THE AUSTRALIAN PERSPECTIVE

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> "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 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 automony 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 Bauldentone 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 recently passed International Arbitration Amendment Act 1988 gives the force of law to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985. It does this by way of amendment to the Arbitration (Foreign Awards and Agreements Act 1974 referred to above, and in doing so renames that Act the International Arbitration Act.

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.