Commercial Arbitration Bill 2012
Submission 005

The Chartered Institute of Arbitrators (Australia) Limited
ACN 118 131 016

Level 16, 1 Castlereagh St
Sydney NSW 2000

Patron
The Hon A M Gleeson AC

President
John Wakefield FCIArb FACICA
Level 17, Angel Place
123 Pitt Street
SYDNEY NSW 2000 T: +61 (02) 9390 8302
E: john.wakefield@holmanwebb.com.au

Chartered Institute of Arbitrators
CIArb

Executive Officer
Michelle Sindler
T: +61 (02) 9239 0700
F: +61 (02) 9223 7053
E: info@ciarb.net.au
W: www.ciarb.net.au

13 December 2012

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

BY EMAIL: lacsc@parliament.qld.gov.au

Dear Research Director,

Commercial Arbitration Bill 2012 (QLD)

We refer to the Commercial Arbitration Bill 2012 (**the Bill**) which has been introduced into the Queensland Parliament and the letter from Legal Affairs and Community Safety Committee dated 5 November 2012 calling for submissions on the draft bill.

We commend the introduction of the Bill aimed at updating and reforming the current uniform domestic arbitration legislation based on the UNCITRAL Model Law, the accepted world standard for international arbitration, with appropriate minor amendments for domestic commercial arbitration. The introduction of the Bill, which in substantially identical form has already been enacted in other states around the country, will assist in ensuring that Queensland domestic arbitration laws reflect accepted international practice for resolving commercial disputes. It will also provide businesses with a cost effective and efficient alternative to litigation.

The Chartered Institute of Arbitrators Australia (**CIArb**) has no matters to raise concerning the form of the Bill which is (with the exception of s.20) substantively identical to the uniform legislation enacted in other states.

There are however two matters which we wish to raise for your consideration concerning the operation of the domestic arbitration regime proposed by the Bill and which is operative in other states upon the introduction of the Uniform Commercial Arbitration Acts. Whether it is appropriate to remedy these matters in the Queensland bill and in so doing bring it out of kilter with the uniformity of the legislation as enacted in other states, or otherwise commence a

dialogue with the attorneys general of the Commonwealth and other states for the purpose of effecting uniform amendments in respect of the issues raised, is a matter for judgment.

The legislative black hole

The first issue is that concerning the "legislative black hole" which arises if section 21 of the *International Arbitration Act* (2010) (Com) (IAA) has a prospective effect. This was identified and discussed by Garnett and Nottage in "*The 2010 Amendments to the International Commercial Arbitration Act: A New Dawn for Australia*", (7(1) Asian International Arbitration Journal 29 at 49-51), the Western Australian Court of Appeal in *Rizhao Steel Holding Group Company Limited v. Koolan Iron Ore Pty Limited* [2012] WASCA 50 and Albert Monichino SC in "*The Temporal Operation of the New Section 21 – Beware of the Black Hole*" to be published in ACICA News (December 2012).

The weakness identified is that the IAA does not make clear whether section 21 applies to arbitration agreements entered into before 6 July 2010. As you are aware, by reason of the new section 21 IAA, parties to an international arbitration agreement entered into after 6 July 2010 are not able to opt out of the Model Law and choose a state/territory arbitration act (or indeed a foreign arbitral law) as *lex arbitri*. If the new section 21 only applies prospectively the parties choice to opt out of the Model Law and any international arbitration agreements entered into before 6 July 2010 remains effective. However, if parties had before 6 July 2010 agreed to arbitrate pursuant to one of the state commercial arbitration acts which have now been repealed and replaced by the uniform domestic arbitration acts there would be no relevant arbitral law to regulate the arbitration.

We are authorised to **enclose** a copy of Mr Monichino SC's paper setting out in detail the way in which the difficulty arises and its consequence. Mr Monichino proposes and CIArb supports legislative intervention at the federal level to provide that the new section 21 has retrospective effect (subject to some very limited exceptions). In the alternative, Professors Nottage and Garnett have suggested intervention at both state and federal level. This would involve both amendment of the IAA to make clear that the new section 21 has a prospective effect only and amendment of the commercial arbitration acts to provide that they continue to apply to give effect to international arbitration agreements entered into before 6 July 2010 which select the only commercial arbitration act as the *lex arbitri* (see Garnett and Nottage 970-971).

The place of arbitration

The second matter is that identified by Malcolm Holmes QC in his paper delivered as part of the domestic arbitration seminar series in the Law Society of New South Wales in December 2011. Section 1(2) of the Bill provides that, subject to limited exceptions, the provisions of the proposed Act "*only apply if the place of arbitration is in Queensland*". Section 20(1) of the Bill provides that "*the parties are free to agree on the place of arbitration*". The difficulty arises where the parties in their arbitration agreement have not stated the place of the arbitration to be in Queensland. Until the arbitration is actually held there is no place of arbitration and arguably

The Chartered Institute of Arbitrators (Australia) Limited
ACN 118 131 016

Level 16, 1 Castlereagh St
Sydney NSW 2000

Chartered
Institute of
Arbitrators

CIArb

the domestic act would not apply. Even if the arbitral tribunal, after it has been formed and heard from the parties, makes a determination as to the place of arbitration (see Art 20(1) of the Model Law), there is an issue as to which act applies until this occurs.

With Mr Holmes' agreement, we **enclose** a copy of his paper including the section concerning the place of arbitration which sets out the difficulties arising out of the current drafting. In CIArb's respectful view, the matter might be resolved by deleting section 1(2) from the Bill.

These comments are made in the interests of refining the regime for uniform domestic arbitration to make it work more efficiently and avoid the pitfalls which have been contemplated. We would be very happy to assist you with further more detailed submissions if that is thought desirable.

Yours sincerely

John Wakefield FCIArb FACICA
President

[ACICA News Article]

The temporal operation of the new section 21 – beware of the black hole[1]

Albert Monichino SC

The Federal legislature should move quickly to address weaknesses in the IAA exposed by recent judicial decisions – in particular, the spectre of a legislative black hole.

Two recent cases (involving arbitrations between Chinese and Australian parties) have exposed weaknesses in the drafting of the *International Arbitration Act 1974 (Cth)* **(IAA)**. The first case is *Castel*,[2] a decision of a single judge of the Federal Court of Australia. The second case is *Rizhao*,[3] a decision of the Court of Appeal of the Supreme Court of Western Australia.

The first weakness is that the IAA does not identify the relevant courts that have jurisdiction to enforce international arbitration awards made in Australia.

The second weakness is that the IAA does not make clear whether the new section 21 applies to arbitration agreements entered into before 6 July 2010. This is the most serious weakness as it gives rise to a potential legislative black hole in respect of certain arbitrations whereby those arbitrations have no arbitral law – in other words, they fall between the gap, attracting neither the IAA, nor the State / Territory arbitration Acts.

This is a significant weakness: without an arbitral law, there is no nominated court to assist or supervise the arbitration. The problem is real and not merely theoretical, as it can fairly be expected that there are numerous long-term agreements in operation, entered into before 6 July 2010, which provide for arbitration seated in Australia. Needless to say, this is an embarrassing situation that needs to be addressed immediately by the legislature.

BACKGROUND

Enforcement of arbitral awards in Australia

International arbitration awards may be enforced under the IAA.[4] Foreign awards (ie. awards made outside of Australia) are enforceable under sections 8 – 9 of the IAA. Section 8 expressly confers upon both the Federal Court and the State/Territory Supreme Courts jurisdiction to enforce foreign awards. Alternatively, an international arbitration award may be made in Australia pursuant

to an arbitration seated in Australia. The recent cases refer to such an award as a non-foreign award.

Non-foreign awards are enforceable under Articles 35-36 of the Model Law, which is given the force of law in Australia by section 16 of the IAA.[5] These articles refer to enforcement by a "competent court". However, in a legislative oversight, there is no definition of "competent court" for the purposes of the relevant articles.

Castel concerned the question whether the Federal Court is a "competent court" for the purposes of Articles 35- 36 whereas *Rizhao* concerned the question whether the Supreme Court is a "competent court" for the purposes of those articles. In resolving those questions, both courts expressed obiter views as to the temporal operation of the new section 21.

Temporal operation of the new section 21

Prior to the amendment of the IAA in 2010, each of the states and territories had arbitration Acts in uniform style (the old CAAs). While those Acts principally regulated domestic arbitration, they also applied to international arbitrations seated in the relevant jurisdiction. Therefore, an international arbitration could attract both the IAA and the CAA.[6]

Since the amendment of the IAA, the old CAA's have been progressively repealed and replaced with new arbitration Acts, which, like the IAA, are based on the UNCITRAL Model Law. Once the new CAA's are enacted throughout Australia, the legislation regulating domestic and international arbitration in Australia will be largely harmonised.[7] But for the moment, there are important differences between the old CAAs and the IAA – in particular, the old CAAs provide greater potential for the supervising court at the seat to set aside an award-particularly, on the grounds of error of law.

The old section 21 of the IAA enabled parties to opt out of the Model Law and choose an alternative lex arbitri. It provided as follows:

> *If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.*

The section generated confusion:

(a) first, there was the question of the uncertain application of the old CAAs to international arbitrations seated in Australia;

(b) secondly, there was the *Eisenwerk*[8] problem – namely, whether parties could be taken to have opted-out of the Model Law by choosing procedural rules which were inconsistent with the Model Law.[9]

The Federal Attorney General's discussion paper of November 2008[10] raised two important questions. In particular, should the IAA be amended to:

(a) first, expressly provide that it governs exclusively an international commercial arbitration seated in Australia; and
(b) secondly, reverse the *Eisenwerk* decision?

The centrepiece of the IAA amendments in July 2010 was the repeal of the old section 21 and its replacement with a new section 21, which provided:

> *If the Model Law applies to an arbitration, the law of a state or territory relating to arbitration does not apply to that arbitration.*

The new section 21 was intended to address both questions identified in the discussion paper.[11]

As a result of the new section 21 , parties to international arbitration agreements entered into after 6 July 2010 are not able to opt out of the Model Law and instead choose a state/territory arbitration Act (or indeed a foreign arbitral law) as the lex arbitri. They remain free, however, to choose procedural rules[12] and the substantive law to determine the merits of the dispute.[13]

Surprisingly, the amending Act[14] did not clarify whether the new section 21 applies retrospectively to international arbitration agreements entered into before the new section 21 came into force on 6 July 2010. This is significant because if the new section 21 only applies prospectively, parties' choice to opt out of the Model Law pursuant to international arbitration agreements entered into before 6 July 2010 remains effective.

In *Castel* and *Rizhao*, four different judges expressed three different views as to the temporal operation of the new section 21.

CASTEL

The facts

A distributorship agreement was made between an Australian party (Castel) and a Chinese party (TCL) in 2003 referring disputes to arbitration "in Victoria" according to Victorian law.[15] Arbitration proceedings were commenced in July 2008, and an arbitration award was rendered in December 2010 in favour of the

Australian party. It then sought to enforce the award in the Federal Court. The Chinese party contended that the Federal Court did not have jurisdiction to enforce the award.

Held

Murphy J held that section 39B(1)(A)(c) of the *Judiciary Act 1903* (Cth) conferred jurisdiction on the Federal Court such that it was a "competent court" to enforce non-foreign awards under Articles 35-36 of the Model Law.[16]

Obiter

A question arose about the temporal operation of the new section 21. TCL argued that the Supreme Court had jurisdiction to enforce the award under the old CAA. In response, Castel argued that the Supreme Court did not have such jurisdiction because of the retrospective operation of the new section 21 which ousted the operation of the old CAAs by rendering ineffective any choice by parties to exclude the Model Law in an international arbitration agreement. In countering this argument, TCL relied on the general presumption in Australian law against retrospectivity of legislation.

It was common ground between the parties that they had not in the instant case purported to opt out of the Model Law[17]. Therefore, the question about the temporal operation of the new section 21 arose in an artificial context.

Murphy J noted that the new section 21 did not change the substantive law to be applied in determining the rights and liabilities of the parties in a Model Law arbitration. He said that section 21 was best described as procedural rather than a substantive provision.[18] As such, s 21 should be construed to have retrospective operation unless the amending Act indicated a contrary intention, or if it adversely affected any vested rights of the parties.[19]

Having examined the extrinsic materials to the amending Act, the learned judge was emboldened in the view that the new section 21 was intended to be an immediate fix to a problem that had created significant legal difficulties and confusion.[20]

As far as "vested rights" were concerned, his Honour found it difficult to see how any vested rights could be adversely affected by the retrospective operation of the new section 21.[21]

Accordingly, Murphy J concluded that the new section 21 had retrospective effect (inferentially, regardless of whether or not an arbitration had been commenced prior to 6 July 2010).

Postscript

Following his determination of the jurisdictional objection, Murphy J proceeded to hear an application by TCL to set aside the award under Article 34 of the Model Law and, further, Castel's application to enforce the award under Article 35 of the Model Law. On 2 November 2012, Murphy J dismissed the setting aside application and held that the award should be enforced (thereby rejecting TCL's arguments based on Article 36 of the Model Law as to why the award should not be enforced)[22].

While Murphy J's judgment was reserved, TCL brought an application in the original jurisdiction of the High Court of Australia contending that the implementation of the Model Law in the IAA as part of Australia's domestic law, is unconstitutional[23]. The matter was heard by the High Court on 6 November 2012. Judgment is reserved

The thrust of the challenge is that the Federal Court's discretion in enforcing an international arbitral award is so limited under Articles 35-36 of the Model Law that it constitutes an impermissible interference with the judicial power of the Commonwealth and/or undermines the institutional integrity of a Ch III Court. This is because Articles 35-36 in effect, it was argued, require Australian superior courts to "rubber stamp" international arbitration awards, even if, on their face, they manifest an error of law.

RIZHAO

The facts

In 2007, a contract for sale of iron ore was entered into between a Chinese party (Rizhao) and an Australian party (Mt Gibson) referring disputes to arbitration in accordance with the *Commercial Arbitration Act 1985 (WA)* **(CAA 1985 (WA))**. Arbitration proceedings were commenced in November 2009 and were substantially advanced by July 2010. An award was rendered in August 2010 (following the commencement of the IAA Amending Act) in favour of the Australian party. It then enforced the award under the CAA (WA) 1985.[24]

[Therefore, an international arbitration agreement was made before 6 July 2010 at a time when parties were permitted to opt out of the Model Law. By selecting the CAA, the parties had opted out of the Model Law in the instant case].

Appeal

On appeal, Rhizao contended that:

a) the Supreme Court had no jurisdiction to enforce a non-foreign award under the CAA, and that such an award must be enforced under the IAA;
b) the opting out of the Model Law in the present case was ineffective because the new section 21 applied retrospectively such that the Model Law covered the field; and
c) the new section 21 related to a matter of procedure and therefore should be construed to apply to all arbitration agreements, whether made before or after 6 July 2010.

Held

The appeal was dismissed (by Martin CJ, Buss and Murphy JJA) on the basis that Rizhao should not be allowed to raise this point on appeal when it was common ground at trial that the Supreme Court had jurisdiction to enforce the non-foreign award under the CAA.[25]

Obiter

Martin CJ (with whom the other members of the court agreed) was of the view that there was no doubt that the Supreme Court has jurisdiction to enforce non-foreign awards under the IAA.[26] Nowhere does the judgment explain how the Supreme Court has jurisdiction. However, this was a matter of common ground on appeal[27].

As far as the temporal operation of the new section 21 is concerned, the Court of Appeal was divided. Two different views emerge:

1. The majority view (Martin CJ, with whom Buss JA agreed): entry into the arbitration agreement created vested rights which the new section 21 did not interfere with, irrespective of whether an arbitration was commenced before 6 July 2010.[28] [Contrast Murphy JA: prior to commencement of an arbitration, the rights created by an arbitration agreement are purely executory. They do not vest until an arbitration is commenced[29]];
2. All members of the Court of Appeal: upon commencement of an arbitration, the contractual rights recognised by section 21 prior to its amendment are invoked, creating vested rights.

Martin CJ observed that very real practical problems could arise if the legal regime governing arbitral proceedings which are underway are fundamentally altered during the course of those proceedings.[30]

Unlike Murphy J in *Castel*, all members of the Court of Appeal took the view that the extrinsic materials did not provide any clear guidance on the question of the temporal operation of the new section 21.[31]

THE BLACK HOLE

If the new section 21 has prospective effect (a view favoured by the majority of the Court of Appeal in *Rizhao*) there is a potential legislative black hole in relation to certain categories of arbitration.[32]

The possibility of this black hole was first identified by Professors Nottage and Garnett in an article published in the Asian International Arbitration Journal in 2011 (before the decisions in *Castel* and *Rizhao*).[33]

The problem is best illustrated by a factual scenario.

Take an international arbitration seated in NSW brought pursuant to an arbitration agreement between a Chinese party and an Australian party made before 6 July 2010 in which the parties had agreed to arbitrate pursuant to the *Commercial Arbitration Act 1984 (NSW)* ***(CAA 1984 (NSW))***. In NSW, that Act was repealed on 1 October 2010 and replaced by the *Commercial Arbitration Act 2010 (NSW)* **(CAA 2010 (NSW))**.

In this example, the parties have opted out of the Model Law, as permitted by the old section 21 (assuming of course that the new s 21 has prospective effect only).

Assume an arbitration was commenced in the above fact scenario in January 2012. By this time, the chosen lex arbitri has been repealed. So there is no relevant arbitral law to regulate the arbitration. Hence the black hole.

In summary, a legislative black hole arises if an arbitration is commenced *following* the enactment of the new CAA where the following conditions are satisfied:

(a) the new section 21 has prospective effect;
(b) the arbitration is brought pursuant to a pre-6 July 2010 international arbitration agreement; and
(c) the parties have selected the old CAA as the arbitral law (and thereby opted out of the Model Law, as permitted by the old section 21).

It is submitted, however, that a legislative black hole would also arise in the above factual scenario if the arbitration had been commenced prior to 1 October 2010.

The new CAAs contain savings and transitional provisions in the following terms:

(1) Subject to subclause (2):

(a) this Act applies to an arbitration agreement (whether made before or after the commencement of this Act) and to an arbitration under such an agreement, and

(b) a reference in an arbitration agreement to the Commercial Arbitration Act 1984 , or a provision of that Act, is to be construed as a reference to this Act or to the corresponding provision (if any) of this Act.

(2) If an arbitration was commenced before the commencement of this Act, the law governing the arbitration and the arbitration agreement is to be that which would have been applicable if this Act had not been enacted.

(3) For the purposes of this clause, an arbitration is taken to have been commenced if:

(a) a dispute to which the relevant arbitration agreement applies has arisen, and

(b) the arbitral tribunal has been properly constituted.[34] [emphasis added]

The better view is that the above provisions (in particular, *subclause (2))* do not apply to international arbitration agreements and therefore do not assist in the above hypothetical situation. Section 1 of the new CAAs makes clear that the new Acts only apply to domestic arbitrations. To be a domestic arbitration, the arbitration has to be brought pursuant to an arbitration agreement made between parties who have, at the time of the conclusion of the arbitration agreement, their places of business in Australia and, further, the arbitration must not be an arbitration to which the Model Law (as given effect by the IAA) applies[35]. The expression "arbitration agreement" in clause (1)(a) of the transitional provisions (referred to above) should sensibly be given a single meaning and not a different meaning depending on whether the agreement was entered into before or after the commencement of the new CAA. It is trite that the new CAA applies only to domestic arbitration agreements entered into after the commencement of the new CAA. By parity of reasoning, the new CAAs (including the transitional provisions) do not apply to international arbitration agreements entered into before their commencement.

Properly considered, therefore, the savings and transitional provisions of the new CAAs save the old CAA (which is otherwise repealed) where a domestic arbitration is commenced before the new CAAs come into force. But they are not relevant to an arbitration brought pursuant to an international arbitration agreement, whether such arbitration is commenced before or after the new CAA comes into force.

Thus, there is also a potential black hole in respect of international arbitrations brought in the above factual scenario prior to the enactment of the CAA 2010 (NSW) on 1 October 2010. That is, when the arbitration was commenced (say on 1 September 2010), the CAA 1984 (NSW) applied. But when the CAA 2010 (NSW)

was enacted (on 1 October 2010), the former Act was repealed and no longer applied to regulate the arbitration. If the arbitration was not concluded before the enactment of the CAA 2010 (NSW) there is no longer any statutory power of the Supreme Court of NSW to assist the arbitration. Even if concluded, there is no arbitral law setting out the grounds and procedure for challenge to the arbitral award, or for the enforcement of the award.

The black hole problem will only get bigger once new CAAs come into force in Queensland, Western Australia and the Australian Capital Territory. So how do we fix the problem?

Professors Nottage and Garnett advocate legislative intervention at both the federal and state/territory level:

(a) first, amendment of the IAA to make it clear that the new section 21 has prospective effect only. [This is because they are of the view that entry into the arbitration agreement creates substantive rights (a view favoured by the majority in *Rizhao*) which should not be interfered with lightly];
(b) secondly, amendment of the new CAA's to provide in effect that they continue to apply to give effect to international arbitration agreements entered into before 6 July 2010 which select the old CAA as the lex arbitri. [This will involve reinstating the old CAAs where they have been repealed, albeit for a limited purpose.][36]

With respect, the prospects of the introduction of such amending legislation on a uniform basis across the various states and territories in Australia, in anything resembling a timely manner, are very poor. I therefore propose that the problem be fixed at the federal level by an amendment to the IAA (without any amendment required to the CAAs at the state/territory level).

In my view, the IAA should be amended to provide that the new section 21 has retrospective operation (i.e. applies to international arbitration agreements entered into before 6 July 2010) unless the following three conditions are satisfied:

(a) first, an arbitration was commenced prior to the coming into force of the new CAA in the relevant state or territory in which the arbitration is seated;
(b) secondly, an award has been rendered before the commencement of the new CAA; and
(c) thirdly, the award has been enforced, alternatively has been set aside, on the basis that the old CAA is the lex arbitri.

This formulation does not interfere with court judgments (dealing with challenges to the award, alternatively enforcement of the award) which have been rendered on the basis that the old CAA is the arbitral law.

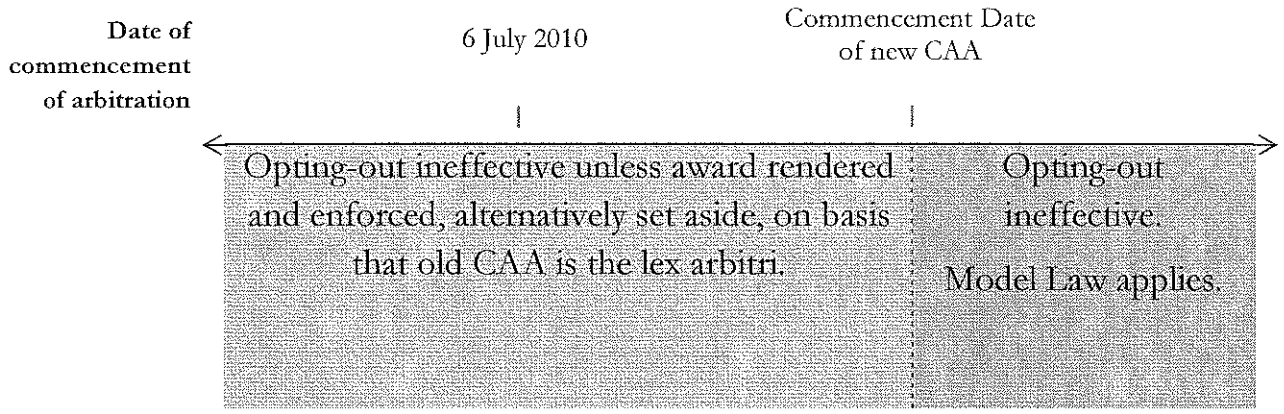
While it might be said that this formulation may have the effect of fundamentally changing the legal regime in which an arbitration has been conducted, the reality is that:

(a) the new CAA regime is strikingly similar to the IAA regime; and
(b) for better or worse, the state and territory parliaments have repealed the old CAA upon the coming into force of the new CAA without saving the old CAAs in their operation for international arbitrations.

There is no need to make any exception for arbitrations instituted following the commencement date of the new CAAs because in those circumstances it is impossible to give effect to the parties' choice in their arbitration agreement to opt out of the Model Law. Put simply, the chosen lex arbitri has ceased to exist.[37]

My proposed legislative solution is illustrated by the following diagram.

Fig 1. Proposed amendment of IAA



Thus, take an international arbitration agreement entered into before 6 July 2010 which selected the old CAA as the lex arbitri. If prior to the commencement date of the new CAA in the relevant state or territory in which the arbitration is seated:[38]

- an arbitration was commenced;
- an award has been rendered; and
- the award has been enforced, alternatively has been set aside, on the basis that the old CAA is the lex arbitri,

under my proposed legislative solution, the parties' purported opting-out of the Model Law is effective. Save for the above limited exception, the new section 21 prevails with the result that Model Law and the IAA covers the field to the exclusion of the state and territory arbitration Acts.

One possible, but inevitable criticism, of the above formulation is that it is a bit arbitrary in terms of the dividing line as to when the opting-out of the Model Law will be deemed to be effective, given that the date will be different between arbitrations seated in different states and territories (depending on the date on which the relevant new CAA commences operation). Of paramount importance, however, is the timely removal of uncertainty as to whether the new section 21 has prospective, alternatively retrospective effect and, further, removal of the spectre of a legislative black hole.

JURISDICTION TO ENFORCE NON-FOREIGN AWARDS

Separately, the IAA should, in my view, be amended to provide expressly that both the Federal Court and the State/Territory Supreme Courts have jurisdiction to enforce awards under Chapter VIII of the Model Law.

This could perhaps be done by way of supplementation of the existing section 18 which nominates the courts that have jurisdiction to perform the functions set out in Article 6 of the Model Law.

Likewise, Article 17 H of the Model Law, dealing with recognition and enforcement of interim measures, refers to "the competent court" but nowhere in the IAA is a relevant Australian court identified as "the competent court". Again, this could be fixed by a simple amendment.

As Justice Rares said extra curially in September 2011:[39]

> Parties should not have to sift through a legislative morass and apply constitutional law principles to find a court in which to enforce an award.

Albert Monichino SC is a senior counsel based in Melbourne. He practises as a barrister, mediator and arbitrator and is a Fellow of ACICA.

---

1 This article is based on a paper presented at ICC Australia's International Arbitration in Australia – 'Doing Business and Resolving Disputes with China' conference on 30 July 2012 in Melbourne.

2 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd* [2012] FCA 21; (2012) 201 FCR 209

3 *Rizhao Steel Holding Group Company Ltd v Koolan Iron Ore Pty Ltd* [2012] WASCA 50.

4 On the other hand, domestic arbitration awards are enforceable under the state/territory CAAs.

5 Indeed, Articles 35 – 36 are not limited to the enforcement of non-foreign awards. However, section 20 of the IAA provides that those articles do not apply to the enforcement of foreign awards. By reason of that restriction, Articles 35 – 36 of the Model Law are limited in their operation to the enforcement of non- foreign awards.

6 See *American Diagnostica Inc. v Gardipore Ltd* (1998) 44 NSWLR 312 at 323 – 325.

7 New CAA's are yet to be enacted in Queensland and the ACT. While enacted in Tasmania and WA, the new CAAs are yet to come into force.

8 *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Qd R 461.

9 *Eisenwerk* was generally considered by commentators to be wrong as it failed to grasp the distinction between the lex arbitri and procedural rules.

10 Federal Attorney-General, 'Review of the International Arbitration Act 1974' (Discussion Paper, November 2008). Accessible at: http://www.ag.gov.au/Documents/Review%20of%20the%20International%20Arbitration%20Act%20 1974%20-%20Discussion%20Paper.pdf.

11 Explanatory Memorandum for the *International Arbitration Amendment Bill 2009* (House of Representatives) paras [110]-[117].

12 Model Law, Article 19.

13 Model Law, Article 28.

14 *International Arbitration Amendment Act 2010* (Cth).

15 No reference was made in the arbitration agreement to the old CAA 1984 (Vic).

16 At [39].
17 See Note 15 above.
18 At [67].
19 At [71].
20 At [75]-[77].
21 At [69].
22 Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co. Ltd [2012] FCA 1214
23 TCL Air Conditioner v Judges of the Federal Court of Australia [2012] HCATrans 172 and [2012] HCATrans 277.
24 In WA, the CAA 1985 (WA) has not yet been repealed.
25 At [93], [153] and [154]
26 At [74]
27 Justice Rares has suggested that the Supreme Court has jurisdiction by virtue of s 39(2) of the *Judiciary Act 1903* (Cth). See Note 40 below.
28 Martin CJ at [133].
29 Murphy JA at [207].
30 At [141].
31 At [141], [203] – [205].
32 See Keane PA, 'The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House Our Rules' (Paper presented at AMTAC Annual Address, Brisbane, 25 September 2012), http://www.fedcourt.gov.au/aboutct/judges_papers/Keane-CJ-20120925.rtf viewed 1 October 201, at pg 4. Separately, if section 21 has prospective operation, the *Eisenwerk* problem remains alive and well.
33 Richard Garnett and Luke R. Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' 7(1) *Asian International Arbitration Journal* 29 at 49-51
34 See, for example, Schedule 2 to the CAA 2010 (NSW).
35 See section 1(3)(a) and (c) of the new CAA 2010 (NSW). An arbitration between a Chinese party and an Australian party would thus not qualify as a domestic arbitration.
36 Richard Garnett and Luke Nottage, *What Law (If Any) Now Applies to International Commercial Arbitration in Australia?* (2012) Vol 35(3) UNSW Law Journal 953 at 970 – 971. Alternatively, they suggest that the new CAAs be amended to provide that they apply in those circumstances.
37 The only way this could be remedied is by an amendment to the new CAAs at the state and territory level as per the first option advocated by Professors Nottage and Garnett.
38 For example, 1 October 2010 in NSW, 17 November 2011 in Victoria.
39 Steven Rares, 'The Federal Court of Australia's International Arbitration List', paper presented at the Senior Counsel Arbitration Seminar of the New South Wales Bar Association (14 September 2011), 12.

Drafting an Effective Domestic Arbitration Clause

by

Malcolm Holmes QC[1]

Before focussing on the particular drafting issues associated with arbitration clauses, it should be remembered that there are some fundamental principles of contract drafting which also apply to any arbitration clause and which must be borne in mind;

1 the clause needs to be carefully and *clearly stated* without any ambiguities and without any uncertainty, e.g., referring to an arbitration institution which does not exist. *Take care*

2 the clause needs to be *concise*, the longer and more wordy the clause, the greater the likelihood of uncertainty and inconsistencies arising. *Make it short as possible*

3 the clause needs to be workable and to provide a *practical* solution, e.g., specifying a named person as the arbitrator may be clear and concise but what if that person is later unavailable or has subsequently entered into a commercial relationship with one of the parties. *Stop and think about how the clause will work in practice*

[1] An earlier version of this paper was delivered as part of the Domestic Arbitration Seminar Series 2011, Law Society of NSW, on 13 December 2011

May I repeat a suggestion for a fourth fundamental drafting principle[2]. What do you want to achieve by the particular clause? When drafting any clause in a contract it is necessary to bear in mind what is to be achieved by that clause. A domestic arbitration clause is no different in this respect. The obvious answer is to ensure that any disputes are resolved by arbitration as distinct from any other form of dispute resolution. However whilst an arbitration clause may be based on the unstated premise that, in the circumstances of the particular transaction, arbitration is the preferred method of resolving disputes, those drafting a domestic arbitration clause should also bear in mind why arbitration is the parties' preferred process (the positives), so as to ensure that those benefits are attained and why in certain cases, arbitration is not preferred (the negatives) so as to ensure that those disadvantages are avoided.

The legislature has encapsulated the desirable features of the arbitration process in s 1C of the *Commercial Arbitration Act 2010* (NSW) where it has set out the paramount object of the Act. The paramount objective is to achieve a

"fair",

"final"

"resolution by impartial arbitral tribunal"

"without unnecessary delay," and

"without unnecessary expense"

---

[2] First made in "Drafting an effective arbitration clause" (2009) 83 ALJ 305

These elements and the paramount objective must be borne in mind when drafting any arbitration clause and the aim of those drafting the clause should be to attain these advantages in resolving any dispute.

Apart from these fundamental principles of contract drafting there are specific matters which must also be considered when drafting an arbitration clause.

1 SCOPE OF THE ARBITRATION AGREEMENT

Absent special circumstances, the parties should not attempt to limit the scope of disputes which are being, or are to be submitted, to arbitration[3]. Less inclusive language invites arguments about whether a particular dispute is covered by the clause and is to be arbitrated or whether the dispute is not covered by the clause and is to be litigated before the courts.

Thus wherever possible use broad and inclusive language such as;

(a) all claims, disputes or differences

(b) related to, in relation to, or in connection with (directly or indirectly)

(c) arising out of, arising under, or arising in connection with

(there is judicial support for the presumption that the parties did not intend to have their disputes resolved by different tribunals *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165, Gleeson CJ)

[3] Guideline 3, IBA Guidelines for Drafting International Arbitration Clause, adopted by IBA on 7 October 2010

2 A COMBINED OR STAGED DISPUTE RESOLUTION PROCESS ENDING IN ARBITRATION

Most modern dispute clauses provide for a staged dispute resolution process involving possibly consultation, mediation or expert determination and ultimately, arbitration. When drafting an arbitration clause a question arises as to whether these more informal and less compulsive processes should be addressed and included. After all, the parties are free at any time to talk and try to mediate their dispute. On balance however, it should be recognized that when the parties have reached the stage of a formal dispute, either party may be reticent about suggesting that they try mediation to resolve their dispute as it may be misunderstood and seen as a sign of weakness or an indication of a lack of a belief in the strength of that party's case. Accordingly, it is generally advisable to include specific and enforceable provisions to mediate although strict time limits should be included in the contract to prevent any unnecessary delay. Otherwise the parties run the risk of losing the advantage of an expeditious and efficient dispute resolution process through arbitration.[4]

An agreement to mediate is enforceable in principle, if the conduct required of the parties for participation in the process is sufficiently certain. *"What is enforced is not co-operation but participation in a process from which co-operation and consent might come."*[5]

---

[4] An example of a staged clause is also found in the judgments in the *Austeel litigation, supra.*
[5] *Hooper Bailie Associated Ltd v. Natcon Group Pty Limited* (1992) 28 NSWLR 195 at 206.

Another consideration which arises when there are consultation, conciliation or mediation processes prior to any arbitration, is a concern that any delay may impact on a limitation period and effect the parties substantive rights. In such a situation the parties may wish to consider including a "standstill" clause that stops the clock running on any applicable limitation period or deadline, pending the completion of any prerequisite dispute resolution process. Alternatively, perhaps consideration can be given to inserting a time limit for any such preliminary mediation processes before a right to arbitrate arises.

This then brings me to some particular **MATTERS ARISING UNDER THE NEW UNIFORM COMMERCIAL ARBITRATION ACT**. A note of caution; the references which follow are to the provisions of the *Commercial Arbitration Act 2010* (NSW) which may differ slightly from the form in which the "almost uniform" legislation was subsequently adopted in other states and territories.

3 PRIVACY AND CONFIDENTIALITY OF THE ARBITRATION

It is the accepted position in Australia that arbitration whilst a private process is not confidential (see *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10). It is that parties to an arbitration may be required to disclose information relating to the arbitration process to corporate regulatory authorities, to shareholders and insurers and the courts in enforcement proceedings, and third parties such as witnesses are not bound by the terms of the arbitration agreement. The Act however has introduced a regime of confidentiality for domestic arbitrations thereby effectively

reversing the conclusion reached by the High Court in *Esso Resources.* Under section 2 of the Act, confidential information in relation to arbitral proceedings "means information that relates to the arbitral proceedings or to an award made in those proceedings and includes (some examples are given). The statutory regime protecting this confidential information is found in sections 27E – 27I of the Act which apply "unless otherwise agreed by the parties" (see s27E(1)). Thus, this regime applies unless the parties agree to opt out, e.g. as in Rule 18 of ACICA Rules)

4 THE NUMBER OF ARBITRATORS

Section 10 states that the parties "are free to determine the number of arbitrators" and failing such determination, the number shall be one. The smaller number is obviously less expensive for the parties and makes it much easier to arrange hearings. There may be a perceived downside of having a single arbitrator if it is thought that a panel of three is more likely to produce a fair result. The default position of one, is is a change from Article 10(2) of the Model Law which states that failing a determination by the parties, there shall be three arbitrators.

One omission in the Act is an ability to resolve an impasse between the parties if they cannot agree on a sole arbitrator. If there is no determination by the parties, there is no default mechanism and it is necessary to go to court to have the arbitrator appointed. This should be addressed in the clause otherwise the costs of an application to the court will be added to the resolution costs.

5 COURT

A significant cost is added with any application to a court and as a rule of thumb, the higher the court the higher the costs to be paid by the parties. Section 6 states that the court performing the limited functions specified under the Act (see Section 5; extent of court intervention) is the Supreme Court, unless the parties agree that it should be the District Court or the Local Court. Thus where the amounts likely to be in dispute are within the jurisdiction limits of these courts, consideration should be given to including an agreement to confer jurisdiction on those courts so as to avoid the cost of initiating proceedings in the Supreme Court.

6 QUESTIONS OF LAW

The Act does contemplate a broader role for the courts in the arbitration process than the very limited involvement contemplated by the Model Law on International Commercial Arbitration on which the Act is based.

Section 27J states "unless otherwise agreed, the court has jurisdiction to determine any question of law arising in the course of the arbitration". This is touted as an added advantage, it is said ("*the Olenia*" [1982] 1 WLR 871 at 882 quoted in Jones at 362) that "the parties can nip down the road and pick the brains of one of Her Majesty's judges and thus enlightened, resume the arbitration. It is essentially a speedy procedure designed to interrupt the arbitration to the minimum extent possible"

But this advantage may be seen to be at odds with the paramount objective of avoiding delay. An illustration is seen in the sorry timeline in the arbitration saga in *Tuta Products Pty Ltd v Hutcherson Bros Pty Limited* (1972) 127 CLR 253 where there was an equivalent process which enabled arbitrators to state a case to allow the parties to obtain the opinion of the court on a legal issue arising during the arbitration;

July 1970 during the arbitration, the arbitrators stated a case on three questions of law

23 September 1970, the Court of Appeal advised on the three questions

18 November 1970, the arbitrators made their arbitral award in conformity with the ruling by the court of Appeal

4 January 1971, the losing party files an application to set aside the award for error on the face of the award

16 January 1971, Isaacs J, refuses the application and naturally follows the earlier ruling by the Court of Appeal

March 1971, Court of Appeal, then refuses an appeal and also follows its earlier decision

1 September 1971, High Court, holds that the Court of Appeal was right on 2 out of 3 of the questions and wrong on the 3rd and remits the award to be dealt by the arbitrators on the basis of the High Court's decision

? after these costs were incurred, the parties were left to a fresh hearing by the arbitrators

7 THE RIGHT OF APPEAL FROM AN AWARD

There is a right of appeal on a question of law arising out of an award under s34A of the Act if the parties agree that an appeal may be made and the court grants leave. The usual position at law is there is no appeal from a judgment of a court (see Campbell JA in *Altaranesi v Industrial Relations Commission of New South Wales* [2011] NSWCA 351 at [25]; "Rights of appeal were unknown to the common law. A right of appeal to this Court [the Court of Appeal] exists only if there is a statute conferring that right of appeal"). It would require very special circumstances to exist before such an agreement would be justified. As noted in the paramount objective, an essential and desired feature is a final decision "by" the agreed tribunal. As a rule of thumb, do not under any circumstance agree.

An extreme example of the delay and uncertainty caused by the right of appeal is the decision of the High Court of Australia in the decision of *Old CGU Inc.*[6] In that case, the High Court on 18 May 2006 by a 4 to 3 majority upheld a preliminary objection taken by a defendant party to proceedings which had been commenced by the applicant in May 2001 and restrained the further hearing of the proceedings. The case had involved fourteen judges in the judicial process over the preceding five years. 10 judges found in one parties' favour but in the only court that mattered, 4 found in favour of the other party.

The defendant failed when it raised the preliminary objection before Peterson J (*McRann v United Globalcom Inc* (2003) 142 IR 275), the

[6] *Old CGU Inc. v Industrial Relations Commission of New South Wales in Court Session*, (2006) 225 CLR 274, [2006] HCA 24, 18 May 2006 (Gummow, Hayne, Callinan and Crennan JJ with Gleeson CJ, Kirby and Heydon JJ dissenting, overruling *Old CGU Inc, v. Industrial Relations Commission* (2004) 60 NSWLR 620 (Court of Appeal, Spigelman CJ, Mason P and Handley JA), *United Globalcom v McRann* [2003] NSW IR Comm 318 (Full Bench) and *McRann v United Globalcom Inc* (2003) 142 IR 275 (Peterson J).

defendant again failed on appeal to the Full Bench 3-0 before Wright J, President, Walton J, Vice President and Boland J now President *United Globalcom v McRann* [2003] NSW IR Comm 318 (Full Bench) and the defendant again failed before the Court of Appeal, 3-0, Spigelman CJ, Mason P and Handley JA *Old CGU Inc, v. Industrial Relations Commission* (2004) 60 NSWLR 620 and failed to convince 3 of the High Court, Gleeson CJ, Kirby and Heydon JJ but finally convinced Gummow, Hayne, Callinan and Crennan JJ *Old CGU Inc. v Industrial Relations Commission of New South Wales in Court Session*, (2006) 225 CLR 274, [2006] HCA 24, 18 May 2006 thereby overruling all courts and judges below. The *minority*, that is the ten other judges involved (which included the three dissenting members of the High Court and all seven members of the three courts below) disagreed with the *majority* of four and delivered judgments which would have allowed the applicant to proceed with his case. The only judicial decision which mattered was that of the ultimate appellate court. As one member of the US Supreme Court said "*we are not final because we are infallible; we know that we are infallible only because we are final.*"[7]

The right of appeal is sometimes touted as an advantage. In an article in the most recent issue of the Australian Law Journal, a critic of arbitration[8], saw commercial arbitration as defective because "judicial review of both arbitration awards and mediated settlements is very limited". This however fails to recognise that when the parties consent to an arbitration process they generally do so to avoid the uncertainty, the additional costs and the

[7] *Brown v Allen,* 344 US 443, 9 February 1953, per Jackson J at 540.
[8] Peter L Murray, "*The privatisation of civil justice*" (2011) 85 ALJ 490.

inevitable delay associated with an appeal process. The parties want a flat system of dispute resolution and do not want the time and uncertainty of appeals which have been available under earlier domestic arbitration legislation or a court judgment. Hence the maixim; choose your arbitrators wisely.

In the recent well publicised case of *Westport Insurance Corp v Gordian Runoff Ltd* [2011] HCA 37, there was a similar criticism of arbitration generally because of alleged delays whereas properly understood, the arbitration did not produce delays, they were in fact occasioned by the right of appeal available under the previous legislation from a domestic arbitration award.

In the article in the ALJ it was asserted that the view that arbitration is quicker, and more expert than public litigation "is an illusion" and that "specialised expertise can be provided in public justice by expert judges, court appointed experts or otherwise" (at page 502). A similar criticism was recently expressed by Heydon J in *Westport v Gordian*, who noted (at [111]) that had the matter not gone to arbitration but had gone before a commercial trial judge, that trial judge "would have ensured more speed and less expense". What Heydon J did not mention however was that the arbitration panel was chaired by a recently retired Court of Appeal judge who could be assumed to know the law better than a first instance trial judge and the arbitration panel also included Australia's leading expert on insurance disputes who provided a wealth of expertise to the workings of the panel. It was the right to appeal which was available for a domestic arbitration award (and which would have been available from any decision of a commercial

trial judge) which produced the delay. If there is no such appellate mechanism, the delays associated with appeals can be avoided.

8 THE PLACE OF ARBITRATION

Under s 1(2) of the Act, subject to limited exceptions such as award enforcement etc, the provisions of the Act "only apply if the place of arbitration is in New South Wales." Note the provision in s 20(1): "the parties are free to agree on the place of arbitration." What is the place of arbitration? If it is not in NSW the NSW Act does not apply. It is advisable to state that the place of arbitration is in NSW. Why?

Section 2A relevantly states that "regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic arbitrations and the application of the provisions of the Model Law (as given effect by the International Arbitration Act 1974 of the Commonwealth) to international commercial arbitrations and the observance of good faith"

Jones on Commercial Arbitration says (at p258) that "the common law position [is that]... if the parties fail to designate the place of arbitration, it is based on the physical location of the arbitration." The authority given is *Amercian Diagnostica v Gradipore Ltd* (1998) 44 NSWLR 312 at 324. There, Giles J as he then was, said; "The seat of the arbitration is not necessarily where it is held, although where the parties have failed to choose the law governing the conduct of the arbitration it will prima facie be the law of the country in which the arbitration is held because that is the country

most closely connected with the proceedings: see *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 607,609, 616; *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at 453-454; *Bank Mellat v Hellinki Techniki SA* [1984] QB 291 at 301."

But the problem remains, until the arbitration is actually held there is no place of arbitration. Does the domestic act apply? What if the contract is made between Australian parties in different Australian states? What if some where in one state and another party and the place of performance is in another?

Where the parties have not chosen the seat or place of arbitration, either expressly or impliedly, the arbitral tribunal may (after it has been formed and heard from the parties) make the determination (Art 20(1) of the Model Law). What act applies in the meantime?

The seat of the arbitration is of critical significance in an international context. The seat is also the place where the award is usually made following the conclusion of the hearing (Art 31(3) of the Model Law and s 31(4)). To assist in making this determination UNCITRAL in 1996 published Notes on Organizing Arbitral Proceedings which stated (at para 25): Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case.

The Model Law does not address the factors to consider when choosing a seat. As was noted by Holtzmann and Neuhaus in their definitive text on the

Model Law at 36-37, "the territorial criterion as finally adopted [in the Model Law] does not provide for the situation in which the place of arbitration is not yet known, as when the question is left to the arbitral tribunal to decide ..... In the end, the problem was left outside the scope of the Model law, since no connecting factor was completely satisfactory to all delegations .. The Commission [UNCITRAL] made clear ... that the matter of court assistance to arbitration prior to selection of the place of arbitration was not one governed by the Model Law so that a party would be able to obtain court assistance under any applicable provision of law other than the Model Law. Legislatures considering the Model law are, of course, free to extend its scope to cover such situations."

The NSW legislature has extended the powers of the Court to deal with these matters but only if the place of arbitration is NSW.

As noted by the Singapore Court of Appeal, "the English concept of 'seat of arbitration' is the same as 'place of arbitration' under the Model Law (PT Garuda Indonesia v Birgen Air [2002] 1 SLR(R) 401 at 407).

The use of the word "juridical" in qualifying the seat of arbitration is deliberate, as the word "means and connotes the administration of justice so far as the arbitration is concerned. It implies that there must be a country whose job it is to administer, control or decide what control there is to be over an arbitration" (*Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] All
ER (D) 222 (Mar); [2008] BLR 321; [2008] 1 Lloyd's Rep 608; [2008] EWHC 426 (TCC) at [15]). Thus selecting the juridical seat, whilst it does

involve choosing a physical location, is concerned with selecting a legal system as distinct from choosing a venue for any hearing. Thus the choice of the seat involves the parties choosing the arbitration law of the seat. This law so selected is variously referred to as the lex arbitri, the curial law of the arbitration or procedural law.

An agreement as to the seat of arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration (C v D [2007] EWCA 1282, Longmore LJ at [17]).The parties' choice of the seat is an agreement that the courts of the seat will have exclusive supervisory jurisdiction over the arbitration. Thus, any challenge to the award should be made under the laws of the seat absent an express agreement between the parties to the contrary and except where the challenge arises on an application for enforcement of the award under the New York Convention. The law of the seat is the curial law which governs the validity of the award and challenges to it. The "principle is that a party should not generally bring proceedings in relation to an arbitration except in the courts of the jurisdiction of the seat of the arbitration" (*Chalbury MccOuat International Ltd v PG Foils Ltd* [2011] 1 All ER (Comm) 435; [2010] BLR 593; [2011] 1 Lloyd's Rep 23; [2010] EWHC 2050 (TCC) at [21], except of course enforcement proceedings in those jurisdictions where the assets may be located).

As the choice of the seat is dependent upon the parties' agreement, it is necessary to ascertain the proper construction of the parties' agreement to

identify the seat. Arbitration agreements embedded in the main contract sometimes cause problems when the parties have not made their intentions clear or have failed to take into account the impact of other clauses in their agreement.

There is the added problem of a seat in federal State. The choice of the seat is directed at ascertaining the particular system of law to regulate and support the arbitration process and the award. This does not cause problems for states having a unitary system of law but, if the seat is located in a federal State such as Australia or Switzerland, it is necessary to specify a city such as Sydney or, as occurred in *Raguz v Sullivan* (2000) 50 NSWLR 236; [2000] NSWCA 240; BC200005212, Lausanne, as the seat. Otherwise merely specifying Australia or Switzerland would not have identified the particular applicable system of law.

There is an implied term in the parties' agreement on the seat and the curial law, that the courts of the seat of arbitration will have exclusive supervisory jurisdiction (*C v D* [2007] All ER (D) 365 (Jun); [2007] 2 All ER (Comm) 557; [2007] EWHC 1541 (Comm) at [52], affirmed on appeal C v D [2007] All ER (D) 61 (Dec); [2008] 1 All ER (Comm) 1001; [2008] 1 Lloyd's Rep 239; [2007] EWCA Civ 1282). Accordingly an attempt to invoke the courts of another jurisdiction to set aside the award is in breach of the parties' contractual rights and may be restrained by an anti-suit injunction (*Shashoua v Sharma* [2009] All ER (D) 64 (May); [2009] 2 All ER (Comm) 477; [2009] EWHC 957 (Comm) Ramsey J at [23]).

9 THE OPT-OUT PROVISIONS

Finally the Act using the opt-out approach, includes a number of other supplementary provisions which are not mandatory and which the parties are free to agree will not apply to their arbitration. These provisions seem to be eminently sensible and should normally apply. In the writer's view, special circumstances would need to exist before the parties should exercise their right to opt out of these provisions when drafting their agreement.

They are;

S3 receipt of written communications

S17 interim measures (cf preliminary or emergency relief)

S 21 commencement of proceedings

S23 statements of claim and defence

S25 default by a party

S27B(2) default of subpoenas

S27C consolidation

S31(3) statement of reasons

S33A specific performance

S33B costs as matter of discretion and costs capping

S33D costs of failed arbitration

S33E, and 33F interest

S37 effect of death of a party
