INTERNATIONAL COMMERCIAL ARBITRATION

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LATEST DEVELOPMENTS IN AUSTRALIA AND NEW ZEALAND

(Notes for Panel Discussion)

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1. A BRIEF SUMMARY OF THE POSITION IN AUSTRALIA

1.1 International arbitration in Australia is governed by the International Arbitration Act 1974. That Act adopts the Model Law as having the force of law in Australia (section 16 of the Act).

1.2 There are three schedules to the legislation being the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, the UNCITRAL Model Law and the ICSID Convention (on the Settlement of Investment Disputes between States and Nationals of other States).

1.3 Section 7 of the Act provides for enforcement of foreign arbitration agreements and for the stay of court proceedings in Australia if the proceedings involve the determination of a matter capable of settlement by arbitration and where there is an arbitration agreement.

1.4 Section 8 of the Act deals with the recognition of foreign awards and the enforcement of them.

1.5 Because Australia is a federation of States, section 18 makes it clear that for the purposes of Article 6 of the Model Law, the Supreme Court of the relevant State shall have jurisdiction to perform the functions referred to in that article.

1.6 By section 19 of the Act, Articles 34 and 36 of the Model Law are expanded upon to make it clear "for the avoidance of any doubt" that an award is in conflict with the public policy of Australia if the making of the award was induced or affected by fraud or corruption; or a breach of

the rules of natural justice occurred in connection with the making of the award.

1.7 By section 21 of the Act, parties to an international arbitration agreement are free to contract out of the provisions of the Model Law to the extent they choose.

1.8 Section 24 of the Act provides for consolidation of arbitral proceedings (by order of the Arbitral Tribunal) where there is a common question of law or fact arising or the rights to relief claimed in all of the proceedings are in respect of, or arise out of, the same transaction or series of transactions, or through some other reason it is desirable that an order be made. The order can require the proceedings to be consolidated on terms or that the proceedings be heard at the same time or in a sequence specified in the order.

1.9 Section 25 of the Act makes it clear that there is power to award interest, which can be at such reasonable rate as the Tribunal determines.

1.10 By section 26 of the Act, the Tribunal may direct the rate of interest payable from the day of the making of the award.

1.11 By section 27 of the Act, costs are in the discretion of the Tribunal.

1.12 By section 28 of the Act, an arbitrator is not liable for negligence in respect of anything done, or omitted to be done, in the capacity of arbitrator.

1.13 In **American Diagnostica Inc. v Gradipore Limited** (1998) 44 NSWLR 312, a case in the Commercial Division of the Supreme Court of New South Wales, the parties to an international commercial

arbitration chose the law of New South Wales as being the law applicable to the contract and the UNICTRAL Arbitration Rules (not the Model Law) were to govern the arbitration. It was held that the Commercial Arbitration Act 1984 (NSW), not the International Arbitration Act 1974, applied to that international arbitration. One of the compulsory local rules (the right to appeal with leave), which could not be put aside by agreement, continued to apply. Although the parties had agreed on the UNCITRAL Rules as governing the procedure, they were read in a manner consistent with the domestic Commercial Arbitration Act 1984. The Court held it had jurisdiction to grant leave to appeal, but refused the application.

1.14 The decision of the Supreme Court of Victoria in **Abigroup Contractors (Pty) Limited v Transfield (Pty) Limited & Obayashi Corporation & Others** [1998] VSC 103, 16 October 1998, is interesting for a number of reasons. First, one of the parties to the contract was a joint venture and one of the joint venturers was an overseas company. It was taken for granted by the parties and the Court that this was sufficient for the International Arbitration Act 1974 to apply. Second, the contract itself provided that the proper law of the sub-contract and of the dispute resolution procedures is the law of Victoria, and the place of the arbitration must in Melbourne, Victoria; that costs were in the discretion of the arbitrator but the arbitrator did not have power to tax any award of costs made under section 34 of the Commercial Arbitration Act of Victoria; and that the Commercial Arbitration Act of Victoria applied to the arbitration except to the extent it was inconsistent with the other provisions of the clause. It was argued that by implication the parties had expressed a clear intention that the Commercial Arbitration Act of Victoria should apply instead of the International Arbitration Act 1974 (with the consequence that the Court had a discretion whether or not to grant a stay of court proceedings, there being no discretion under the

International Arbitration Act 1974.) It was held that by adopting the State Act to apply to the arbitration that did not also exclude the application of the International Arbitration Act 1974 and therefore the Court was obliged to grant a stay of proceedings.

The Court went on to say that if it did have a discretion under the State legislation, then it would not have granted a stay. Having held that it was obliged unto the International Arbitration Act to grant a stay, the Court went on to urge the parties to agree that all issues (because there were many issues involving a number of parties and not all issues were within the scope of the arbitration clause) should be dealt with in court or in arbitration, by consent.

Fourth, anyone familiar with construction disputes will know that one of the recurring difficulties is whether or not a claim for quantum meruit is within the scope of an arbitration clause. In this particular case, a dispute was defined as “a dispute difference claim or any unresolved issue arising between the parties relating to the interpretation of the sub-contract or any matter arising under or relating to the sub-contract or the sub-contract works”. The Court said that it was not willing to conclude that the quantum meruit claims were covered by the scope of that arbitration agreement. The matter was left open for further argument, if necessary.

1.15 The importance of selecting an appropriate seat of an international arbitration was further underlined in the decision of **The Independent State of Papua New Guinea v Sandline International Inc.** Queensland Supreme Court, March 1999, Mr Justice Ambrose. This interesting case involved a contract by the Government of Papua New Guinea for the hiring of mercenaries. The contract provided that English law should apply but for no reason other than geographical proximity and

convenience, the parties agreed that the arbitration would take place in Queensland, Australia. Having selected Queensland as the seat of the arbitration, the law of Queensland therefore governed matters of procedure and enforcement. The award was challenged on the basis of error of law. However, the Supreme Court held that since the law of the contract, English law, was foreign law and therefore had been proved in the arbitration as a question of fact, there was no jurisdiction to entertain an appeal on a question of law! An appeal to the Queensland Court of Appeal was never heard because the parties reached a settlement. This is a pity because the outcome must have been finely balanced and could easily have gone the other away on appeal.

1.16 The importance of obtaining signed terms of reference prior to an international arbitration became clear in the decision of **Commonwealth Development Corp. v Austin John Montague,** Supreme Court of Queensland, June 27, 1999. That involved an international arbitration under the ICC Rules. The dispute involved a franchising agreement and Mr Montague was not a party to the master contract that contained the original arbitration clause. He did, however, sign the terms of reference. The ICC arbitrator (a New Zealand barrister) determined that Mr Montague was not a party to the contract containing the arbitration clause. The Tribunal therefore had no jurisdiction to determine the claims which he made in the arbitration in which the Tribunal's jurisdiction was founded solely on a particular clause of the master franchise agreement. However, the arbitrator also decided that the costs of the arbitration should significantly be borne by Mr Montague. For Mr Montague, it was argued that since he was not a party to the original arbitration agreement an award of costs could not be enforced against him under the New York Convention or any other law. This argument failed because the terms of reference were clearly an agreement to arbitrate in terms of Article 2(1) of the New York Convention. It was

said, "The fact that having regard to the determination of the preliminary jurisdictional point there was no determination of the arbitral proceedings on the merits can have no relevance to the ability of [CDC] pursuant to the International Arbitration Act 1974 to enforce the interim award made by the arbitrator with respect to the costs of the determination of the preliminary point to which [Mr Montague] agreed in writing, signed by his Counsel, on 13 September 1996".

The Court found that the terms of reference document was "one under which the parties undertook to submit a difference which might arise between them in respect of a defined legal relationship (namely, participants in an arbitration) to arbitration. The terms of reference, therefore, fell within the definition of "arbitration agreement" in the International Arbitration Act 1974.

1.17 A difficult and recurring issue is the question of interim measures, this being an area where many international arbitrators stumble. An important case which illustrates this is the decision of the Supreme Court of Queensland in **Resort Condominiums International Inc. v Bolwell** (1993) SC (Q1d) 116 ALR 655. In that case, an arbitrator in Indiana, USA, made an "interim arbitration order and award" in draconian terms including injunctions relating to financial records, compliance with a licence agreement, and establishing a bank account requiring both parties' signatures before withdrawal. These orders were interlocutory and procedural in nature and did not in any way purport to finally resolve the dispute or legal rights between the parties. In a nutshell, the Australian Court, which was asked to enforce the award in Australia, held that the reference to an "arbitral award" in the New York Convention did not include an interlocutory order but only an award which finally determined the rights of the parties; also that many of the orders made by the arbitrator were contrary to the public policy of

Queensland, because, for example, they would not have been made in Queensland without undertakings as to damages and appropriate security; and also because of possible double vexation and practical difficulties in interpretation and enforcement.

1.18 In **HI-FERT (Pty) Limited v Kiukiang Maritime Carriers Inc. & Another** (1998) 159 ALR 142, a decision of the Federal Court of Australia, the Court was dealing with an application for stay under section 7 of the International Arbitration Act 1974. It held that certain shipping claims were clearly within the scope of the arbitration clause ("any dispute arising from this charter ….") should be stayed and dealt with by arbitration in London as provided for in the Bill of Lading. These included claims for breach of the charter contract and for negligence and breach of duty as a carrier. However, the claims for misleading or deceptive conduct under the Trade Practices Act 1974, negligent misrepresentation and breach of collateral warranties did not fall within the scope of the arbitration clause and there was no entitlement as of right to a stay. Those disputes had a significant connection with Australia and were to be dealt with in the Federal Court.

1.19 Hot of the press is a decision of the New South Wales Court of Appeal in **Angela Raguz v Rebecca Sullivan & Others** [2000] NSWCA 240. This is an important and interesting case involving an arbitration between competing judo representatives. They entered into an arbitration agreement providing for arbitration by the Court of Arbitration for Sport, sitting as an appellant arbitral tribunal hearing an appeal from the Judo Federation of Australia's Appeal Tribunal. The dispute resolution clause also included an exclusion agreement purporting to prohibit any appeal to a court of law. Under the New South Wales Commercial Arbitration Act 1984, section 40, an exclusion agreement in a domestic arbitration is binding only if it is entered into

after the agreement to arbitrate. That had not happened in this case so one question was whether or not the arbitration was a domestic arbitration or an international one. The agreement provided for the seat of the arbitration to be in Switzerland but the arbitral panel had the power to hear the case in another place. Switzerland being the "seat" of the arbitration, it was held that the arbitration was an international one even though the law of the merits, being the substantive law of the dispute, was the law of New South Wales, and the hearing took place in Sydney, New South Wales. The case contains an interesting and helpful discussion on exclusion agreements, the importance of the difference between the seat of an arbitration and the place where the hearing might take place, if it is different. Even though the parties to the arbitration were Australians, and the hearing took place in New South Wales, it was nevertheless held that it was an international arbitration because the official seat was in Switzerland. Therefore, the arbitration was not a domestic one and the exclusion agreement, having been entered into prior to the agreement to arbitrate, was binding.

1.20 Some further helpful references include:

- **Legal Issues Concerning International Arbitrations** by Professor Michael Pryles of Melbourne, 1990, Volume 64, The Australian Law Journal from page 470

- **An Introduction to ICC Arbitration in Australia : Some Current Issues in International Arbitration** by Michael Polkinghorne and Jean-Claude Najar (1991) 3 Bond Law Review from page 43

- **The Standard of Conduct Expected of Arbitrators involved in International Commercial Arbitration in Australia** by Judy Gardiner of Monash University, Australian Dispute Resolution Journal, February 1996, from page 61

- **Internationalism in Australian Arbitration** by Garry Downes AM QC, Commercial Law Association, December 1997, from page 20

- **The Current Status of International Arbitration Agreements in Australia** by Richard Garnett of Monash University (1999) 15 Journal of Contract Law, from page 29

- **Contemporary Developments in the Law of International Arbitration in Australia and New Zealand** by Peter King, Barrister, Sydney, (1999), 18 Australian Bar Review, from page 254

- **The Australian International Arbitration Act, The Fiction of Severability and Claims for Restitution** by Adrian Baron, Solicitor, Brisbane, 2000 Arbitration International, Volume 16, No. 2, from page 159

2. A BRIEF SUMMARY OF THE NEW ZEALAND POSITION

2.1 In 1996 the New Zealand Parliament enacted the Arbitration Act 1996 which came into force on 1 July 1997.

2.2 By that legislation, New Zealand adopted the UNCITRAL Model Law for both international and domestic arbitrations, with some minor modifications.

2.3 The (slightly revised) Model Law is the First Schedule to the Act and it applies to all arbitrations. In many situations, but not all, the Model Law permits the parties to “agree otherwise”.

2.4 There is an important Second Schedule which has provisions dealing with default appointment of arbitrators, consolidation of arbitral proceedings, additional powers relating to the conduct of arbitral proceedings, determination of a preliminary point of law by the Court, appeals on questions of law (with leave), costs and expenses of an arbitration, and extensions of time for commencing arbitration proceedings. If the arbitration is an international one, * then the Second Schedule does not apply unless the parties opt into it. If the arbitration is a domestic one, then the provisions of the Second Schedule apply unless the parties opt out of them or some of them.

* Places of business in different States, or the place of arbitration is situated outside of the State in which a party has a place of business, or if a substantial part of the obligations are to be performed outside the State in which the party has its place of business, or by agreement.

2.5 Even if the place of an arbitration (any arbitration) is outside of New Zealand then certain Articles in the First Schedule apply, namely:

- Article 8, Stay of New Zealand Court Proceedings.

- Article 9, Interim Measures in New Zealand by the Court (including orders for the preservation or interim custody of goods, securing the amount in dispute, appointing a receiver or other orders to ensure that any award will not be rendered ineffectual, and the granting of an interim injunction.

- Article 35, recognition and enforcement.

- Article 36, grounds for refusing recognition or enforcement.

2.6 Under the Act itself (Section 12) an arbitral tribunal may, "…award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court…"

In practice, this means that an arbitral tribunal in New Zealand may (assuming the scope of the arbitration clause is wide enough) make equitable orders such as for rectification and specific performance, and orders for damages for breach of the trade practices and fair trading legislation.

2.7 Section 14 provides that, unless otherwise agreed by the parties, an arbitration agreement "…is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings."

2.8 There is limited immunity under Section 13 which provides that an arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator.

2.9 New Zealand has a sound and workable arbitration regime for both international and domestic arbitrations. New Zealand has, for some time, ratified the Geneva Protocol on Arbitration Clauses (1923,) the Geneva Convention on the Execution of Foreign Arbitral Awards (1927) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). It has also ratified the ICSID Convention.

2.10 The New Zealand Court of Appeal has endorsed the enforceability and finality of international arbitrations. The former President of the Court (now Lord Cooke of Thorndon) said in **CBI NZ Ltd v Badger Chiyoda** [1989] 2 NZLR 669 at 667:

> "The provision of a system of justice is a basic function of any civilised State, but there is nothing uncivilised in accepting that an award duly obtained in New Zealand under an ICC or similar arbitral system should be enforceable here without being exposed to review by the New Zealand Courts on questions of law."

Although this comment was made during the currency of the Arbitration Act 1908, (which permitted curial review for "misconduct" interpreted to include an error of law on the face of the award,) it would apply all the more under the 1996 Act.

2.11 A summary of recent cases follows. (A more detailed review of these authorities is to be found in New Zealand Law Review 2000, Part One, a review of arbitration and dispute resolution by David A R Williams QC, of New Zealand, who is a member of the International Court of Arbitration, ICC, Paris).

2.11.1 Confidentiality of Arbitral Proceedings

In **Television New Zealand Limited v Langley Productions Limited** High Court, Auckland, CL 7/99, 7 February 2000, Robertson J had to consider whether or not the confidentiality of arbitral proceedings (preserved by statute in section 14 of the Arbitration Act 1996) continued once High Court proceedings were initiated. Predictably, His Honour held that once High Court

proceedings were initiated, "it is the principles applicable to the High Court which must determine the question of access and public knowledge." His Honour said that there "may be some cases where the Court, in having to exercise a discretion as to whether to order suppression of some material in a particular case, might have regard to the fact that the proceeding in the Court had its genesis in an arbitral process in which confidentiality was an essential ingredient". However, in the case in question, which had attracted a very high public profile, it was held it was inappropriate to conduct confidential court proceedings. Thus, Robertson J did not exclude the possibility of the High Court continuing some degree of confidentiality in respect of some material introduced in arbitral proceedings, if the parties had specifically addressed confidentiality in relation to High Court proceedings in their arbitration agreement.

2.11.2 Stay of Court Proceedings

Under Article 8, one ground for refusing a stay is "that there is not in fact any dispute between the parties with regard to the matters agreed to be referred." In **Fletcher Construction NZ & South Pacific Limited v Kiwi Co-Operative Dairies Limited,** High Court, New Plymouth, CP 7/98, 27 May 1998, Master Kennedy-Grant had to consider the appropriate test when applying this part of Article 8. Although this particular case involved a domestic arbitration, the same principles would obviously be applicable to an application for stay under Article 8 in an international arbitration. The Master was invited to choose between a test, based on whether or not the defence was advanced in good faith, whatever its chances of success (for which there was some English authority) or a test similar to that applied in summary judgement applications, namely whether there was an arguable defence. The Master preferred the

latter approach (whether or not there was an arguable defence). This position in New Zealand, must therefore be contrasted with the current English position where there was must be a reference to arbitration even if the Court considers there is no sustainable defence: **Halki Shipping Corp. v Sopex Oils Limited** [1997] 1 WLR 1268.

2.11.3 Article 12: The requirement that arbitrators shall be impartial and independent

The threshold for legal bias seems to vary from country to country. In New Zealand, the appropriate test for bias in the arbitration context has been authoritatively stated by the Court of Appeal in **BOC NZ Limited v Trans Tasman Properties Limited** (1996) 10 PRNZ 199 as being whether a reasonable objective observer, knowing all the material facts, would consider that there was a **real danger** in the sense of **reasonable possibility** of bias. In other words, New Zealand has opted for a fairly high threshold.

2.11.4 Articles 18 and 34 - Fair Hearing and Natural Justice

(In New Zealand, as in Australia, Article 34 has been extended to make it clear that failure to observe the rules of natural justice would be in conflict with public policy).

In **Trustees of Rotoaira Forest Trust v Attorney General** [1999] 2 NZLR 452, Fisher J considered the requirements of equal treatment and full opportunity of presenting the case (Article 18) and observing the rules of natural justice (failure to do so being a ground for setting aside under Article 34) and set out ten very helpful guidelines. These include an opportunity to understand, test and

rebut the opponent's case, the arbitrator is normally precluded from taking account of extraneous evidence or argument without giving the parties further notice and the opportunity to respond, similarly with the case of the arbitrator's own opinions and ideas, the arbitrator is not generally under an obligation to disclose what he or she is minded to decide, and an arbitrator should not eventually apply reasoning which takes the parties or one of them by surprise because should that occur, it could indicate procedural prejudice in the absence of indications to the contrary.

2.11.5 What is an 'award'?

Section 2(1) of the Arbitration Act 1996 defines an arbitral award as "a decision …. on the substance of the dispute ….."

In **McConnell Dowell Constructors Limited – the Pipeflow Technology Limited** (High Court, Auckland, M 2029/98, 25 March 1999) Paterson J had to consider the distinction between issues of substance and procedure in arbitration proceedings. This was a dispute between a head-contractor and its sub-contractor. The sub-contract agreement contained a common provision entitling the head-contractor to advance any issues in common against the employer first, with the sub-contractor having to live with the result. In this particular case, the head-contractor acquiesced in the fixing of a date of hearing for the arbitration with the sub-contractor before it had even given a notice of claim under the head contract against the employer. It had obviously overlooked the well-known clause and when it woke up to its existence it then applied to have the hearing of the sub-contract arbitration postponed to await the outcome of the head contract arbitration. I was the arbitrator in that matter and issued an interim award to the effect that the head-contractor had

waived its rights under the particular clause and the hearing of the sub-contractor's claim should proceed. While I would like to think there were good enough grounds to uphold my decision on the merits, Paterson J decided that he had no jurisdiction to determine an appeal on a question of law arising out of an "award" because what I had really issued was a procedural ruling (wrongly called an interim award) from which there was no right of appeal. There is obviously a fine line between matters of substance and matters of procedure. I had thought that because I was bringing to an end the head-contractor's rights of postponement, it was proper to describe the decision as an interim award. On the other hand, the only dispute legitimately before the arbitrator was the sub-contractor's claim, and to that extent one could justify treating the decision, as did the judge, as being a procedural ruling. Again, this is an example of the New Zealand Courts setting a high threshold making it very difficult to challenge awards or rulings.

2.11.6 Article 9 – Interim Measures

(The New Zealand provision slightly expands on the original Article 9)

In **Marnell Corrao Associates Incorporated v Sensation Yachts Limited** (High Court, Auckland) CP 294 SWRO, 22 August 2000, Wild J was confronted with a significant dispute in an international arbitration involving the construction of a super yacht. There was a dispute as to whether there was a binding arbitration clause (which would normally be dealt with the Arbitral Tribunal) but only two of the three members were then appointed and there was great urgency for interim protective measures. Wild J considered it was appropriate for the Court to make an order for interim measures

largely because, in the circumstances, it was inappropriate to await the appointment of the full Arbitral Tribunal. For the same reason (unavailability of the full Tribunal), the Judge considered whether or not the arbitration clause was binding and held that it was. In the course of the judgement, the Court reiterated the sentiment of the Court of Appeal in **CBI NZ Limited v Badger Chiyoda (Super)** evidencing a strong New Zealand policy in favour of enforcing contractual arbitration provisions, especially in international commercial disputes. The Court also referred to a decision on 29 March 2000 of the United States Federal Court for the Southern District of Texas in **Enviro Petroleum Inc. v Condur Petroleum** SA 91 F, Supp 3rd 1031 where at page 1035 the Court said:

> "The plaintiff seems to forget that there is a strong public policy in favour of enforcing contractual arbitration provisions, especially where, as here, they involve international commercial disputes between sophisticated business concerns."

2.11.7 The Threshold for Leave to Appeal

There is no right of appeal to the Court on a question of law arising out of an award in an international arbitration in New Zealand, unless the parties agree that there should be such a right. In a very recent decision of the New Zealand Court of Appeal in **Gold & Resource Developments (NZ) Limited v Doug Hood Limited**, Court of Appeal, 57/00, 18 July 2000, the Court was considering an application for leave to appeal in a domestic arbitration. However, the principles enunciated by the Court will apply in New Zealand where the parties to an international arbitration have agreed there should be a right of appeal on a question of law, with leave. In this important decision, the Court has expanded on the **Nema** guidelines.

In short, the Court held that if it is a one-off point unlikely to recur and is without precedent value, then "…unless there are very strong indications of error [of law] leave should rarely be given"; in other cases a "strongly arguable case would normally be required". The test is very similar to that in England ("obviously wrong" pursuant to section 69(3) of the Arbitration Act 1996 (UK)) and in Australia ("strong evidence that the arbitrator … made an error of law" the Commercial Arbitration Acts in Australia). Some further, secondary, guidelines have been added which include whether the question of law arose unexpectedly (greater readiness to grant leave) or was the very point originally put to the arbitrators (less readiness), the qualifications of the arbitrators, the importance of the dispute to the parties, the amount of money involved, the amount of delay involved in going through the courts, whether the contract provides for the arbitral award to be final and binding and whether the dispute before the arbitrators is international or domestic.

2.12 Some further helpful references include:

- **New Zealand Law Commission, Arbitration:** Report No. 20 (Wellington, 1991)

- **'Arbitration Law Reform: The New Zealand Experience'** (1996) 12 Arbitration International 1 at 57, by Megan Richardson, which also contains a copy of the Arbitration Bill at First Reading at page 67

- **Arbitration Law Reform: The New Zealand Experience – An Update** (1997) Arbitration International 228, by Megan Richardson

- **The New Arbitration Act** [1999] New Zealand Law Journal 386, by David Williams QC

- **International Commercial Arbitration** [1999] New Zealand Law Journal 381, by David Williams QC

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