An Introduction to International Commercial Arbitration[1]

1. International Commercial Arbitration is a consensual dispute resolution process for transnational commercial disputes.

2. In this seminar, it is intended to give a broad introductory overview of International Commercial Arbitration[2] including a brief discussion of:
   - the New York Convention and the UNICTRAL Model Law;
   - the agreement to arbitrate;
   - arbitrability;
   - applicable laws;
   - procedure and evidence;
   - interim relief;
   - court supervision and support;
   - remedies;
   - awards, setting aside and enforcement and challenges thereto;
   - the domestic situation.

Introduction:

The rule of law:

3. The rule of law is essential to the operation of a democratic society and a market economy. It is critical for the proper functioning of a market economy for those who sell goods and services to know that they will be paid for them.[3] An essential part of the rule of law is freedom from arbitrary power and equality before the law, as well as

---

[1] This paper was originally presented at the Law Institute of Victoria, Essential Skills, CPD program on 14.03.13. For a general reference to the uniform domestic arbitration legislation see, *Commercial Arbitration in Australia*, Doug Jones, 2nd Ed. Thomson Reuters, 2012, and, the *International Arbitration Act* 1974 (Cth), see *The International Arbitration Act 1974: A Commentary*, M. Holmes, and C. Brown, Lexis Nexis, 2011; and generally, *Redfern and Hunter on International Arbitration, Student Edition*, by Redfern, Hunter, Blackaby and Partasides, Oxford, 2009; *International Arbitration: A Handbook*, by Phillip Capper, 3rd Ed., LLP, 2004; Arbitration title in *Court Forms Precedents and Pleadings – Victoria,* by D. Byrne, updated by D. Bailey.

[2] For those wishing to pursue this subject further the Chartered Institute of Arbitrators offers a Diploma course in International Commercial Arbitration. Go to: http://www.ciarb.org/education-and-training/course-finder/?pathway=International%20Arbitration. Local universities also offer similar subjects.

[3] According to Victor Hanson in *Why the West Won*, Faber & Faber, 2001, pp. 170-232, esp. pp. 55, 201, 229 a not unimportant factor underlying the success of a small group of Spanish conquistadors against their far more numerous Aztec opponents was that the Spanish were paid (as opposed to the Aztecs soldiers many of who were slaves) and they were confident that they would get what they were entitled to for their efforts and that such entitlements could be lawfully and properly vindicated through the Spanish legal system. This expectation of reward gave them greater reason to risk all and to fight hard against their opponents. There was much litigation in Spain following the conquistadors' return home resolving disputes about their share of the booty. It is not known whether any of these disputes were arbitrated.

the effective vindication of rights. These characteristics of the rule of law are manifested in fair and enforceable dispute resolution mechanisms. As we will see, international commercial arbitration is entirely dependent for its effectiveness upon the rule of law.

Different types of ADR:

4. Arbitration is one of a number of types of alternative dispute resolution processes – alternative in distinguishing it (or them) from the predominant 'local', or 'national' variant - litigation. Apart from arbitration, common forms of ADR are mediation[4], conciliation, early neutral evaluation (each of which is non-binding)[5], statutory adjudication[6], and expert determination. Sometimes these processes are characterised by whether they are binding or non-binding[7].

What is arbitration?

5. Arbitration has been described as "litigation in the private sector" – free enterprise litigation[8]. Its foundations are consensual - two or more persons agreeing (commonly in a contract between them) to submit any disputes that may arise between them, to a neutral third party, agreed, or to be agreed, between them, or appointed pursuant to their agreement by some other party, for final and binding determination[9].

Why arbitration?

6. Arbitration is the favoured method for resolving international commercial disputes. When companies or individuals from different countries do business often neither party will be willing to submit disputes that may arise between them to the courts of the other party's country. Each party will view the other party's legal system with

---

[4] sometimes mediation may be combined with arbitration – the so called "Med-Arb" process in which the parties will first try to mediate their dispute but if that is not successful they will proceed to arbitration

[5] For an overview of each type of ADR, see, ibid, *Commercial Arbitration in Australia,* Doug Jones at pp 24-32

[6] Limited to disputes in the construction industry over progress payments under the security of payment legislation which although not uniform is similar across all Australian States and Territories, eg. *Building and Construction Industry Security of Payment Act* 1999 (NSW); *Building and Construction Industry Security of Payment Act* 2002 (Vic). There is also similar legislation in the UK: *Housing Grants, Construction and Regeneration Act* 1996; in NZ, *Construction Contracts Act* 2002; Singapore: *Building and Construction Industry Security of Payment Act* 2004 and Malaysia: *Construction Industry Payment and Adjudication Act* 2012.

[7] see, ibid, *Commercial Arbitration in Australia*, Doug Jones at pp 24 and 28

[8] Sir John Donaldson in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd & Anor* [1984] 2 All E.R. 175 at 189 - "Arbitration is usually no more and no less than litigation in the private sector. The arbitrator is called on to find the facts, apply the law and grant relief to one or other of the parties" – cited in a paper by Doug Jones, *International Commercial Arbitration and Australia* delivered at the Australian-European Lawyers Conference National Museum of Australia, Canberra, 2-3 March 2007 available at http://www.claytonutz.com/area_of_law/international_arbitration/docs/International_commercial_arbitration_and_Australia.PDF (viewed 8.03.13).

[9] ibid, Doug Jones, International Commercial Arbitration and Australia, see n. 3

distrust perceiving that they will not get a fair hearing, or simply that they do not understand the other party's legal system and feeling if they are forced to litigate in the foreign country, they will be hampered by language and cultural problems, and systems and procedures that they do not know anything about.

7. Arbitration enables the parties to a contract, to agree that if a dispute arises, a neutral and respected third party or parties will be appointed to resolve their dispute in accordance with procedures that they will have a large part in devising, in a desired venue, in accordance with a set of arbitration rules they have chosen, with a particular set of laws to give the arbitration its legal basis (the *lex arbitri*) and another set of laws in accordance with which the dispute will be resolved (*lex causa*).

8. For international commercial arbitration to operate and be effective, it must be supported by at least two bodies of national or local laws: *first*, the *lex arbitri* which will give legal force and effect to the process of the arbitration; and *secondly*, the national laws which enact, or legislate for, the enforcement mechanisms of the New York Convention (see below).

9. Without either of these sets of law, the arbitration will not be effective or enforceable.

10. Arbitration generally, and international arbitration in particular, is seen to offer various advantages over litigation, including flexibility - the ability to 'tailor-make' procedures to suit the particular dispute and the parties - rather than having to adopt the 'one size fits all' civil procedure rules and practices of State litigation; the parties are able to choose their own decision-maker with particular competence and expertise; greater enforceability of awards under the New York Convention; the ability of an arbitrator to decide disputes acting *amiable compositeur* or *ex aequo et bono*[10]; and confidentiality (litigation is essentially a public exercise).

[10] To decide the case on the basis of what is fair and reasonable, see Redfern & Hunter at para 1.151; 3.200ff and see Art 28(3) *Model Law* which provides that an arbitral tribunal may only decide on this basis if the parties have expressly authorised it to do so. For an interesting recent Victorian case, see *Yesodei Hatorah College Inc v The Trustees of the Elwood Talmud Torah Congregation* [2011] VSC 622 per Croft J which dealt with a similar provision under the CAA 1984, s 22(2). This provision empowered the arbitral tribunal if the parties expressly agreed in writing to determine any question that arose for determination by reference to considerations of general justice and fairness. In this case the arbitrator erred in failing to apply the mandate conferred on him by s 22(2).

The New York Convention and the UNICTRAL Model Law:

New York Convention:

11. The single most important reason for the success of international commercial arbitration as the preferred method for resolving international commercial disputes is the **New York Convention** (NYC)[11]. This United Nations Convention is one of the most successful conventions or treaties ever made, and has over 148 State parties which have acceded to (or adopted) it.

12. The NYC is primarily concerned with two matters:

    (1) the recognition of, and giving effect to, arbitration agreements; and

    (2) the recognition, and enforcement, of international (non-domestic) arbitral awards.

13. The NYC gives both recognition and effect to arbitration agreements by:
    (a) requiring a court of a Contracting State to refer a dispute which has come before it, and which falls within the scope of an arbitration agreement to arbitration (parties are not free to litigate disputes that they have agreed to arbitrate)[12]; and
    (b) enabling the successful party to enforce the award (which is the culmination of the arbitration process) if the losing party will not voluntarily comply with it. The successful party is able to easily and simply obtain recognition and enforcement of an award in any country which is a party to the Convention in accordance with that country's arbitration laws[13] (ideally where the losing

[11] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York on 10 June, 1958 commonly known as the New York Convention. For further information, see online New York Convention Guide (www.newyorkconvention1958.org) launched on 2 July 2012 and UNCITRAL guide currently being prepare, see Tools and Resources for Uniform Interpretation of UNCITRAL Texts by Hanjo Kim Legal Expert UNCITRAL Regional Centre for Asia and the Pacific below at note 7, and see http://www.uncitral.org/.
[12] Article II NYC
[13] Article IV NYC. Most of the arbitration laws of States provide for the award to be enforced as though it were a judgment of the Court. For example, in Singapore under s. 19 *International Arbitration Act*, an award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award. In Malaysia, under s. 38(1) *Arbitration Act* 2005 on an application in writing to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action. In Indonesia it is the *Arbitration Act* 1999, see Articles 66-69 - International Arbitration Awards will be recognised and enforced within the Republic of Indonesia if certain conditions are met. In South Africa under s. 31(1) *Arbitration Act* 1965, an award may, on the application to a court of competent jurisdiction by any party

party may have assets), and there are only a limited number of grounds by which enforcement of an award may be refused[14].

Model Law:

14. Along with the NYC, the other most influential international legal instrument in the context of international commercial arbitration is the United Nations Commission on International Trade Law Model Law (UNCITRAL) on International Commercial Arbitration commonly known as the **Model Law** [15]. The Model Law is not legally

---

to the reference after due notice to the other party or parties, be made an order of court. In Sweden under s. 59 of the Swedish *Arbitration Act* (SFS 1999:116), where the Court of Appeal grants an application for the enforcement of a foreign award, the award shall be enforced as a final judgment of a Swedish court, unless otherwise determined by the Supreme Court following an appeal of the Court of Appeal's decision. Under the *Arbitration and Conciliation Act* of Nigeria, s. 31(1) an arbitral award shall be recognised as binding and subject to this s. 32 of this Act, shall, upon application in writing to the court, be enforced by the court. In Japan, Article 45 of the *Arbitration Law* (Law No.138 of 2003) an arbitral award (irrespective of whether or not the place of arbitration is in the territory of Japan; this shall apply throughout this chapter) shall have the same effect as a final and conclusive judgment. Under the English *Arbitration Act* 1996, s. 66 an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. The *Arbitration Law* of the People's Republic of China, Article 62 provides that "the parties concerned shall execute the arbitral award. If one of the parties refuses to execute the award, the other party may apply for enforcement with the people's court according to the relevant provisions of the Civil Procedure Law. The people's court with which the application is filed should enforce it". In India, under s. 36 *Arbitration and Conciliation Act* 1996 provides that where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court. Article 194 of the Swiss *Federal Statute on Private International Law* provides that the recognition and enforcement of a foreign arbitral award is governed by the New York Convention.

[14] which are by and large limited to matters effectively of 'jurisdiction' and procedural fairness, see Article V NYC upon which subsections (5) and (7) of s. 8 *International Arbitration Act* 1974 (Cth.) are based. See para 20 below.

[15] The 1985 UNCITRAL Model Law on International Commercial Arbitration which was revised in 2006, the text of which is available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly in 1966 with its headquarters in Vienna. It is the UN's principal legal body in International trade law. The UNCITRAL's mandate is to facilitate and remove legal impediments to international trade by progressively modernizing and harmonizing international trade law. Apart from international commercial arbitration, UNCITRAL prepares legal instruments and texts in a number of important areas and provides technical assistance to law reform activities, including 1980, United Nations Convention on Contracts for the International Sale of Goods (CISG). The techniques utilized by UNCITRAL to fulfil its mandate to modernize and harmonize trade law, include the Convention, the Model Law and the Legislative Guide. For harmonisation to occur, it is necessary for "wide adoption and uniform interpretation of UNCITRAL texts". In 1988 UNCITRAL established Case Law on UNCITRAL Texts (CLOUT) which is a collection of court decisions and arbitral awards relating to UNCITRAL texts. UNCITRAL produces yearly digests to assist in the understanding, interpretation and application of UNCITRAL texts, eg, the 2012 Digest of Case Law on the Model Law of International Commercial Arbitration and on the CISG. See *Tools and Resources for Uniform Interpretation of UNCITRAL Texts* by Hanjo Kim Legal Expert UNCITRAL Regional Centre for Asia and the Pacific presented at UNCITRAL Commercial Law Group, Faculty of law, Monash University seminar, UNCITRAL texts in Australia: Arbitration, Electronic Commerce, Sale of Goods held at Monash University Law Chambers on 7 February, 2013. CLOUT is helpful to Australian courts and practitioners in the interpretation and implementation of the uniform Commercial Arbitration Acts based on the Model Law. See ibid, note 1 above, Doug Jones, *Commercial Arbitration in Australia* where numerous references thereto are made.

effective or enforceable on its own but is simply a template for legislation for an arbitration law (a *lex arbitri*) which may be enacted by individual States. It draws heavily from the NYC and the 1976 UNCITRAL Arbitration Rules[16]. It has been adopted in 73 jurisdictions to date[17].

International arbitration in Australia is governed by the *International Arbitration Act* 1974 (Cth.)(IAA)

15. In Australia, international commercial arbitration is governed by the IAA[18]. Among the IAA's stated objects are to give effect to Australia's obligations under the NYC, and to give the Model Law and also the ICSID[19] Convention effect (which are each annexures to the IAA). By virtue of s. 16 IAA, the Model Law has the force of law in Australia. Until amendments to the IAA under s. 21 IAA the parties were free to exclude the Model law by agreement in writing. Section 21 IAA now provides that if the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration. But note s. 20 IAA which provides that where, but for this section, both Chapter VIII of the Model Law and Part II of (the IAA) would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award.

16. The IAA also deals with the two principal matters addressed by the NYC:

    (a) the enforcement of foreign arbitration agreements - by s. 7[20]; and
    (b) the recognition, and enforcement, of foreign awards - by s. 8 and 9.

Stay of proceedings:

17. Under s. 7 (provided that in substance, the arbitration agreement, or one of the parties has a connection to Australia or a Convention country[21]), if proceedings are

[16] Ibid, Holmes and Brown at pp 3-5. The UNCITRAL *Arbitration Rules* 1976 was part of UNCITRAL's early work and aimed to create a set of arbitration rules based on international best practice, ibid, Holmes and Brown at p. 4. In 2010 UNCITRAL produced a revised set of arbitration rules aimed at improving the efficiency of arbitrations. Available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

[17] Ibid, Holmes and Brown at p 5 and see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/

[18] The Commonwealth Act by which Australia acceded to the NYC was the *Arbitration (Foreign Awards and Agreements) Act* 1974 (Cth.) now known as the *International Arbitration Act* 1974 (Cth.)(IAA). The NYC is Schedule 1 to the IAA. The constitutionality of the IAA was confirmed in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5. See note 30 below for a related case.

[19] International Centre for Settlement of Investment Disputes

[20] Australia's obligations under article II(3) of the New York Convention – see Doug Jones, *International Commercial Arbitration and Australia*, p. 6.

instituted by a party to an arbitration agreement (to which the section applies) against another party to the agreement, and the proceedings involve the determination of a matter that under the agreement, is capable of settlement by arbitration, the court must, on application of a party to the agreement, stay the proceedings (or that part which falls within the scope of the agreement).

Enforcement of awards:

18. Section 8 provides that (subject to Part II), by virtue of the IAA, a foreign award[22]:

(a) is binding for all purposes on the parties to the arbitration agreement in pursuance of which it was made; and

(b) may be enforced in a court of a State or Territory or the Federal Court, as if the award were a judgment or order of that court.

Limited grounds for refusing to enforce a foreign award:

19. The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7) of s. 8 (which are similar to, and drawn from, the grounds referred to in Article V(1) and (2) NYC and Article 36 (1) and (2) Model Law)[23]. "The award creditor is entitled to have a judgment unless the court is satisfied that enforcement should be refused on one of the grounds specified in subss 8(5) and (7) of the IAA" (s 8(3A))[24].

20. Subs (5) and (7) provide as follows:

> (5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that: (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made; (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made; (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise

---

[21] S. 7(1) is to the effect that if the procedural law of an arbitration under an arbitration agreement is governed by the law of a Convention country, or if not one party to the arbitration agreement is an Australian party, or the Government of, or a person domiciled, or ordinarily resident in, a Convention country, the section will apply to it.

[22] A "foreign award" means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.

[23] which are also virtually identical to the grounds for setting aside an award in Art 34 Model Law.

[24] *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; BC201201492 at [108]; *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161; [2012] FCA 696; BC201204809 per Foster J.

unable to present his or her case in the arbitration proceedings; (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that: (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting[25]; or (b) to enforce the award would be contrary to public policy.

Procedure for enforcement of foreign, and 'non-foreign', award:

21. The procedure for seeking enforcement of a foreign award is set out in s. 9, and is similar to Article IV NYC and Article 35 Model Law. In Victoria an application to enforce a foreign award pursuant to s 8 IAA is made, as far as possible, in accordance with rr 9.04 and 9.05 of Ch II of the Rules[26]. The application, unless the Court otherwise orders, is made ex parte under r 9.04(1) (b)[27].

22. It should be noted that notwithstanding that there is no provision of the IAA which specifically vests jurisdiction in any court to enforce a *non-foreign award* made in an international commercial arbitration under the IAA and the Model Law (that is, an award made by an arbitral tribunal in an international commercial arbitration in Australia, as opposed to in a country other than Australia), by virtue of s 39B(1A)(c)

[25] "matter" has been interpreted as "any claim for relief of a kind proper for determination in a court": *Elders CED Ltd. v. Dravo Corporation* (1984) 59 ALR 206 cited in Doug Jones, International Commercial Arbitration and Australia at p. 7. As Mr Jones notes "courts have also refused stay applications where the dispute involves antitrust, bankruptcy or insolvency" but "the courts have not stated that these matters are inherently incapable of settlement by arbitration. Rather, they have focused on whether the scope of the arbitration agreement is broad enough to cover such disputes" (ibid). In *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 and in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers* (1998) 159 ALR 142 it was held that disputes based on the former s. 52 *Trade Practices Act* (now s. 18 *Australian Consumer Law*) are arbitrable.

[26] Practice Note No 2 of 2010, paragraph 10; see also, *Altain Khuder LLC v IMC Mining Inc* (2011) 246 FLR 47; [2011] VSC 1; BC201100150 per Croft J which was reversed on appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9; [2011] VSCA 248; BC201106268; see also Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2) (2011) 277 ALR 415; [2011]FCA 131; BC201100586; *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905; BC201105961; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)*, above

[27] For further reference, see *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, above, at [19] (cf SPP (*Middle East) Ltd v Arab Republic of Egypt* [1984] 2 Qd R 410; *International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* 07/07/1995 SCVIC 5813/94; BC9503363). However, in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* Warren CJ stated that where a party is seeking to enforce a foreign arbitral award, and it becomes necessary to adduce extrinsic evidence to establish that the documents upon which it relies satisfy s 9(1) IAA, the judge should ordinarily direct the enforcing party to give notice to the defendant, and the proceeding should proceed *inter partes*.

Judiciary Act 1903 (Cth), the Federal Court has original jurisdiction in relation to such awards as the relevant matter arises under a law made by Federal Parliament[28].

23. As has been noted, where both Chapter VIII of the Model Law and Part II of the IAA would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award[29].

24. According to one noted commentator and international arbitrator, "Australian courts have an excellent record for enforcing foreign arbitral awards"[30].

Procedure for setting aside a foreign award:

25. Jurisdiction to set aside an arbitral award is pursuant to art 34(2) of the Model Law. Such jurisdiction is vested in the Federal Court of Australia, or if the place of arbitration is in a State, or Territory, the Supreme Court of that State or Territory: s. 18 IAA[31].

26. In Victoria, an application to set aside a foreign award pursuant to Article VI of the NYC or Article 34 of the Model Law (see Part II and ss 16 and 20 IAA) should, as far as possible, comply with the requirements of Ch II, rr 9.04 and 9.05[32].

The agreement to arbitrate:

27. Arbitration agreements are the foundation of the arbitration process. Several important matters can be stated in relation to such agreements:

    (a) *first*, an agreement to arbitrate, or an arbitration clause, is considered to be a contract independent of the contract in which it is contained. On this basis, the arbitral tribunal has jurisdiction to rule on its own jurisdiction[33] even if the

---

[28] Section 33 confers original jurisdiction in the federal court in any matter "arising under any laws made by the Parliament"; see *Civil Procedure Victoria* ("CPV") at [II 9.04.7]. Doug Jones notes that "where the New York Convention does not apply, enforcement may be possible under article 35 of the Model Law", ibid, International Commercial Arbitration and Australia at p. 9. As can be seen there is a failure in the IAA to provide specific jurisdiction for any court to enforce a non-foreign award (*Castel Electronics*, above at [35]).

[29] s. 20 IAA

[30] ibid, Doug Jones, International Commercial Arbitration and Australia, p. 9.

[31] See for example, ibid, *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (No 2) [2012] FCA 1214; and see CPV at [II 9.04.10]

[32] see *Altain Khuder LLC v IMC Mining Inc* (2011) 246 FLR 47; [2011] VSC 1; BC201100150 which was reversed on appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder* LLC (2011) 253 FLR 9; [2011] VSCA 248; BC201106268.

[33] which may ultimately be resolved by a State Court

underlying contract has been terminated, or is set aside. The arbitration clause survives termination of the underlying contract[34];

(b) *second*, the terms of an arbitration agreement bind the parties and the arbitrator who enters upon a reference pursuant to the arbitration agreement[35];

(c) *third*, the terms of an arbitration agreement will necessarily be dependent upon the circumstances.

28. In practice an issue which often arises is as to the *scope* of an arbitration clause – whether a particular dispute fails within its terms – if the dispute or part of it does, the matter (or part) cannot be litigated in the courts, in the face of opposition. This issue will often arise when a court is asked to stay court proceeding on the grounds that the issues fall within the terms of an arbitration agreement[36].

29. The major arbitration institutions such as the ICC, the LCIA, regionally, SIAC, HKIAC, KLRCA, and CIETAC and in Australia, ACICA have recommended arbitration clauses[37], or the parties can devise their own.

---

[34] *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 287 ALR 315; 262 FLR 1; [2012] WASCA 50; BC201201101 at [165]–[166] citing *Ferris v Plaister* (1994) 34 NSWLR 474 at 484, 496–7, 500–1 and 503–4; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 at 714–16 and 723–4 ; [1993] 3 All ER 897 at 906–8 and 914–15 ; (1993) 3 WLR 42 at 52–4 and 61; *Heyman v Darwins Ltd* [1942] AC 356 at 374; [1942] 1 All ER 337 at 347; *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909 at 997 ; [1981] 1 All ER 289 at 310 ; [1981] 2 WLR 141 at 166

[35] ibid, *Rizhao Steel Holding Group Co Ltd* at [165]–[166] citing *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 29; 128 ALR 391 at 400 ; [1995] HCA 19. A further agreement arises when a dispute is referred to arbitration, which is subsidiary to, and separate from, the arbitration agreement itself: *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at 454–5; *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45 at 57 (Sumitomo); *C v D* [2007] 2 All ER (Comm) 557 ; [2007] EWHC (Comm) 1541 at [43]

[36] see s. 7 IAA at para 17 above

[37] International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), Kuala Lumpur Regional Centre for Arbitration (KLRCA) and China International Economic and Trade Arbitration Commission (CIETAC). In Australia, ACICA (see n. 44) recommends the following: *Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia [or choose another city]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three, or delete this sentence and rely on Article 8 of the ACICA Arbitration Rules]*. ACICA also acts as an appointing authority under the UNCITRAL Arbitration Rules. In this context it recommends the following : *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the Australian Centre for International Commercial Arbitration. The number of arbitrators shall be [one or three]. The place of arbitration shall be Sydney, Australia [or choose another venue]. The language(s) to be used in the arbitral proceedings shall be [...].*

30. Arbitration agreements[38] will commonly deal with such matters as the types of disputes which fall within its terms, the seat of the arbitration (which will determine the *lex arbitri*), the law in accordance with which the dispute will be determined (*the lex causa*), the number of arbitrators[39], and their appointment, the language of the arbitration, and whether it will be an institutional or *ad hoc* arbitration[40].

Arbitrability:

31. A similar issue to the scope of an arbitration clause is the question of *arbitrability* which involves determining which types of dispute may be resolved by arbitration and which must go to court[41]. This determination will need to be made initially by the arbitral tribunal, but may ultimately be made by courts of particular States applying national laws[42]. Despite the principle of party autonomy there are disputes, which by their very nature, must be determined by the courts, for example, insolvency, criminal proceedings, divorce, registration of land or patents.

Ad hoc or institutional arbitration:

32. When parties are negotiating an arbitration clause one issue which will arise is whether the arbitration will incorporate the rules of a recognised arbitration institution and adopt the institution as the appointing, or default, appointing authority, or will rather proceed '*ad hoc'*. With an '*ad hoc'* arbitration, the parties are free to decide on whatever arbitration rules they, or the arbitrator wishes, and as well as an appointing procedure, and may subject themselves to the default appointing power of state courts[43].

33. The institutions will generally have much to offer, including provision of non-curial supervision of arbitrations by arbitration experts, expertise in choosing the right tribunal for the particular dispute, and putting a cap on, or controlling, the costs of the arbitration. The ICC even provides a service where it will 'vet' drafts awards to ensure that they comply with all essential matters that were required of them[44].

---

[38] which must be distinguished from submission agreements which will be entered into once a dispute has arisen

[39] Many commentators suggest that it is safer to have three rather than one arbitrator.

[40] See para 32ff below

[41] ibid, *Redfern and Hunter of International Arbitration*, at [2.111]. The issue may arise at the enforcement stage under Article II (1) of the NYC

[42] Ibid, Redfern and Hunter at [2.114].

[43] There is a danger with ad hoc arbitrations that the arbitration clauses if devised by the parties are flawed or "pathological". See Alternative Dispute Resolution Clauses – How to get the most out of them by A. Monichino SC, List A, Victorian Bar, viewed at barristers.com.au/wp-content/uploads/.../adrseminarpapernov08.pdf

[44] Art 33, ICC Rules of Arbitration – Scrutiny of Awards by International Court of Arbitration

34. In Australia it is possible to utilise both international and local arbitral institutions.[45]

Applicable laws:

35. There are several different sets of laws which will commonly apply in an international commercial arbitration[46]. The principal ones are:

    (a) the *lex arbitri* – the law of the place of arbitration – the seat gives the arbitration a set of laws which give it its legal validity;

    (b) the *lex causa* – is the law by which the substantive dispute will be resolved;

    (c) the laws of the State where enforcement is sought.

    These laws are discussed in various contexts in this paper[47].

Arbitration Rules:

36. In an arbitration clause parties may agree on a set of arbitration rules which will apply in the event that a dispute arises between them which is referred to arbitration. The major arbitration institutions on the international stage such as the ICC, the LCIA and in Australia, ACICA, produce recommended arbitration clauses which make express reference to the institution's rules[48].

37. In the event that it is an *ad hoc* arbitration, the parties may adopt the UNCITRAL Arbitration Rules, or any other set of rules they agree upon. In default of agreement, the Arbitral tribunal may decide on a set of arbitration rules depending upon the particular *lex arbitri*.

Procedure and evidence:

38. The parties to an international commercial contract may in the arbitration clause, which they have inserted into their contract, choose a set of arbitration rules, either that of a particular institution, such as ACICA, ICC or the LCIA, or in an ad hoc context, the UNCITRAL Arbitration Rules. If so, these rules will by and large govern

---

[45] The Chartered Institute of Arbitrators has an Australian Chapter (CIArb). CIArb promotes all forms of private dispute resolution and provides training and support for arbitrators and mediators. See www.ciarb.net.au/. The ICC (the International Chamber of Commerce) has offices in Sydney and Melbourne. The LCIA (London Court of International Arbitration) has an Australian Chapter as part of its Asian-Pacific Users Council. Nationally there is the Australian Centre for International Commercial Arbitration (ACICA) and the Australian Commercial Disputes Centre (ACDC) focusing on domestic arbitration. Reference may be made to their respective websites.

[46] Ibid, Capper at p. 11ff

[47] See paras 7,8, 14, 30, 37, 39, 43, 45, 47

[48] See, ACICA arbitration clause referred to in note above.

issues of procedure and evidence. The arbitration rules that the parties have adopted will provide procedures for different stages in the arbitral process.

39. During an arbitration, the parties and the arbitrator may be able to adapt the chosen arbitration rules to suit the particular circumstances of a dispute[49]. However the particular *lex arbitri* may have mandatory provisions which govern procedural issues and which cannot be contracted out of, or overridden, by the parties or the arbitrator[50].

40. After appointment the arbitral tribunal will wish to communicate quickly with the parties and hold an initial meeting to confirm matters of jurisdiction, to devise and make procedural orders[51], including whether to have a hearing, how to present the evidence[52], and to set out other steps which will take place during the arbitration proceeding.

41. In devising procedures the tribunal will need to bear in mind that there is not one right way to conduct an arbitration and take its lead from the parties, keeping in mind the overriding right of each party to be treated equally, and to be given a full opportunity of presenting its case[53], as well as taking into account the different cultural and legal backgrounds of the parties.

42. In international commercial arbitration there are aids to assist the arbitral tribunal and the parties to devise sensible and efficient procedures. These include:
    (a) the IBA Rules on the Taking of Evidence in International Arbitration;[54]

---

[49] Most questions will depend on the arbitration agreement incorporating any rules as modified by the lex arbitri

[50] For example English *Arbitration Act* 1996, s 4 and Schedule 1

[51] in relation to pleadings; memorials and whether evidence must be presented 'up front'; interim measures, disclosure/discovery; terms of reference;

[52] witness statements; whether to hot tub expert witnesses, as well as witnesses to fact; whether to have a hearing by chess clock.

[53] Art 18 Model Law

[54] The IBA Rules on Evidence provide a resource to parties and to arbitrators to assist in achieving an "efficient, economical and fair process for the taking of evidence in international arbitration". The Rules provide procedures for a variety of steps in the arbitral process including the presentation of claims, and cross claim, defences and other documents, procedures for witnesses of fact and expert witnesses, inspections, as well as the conduct of hearings. According to the Foreword they are "designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations". They take guidance from many legal systems and are a compromise between the procedures in various systems, including the common law and the civil law systems. The Rules are aimed at achieving international best practice. The Rules will not be binding absent agreement of the parties. The parties may agree that the arbitration shall be conducted according to the IBA Rules of Evidence. The text is available at:

(b) the UNCITRAL Notes on Organizing Arbitral Proceedings;[55] and

(c) the IBA Guidelines on Conflicts of Interest in International Arbitration[56]

Interim relief:

43. Arbitration rules, such as the UNCITRAL Arbitration Rules, and applicable national laws (*lex arbitri*), such as those based on the Model Law, give the arbitral tribunal the power to make interim orders in aid of, and, to assist, the final award[57]. These may include freezing orders, preservation of evidence, and such matters. Interim orders will be enforceable with the assistance of courts at the seat of arbitration, or parties may wish to seek such interim measures from the courts directly.

Court supervision and support

44. Under the domestic uniform *Commercial Arbitration Acts* (CAA) modelled on the Model Law, the local courts provide assistance to the arbitration process in the following ways (the provisions first noted are from the Victorian CAA 2011, and the provisions which are common with the Model Law (or substantially so) are indicated in bold following the CAA reference):

(a) a request to refer a matter to arbitration (s 8) **[Model Law, Art 7]**;
(b) in various situations where there is a failure by the parties to agree on the appointment of arbitrators, the court make the necessary appointment (s 11) **[Model Law, Art 11]**;
(c) if a challenge to an arbitrator is not successful, the challenging party may request the Court to decide on the challenge (s. 13) **[Model Law, Art 13]**;
(d) any party may request the Court to decide on the termination of the mandate of an arbitrator under s. 14(1) (s. 14(2)) **[Model Law, Art 14]**;
(e) if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court to decide the matter (s. 16(9)) **[Model Law, Art 16]**;
(f) recognition and enforcement of interim measures issued by the arbitral tribunal (s 17H) **[Model Law, Art 17H]**;
(g) to issue interim measures in relation to arbitration proceedings (s. 17J) **[Model Law, Art 17J]**;

---

http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence

[55] The Notes list and briefly describing questions in relation to which appropriately timed decisions on organizing arbitral proceedings may be useful. While the text was prepared with a particular view to international arbitrations, it may be used whether or not the arbitration is administered by an arbitral institution. The Notes are not suitable, and should not be adopted, as arbitration rules. They are there to assist an arbitral tribunal to properly organize the conduct of an arbitration. See, Introduction to the Notes. Available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf

[56] The guidelines assist an arbitral tribunal to identify, and properly deal with, conflicts and conflict of interest situations. What matters should an arbitral tribunal be required to disclose; what should he or she do when faced with a challenge based on an alleged conflict? The guidelines seek to promote and coincide with international best practice but are subject to any applicable national law or arbitral rules chosen by the parties Available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

[57] See, for example, paragraph 43(f) and (g) below

(h) upon request of the arbitral tribunal, or a party with approval of the arbitral tribunal, to assist in taking evidence (s 27) **[Model Law, Art 27]**;

(i) if a person, inter alia, fails or refuses to attend before an arbitral tribunal to give evidence or produce documents, or fails or refuses to take an oath (or affirmation) or to answer questions, the court may order the person in default to attend the court to be examined, or to produce the documents (s 27B)**[there is no equivalent under the Model Law]**;

(j) upon application being made by a party (with the consent of the arbitrator or all of the parties), the court has jurisdiction to determine any question of law arising in the course of an arbitration unless otherwise agreed to by the parties (s 27J) **[there is no equivalent under the Model Law]**;

(k) application to the court to set aside the award under subs 34(2), (3) (s. 34) **[Model Law, Art 34]**;

(l) an appeal lies to the court on a question of law arising out of an award if the parties agree (before the end of the appeal period referred to in s 34A(6) that an appeal may be made under such section), and *Casaceli v Natuzzi SpA* (2012) 292 ALR 143; [2012] FCA 691; BC201204720 application to the court for recognition and enforcement of awards (ss 35, 36) **[Model Law, Art 35, 36]**;

(m) where matters that are the subject of an arbitration agreement come before the court by way of inter-pleader, the court must order that the issue be determined in accordance with the agreement, unless sufficient reason is shown to the contrary (s 38)**[there is no equivalent under the Model Law]**[58].

Remedies:

45. While in general terms, in international arbitrations, arbitrators can give the sorts of remedies and relief which national courts can give, what an arbitral tribunal can give in a particular arbitration will depend upon, inter alia:

(a) the arbitration agreement, including any arbitration rules the parties have agreed to;

(b) the *lex arbitri* (the law applicable to the arbitration proceedings);

(c) the *lex causa* (the law applicable to the substance (or merits) of the dispute); and

(d) the laws of the place of enforcement[59].

46. Awards which may be made will include an award of payment of a sum of money, declarations, interest, specific performance, injunction, rectification, costs[60].

Awards, setting aside and enforcement and challenges thereto:

47. The making of the award by the arbitral tribunal is the culmination of the arbitration process. The content of an award will be principally determined by the arbitration

[58] see CPV at [II 9.02.0].
[59] Ibid, Capper at p. 113ff
[60] Ibid, Capper

agreement (incorporating any rules) and the *lex arbitri*[61]. For both the arbitrator and the parties (or at least the successful party), it is critical that the award is *enforceable*. In order for this to be so, the award must[62], inter alia:

(a) be reasoned;

(b) deal with all the issues, but only those issues, referred to arbitration and effectively determine the issues in dispute;

(c) comply with all essential formalities[63]. The particular *lex arbitri* which is engaged will set certain requirements which an award must contain;

(d) be unambiguous;

(e) be intelligible;

(f) correctly identify the parties.

48. Throughout the arbitration process the arbitral tribunal must have in mind as its object, and purpose, the end of producing a binding and enforceable award.

49. If the arbitral tribunal has been guilty of, or the process subject to, some serious irregularity and in a limited range of other circumstances, the award is liable to be set aside, or refused recognition or enforcement. The circumstances by which an award may be set aside are set out in Art 34 of the Model Law, and those on the basis of which it may be refused enforcement are contained in Art 36 of the Model Law[64]. The circumstances under Arts 34 and 36 are virtually identical.

50. The enforcement of arbitral awards has already been discussed above.

The domestic situation

51. In Australia, in the domestic context, at the Standing Committee of Attorneys-General (SCAG) meeting held on 7 May 2010, it was agreed to implement the model Commercial Arbitration Bill 2010 based on the Model Law as uniform domestic arbitration legislation.

52. The previous legislative regime of uniform Acts in force in Australian States and Territories[65] had several marked differences to the Model Law[66].

---

[61] Ibid, Redfern & Hunter at para 9.114; ibid, Capper at p. 117ff
[62] Ibid, Redfern & Hunter; ibid, Capper at p. 118.
[63] Eg. Art 31 Model Law
[64] cf. s. 8(5) IAA, see para 20 above
[65] eg in the *Commercial Arbitration Act* 1984 (Vic)

53. New South Wales was the first state or territory to enact the model Bill as the *Commercial Arbitration Act* 2010[67]. The Victorian legislation, the *Commercial Arbitration Act* 2011[68] came into operation on 17 November 2011[69]. The other States and Territories have followed suit[70].

Conclusion:

54. International commercial arbitration has proven spectacularly successful in the post-war era. It will no doubt continue to be so. With the greater opportunities for trade and commerce on the international stage brought about by globalisation, as the preferred form of dispute resolution of international commercial disputes, international commercial arbitration offers practitioners new opportunities for practice, and is deserving of close attention.

14 March, 2013

John K Arthur
LLB., BA.
Barrister and Member of the Victorian Bar
ACIArb

Isaacs Chambers
Tel: 9225 8291
Mob: 0412 892199
E-mail: jkarthur@vicbar.com.au
W: www.gordanandjackson.com.au
Liability limited by a scheme approved under Professional Standards Legislation

---

[66] Under the previous regime, the courts had a far greater role in the appointment, challenge and removal of arbitrators (for misconduct, s. 42 Victorian Act) and in the review of awards.
[67] repealing the *Commercial Arbitration Act* 1984, was assented to on 28 June 2010
[68] which repealed the Commercial Arbitration Act 1984
[69] Ss 1AA-47 on 17/11/2011: SG (No. 369) 15/11/2011 p. 1
[70] South Australian *Commercial Arbitration Act* 2011, commenced on 1 January, 2012. In the Northern Territory, the *Commercial Arbitration (National Uniform Legislation) Act* 2011, commenced on 1 August, 2012. In Tasmania, the *Commercial Arbitration Act* 2011, was assented to on 16 October, 2011 and came into force on 1 October 2012 (Stat Rule 2012, No. 77). In Queensland, the *Commercial Arbitration Act* 2013 commenced on 17 May 2013 (2013 SL No. 65). In Western Australia, the *Commercial Arbitration Act* 2012, was assented to on 29 August, 2012 but is not yet in force. Only the Australian Capital Territory has no bill yet introduced. See, The new Commercial Arbitration Acts: five points to remember, by Doug Jones, Clayton Utz Insights viewed at http://www.claytonutz.com/publications on 27.02.13)