. Conceptually, a Court then becomes (at least in the first instance) a "revolving door", and has jurisdiction to direct where a dispute will be resolved. This proposal would go further than the present New Zealand law (which is discussed at pp 55-58 of Issues Paper No 7). If this quite radical approach were adopted, the problem of joinder would disappear.

Consolidation of arbitrations

A not dissimilar problem can arise (particularly in "string" contracts containing arbitration clauses) with respect to consolidation of arbitrations. In practice, in such situations (which so far as I am aware do not arise all that frequently in New Zealand, although they are not uncommon in the United Kingdom) the parties can agree to a single
arbitrator for all the arbitrations. However, once again one or more parties may be bloody-minded and there does not appear to be any power in the present New Zealand statute to order consolidation. In the civil courts the power to consolidate actions has existed for many years now, and it may be appropriate that there should be a general discretionary power in a court to consolidate arbitrations where necessary.

Arbitrators' remedies

Once an award has been given it may (under s 13 of the 1908 Act) "by leave of the Court, be enforced in the same manner as a judgment or order to the same effect." This is commonly known as an action on the award.

The specific remedies which may be granted by an arbitrator are discussed at pp 44-46 of Preliminary Paper No 7 issued by the Law Commission. These include (now), the power to make money awards, to order specific performance and make orders under the various contractual adjustment statutes, to make interim awards, and to award interest and costs.

One remedy which is not specifically mentioned is that of rectification of the contract. There is New Zealand authority, which has been followed in the English Court of Appeal, to the effect that under a submission which is sufficiently widely drawn, an arbitrator can exercise this remedy. A claim to rectification does not impeach the contract but merely seeks to bring it in to conformity with the true agreement between the parties. Given this recognition by the courts, should a new statute imply such a power unless it is specifically excluded by the parties?
A second issue is more fundamental. At the moment the assistance of the court is required with respect to the equity type remedies. Ultimately, for instance, specific performance is enforced by committal or sequestration if the decree (award) is not complied with. The question has not been squarely asked in the reviews of arbitration acts to date in the Commonwealth whether an arbitrator should be given those ultimate powers. It is after all inconvenient and certainly expensive for the parties, and to the State, for a party to have to go to the High Court to enforce say an order of specific performance. And increasingly many awards are given by former judicial officers. It would be possible by statute (but presumably not by agreement?) to confer contempt and sequestration powers upon an arbitrator or umpire. However, it seems inconceivable that such a power should be conferred without a right of appeal to the regular courts of law. I am not aware that there have been sufficient (if any instances) of incidents in the field to warrant the statutory conferment of powers of this kind. And it should be recalled in this connection that arbitrators have, through the costs remedy, if appropriately applied, a relatively potent control device. Again the views of seminar participants would be useful.