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Introduction

In this presentation, I propose to begin by telling you something about the Australian legal system and the procedure followed by the Supreme Court of New South Wales in dealing with disputes concerning international commercial arbitrations. I then propose to say something about several recent Australian cases that demonstrate the current attitude of Australian courts to international commercial arbitration. Finally, I propose to say something about the arbitration "scene" in Australia.

The Australian legal system

Australia has a federal system of government, and its legal system comes from the English common law tradition.

At both the Federal and State levels, the legislatures have passed legislation which largely adopts the UNCITRAL Model Law on International Commercial Arbitration and implements the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The federal legislation governs

[1] I would like to acknowledge the assistance that my tipstaff, Nicholas Borger, gave me in preparing this paper

international commercial arbitrations. The amendments which adopt the Model Law came into effect in 2010. There was a challenge to the validity of the amended legislation on constitutional grounds that was heard by the High Court of Australia, Australia's final court of appeal, in 2013.[2] That challenge failed; and there can now be no question of Australia's adoption of the Model Law.

State legislation governs domestic arbitrations.

The Federal Court of Australia has jurisdiction to hear matters arising under the federal legislation. State Supreme Courts have jurisdiction to hear matters arising under both the federal legislation and their respective State laws.

Several things follow from this.

The first is that the approach of practitioners and the courts to domestic and international arbitration is largely uniform. This has assisted both judges and practitioners who specialise in dealing with arbitration disputes to build up knowledge and expertise which is relevant to international commercial arbitrations.

Second, as is apparent from what I have said, those who choose to arbitrate international disputes in Australia have a choice of which system of courts to use to resolve any issues concerning their arbitration and to seek to enforce awards made in Australia. During the period 2010 to 2013, 27 cases were determined in the Supreme Court of New South Wales, 24 cases were determined in the Federal Court

[2] *TCL v Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 295 ALR 596.

of Australia and 10 cases were determined in the Supreme Court of Victoria concerning the operation of the federal *International Arbitration Act*. A smaller number of cases concerning the federal *International Arbitration Act* were decided in other state courts.[3]

Third, although there is that choice, the way the court hierarchy and system of precedent operates in Australia means that it is to be expected that the law governing both domestic and international arbitrations will develop in a uniform way throughout Australia.

Procedures in the New South Wales Supreme Court

Against that background, let me say something now about proceedings in the Supreme Court of New South Wales.

The procedures followed by the New South Wales Supreme Court are governed by legislation known as the Civil Procedure Act, the Uniform Civil Procedure Rules that are made under that Act and Practice Notes issued by the Chief Justice following consultation with interested parties including legal practitioners who have an interest in the relevant field.

One of the things the Practice Notes do is establish specialised lists within the court structure for determining particular types of dispute. At the beginning of 2012, a

[3] L Nottage, "international Commercial Arbitration in Australia: What's New and What's Next?", ***Journal of International Arbitration*** 465 at 473.

specialist Commercial Arbitration List was established.[4] That list is supervised by the Judge who is also responsible for the Commercial List and the Technology and Construction List, which also operate within the court system. The purpose of the Commercial Arbitration List is to facilitate the prompt resolution of disputes arising in the context of arbitral proceedings in which the Court has jurisdiction, which includes both domestic and international arbitrations. The list operates on the basis that few interlocutory steps should be necessary in order to prepare a dispute concerning an arbitral proceeding for hearing. At the time the proceedings are commenced, the plaintiff must file a document setting out:

(a) a statement of the nature of the dispute;

(b) a succinct statement of the issues of fact the plaintiff contends will arise;

(c) a succinct statement of the issues of law the plaintiff contends will arise;

(d) a statement setting out the interlocutory steps the plaintiff considers necessary to prepare the matter for hearing.

The defendant must file a response dealing with the same issues.

Generally, the onus is on the party who seeks an interlocutory step, such as pre-trial discovery, to convince the Court that that step is necessary for the just and quick disposal of the proceedings. The emphasis of the Practice Note is on fixing a date for the hearing of the dispute as quickly as possible.

[4] See Practice Note SC Eq 9 Commercial Arbitration List

Recent case law

Let me turn now to some recent Australian cases concerned with international commercial arbitrations. A brief overview of those cases demonstrates I think that Australian courts take a sensible, commercial approach when dealing with arbitration clauses and arbitral awards.

Even before the 2010 amendments adopting the Model Law, Australian courts had started to take a broad approach to the construction of the scope of an arbitration clause. In 2006, for example, the Full Federal Court of Australia in the decision of *Comandate Marine Corp v Pan Australia Shipping Ltd*[5] held that courts should adopt a liberal approach to the construction of an arbitration clause. The Court said that this liberal approach is "underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places".[6]

There is currently a debate in Australia about the extent to which a court should interpret the scope of an arbitration clause by reference to a presumption that the parties intended to refer all their disputes to arbitration rather than by reference to the ordinary principles that apply to the interpretation of any term in a commercial contract. A recent decision of the New South Wales Court of Appeal[7] suggests that, consistently with the interpretation of any terms in a commercial contract, the interpretation of an arbitration clause must start with the terms used by the parties, rather than a particular presumption or rule of construction irrespective of the plain

[5] [2006] FCAFC 192; (2006) 157 FCR 45.
[6] Ibid [164].
[7] *Rinehart v Welker* [2012] NSWCA 95, [121]-[122] (Bathurst CJ); [204] (McColl JA); [218] (Young JA).

meaning of the words. On the other hand, the Western Australian Court of Appeal said in *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd*[8] that the approach of the English House of Lords in *Fiona Trust & Holding Corporation v Privalow* "was consistent with the approach taken in Australia".[9] The House of Lords in the *Fiona Trust* case suggested that no emphasis should be placed on fine distinctions or shades of meaning in arbitration clauses. Instead, construction of the clause should begin from an "assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered…to be decided by the same tribunal".[10] Interpretation of an arbitration clause should proceed in that way "unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction".[11]

It seems to me, however, that the debate about which approach is correct is largely an academic one. Both approaches accept that if the meaning of the arbitration clause is clear then that is the meaning the court must give to the clause. If the meaning of the clause is not clear, then, even on the approach of the New South Wales Court of Appeal, it is necessary to construe the clause in the context in which it was agreed. Part of that context is one in which it is to be expected that the parties would want all their disputes determined by one tribunal. The words of the arbitration clause must be interpreted having regard to that context. To adopt a narrow interpretation of an arbitration clause in that context would be to ignore the commercial reality that lies behind the decision of the parties to agree to submit

[8] [2008] WASCA 110.
[9] Ibid [39].
[10] *Fiona Trust & Holding Corporation v Privalow* [2007] 4 All ER 951, [13] (Lord Hoffman).
[11] Ibid.

disputes to arbitration. On either approach, then, the court is likely to favour a broad interpretation where the clause is not clear.

If a dispute falls within an arbitration clause, then, generally speaking, an award made by the arbitrator will be valid and enforceable. One exception to this principle, which is recognised in the Model Law and has been adopted by the Australian legislation, is where the subject matter of the dispute is not capable of settlement by arbitration – in other words, it is not arbitrable. This requirement is found in Art 34(2)(b)(i) of the Model Law, which states that an arbitral award may be set aside by a court with competent jurisdiction if the court finds that "the subject matter of the dispute is not capable of settlement by arbitration under the law of [the] State".

Once again, Australian courts take a broad approach to what is arbitrable. In *Comandate,* for example, the arbitration clause used the words "all disputes arising out of this contract shall be arbitrated". The Full Federal Court held that those words were wide enough to encompass a claim for misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth) (now the *Australian Consumer Law*) and that claims for damages for misleading and deceptive conduct made under that legislation were arbitrable, even though the relevant legislative provisions have a public interest component of protecting members of the public from misleading and deceptive conduct by corporations.

Another example of Australian courts taking a broad approach to what is arbitrable is the decision of the New South Wales Supreme Court in *Larkden Pty Ltd v Lloyd*

Energy Systems Pty Ltd,[12] where it was held that questions concerning the eligibility of one of the parties to a patent licence agreement to apply for a patent in Australia were arbitrable in accordance with an arbitration clause contained in the agreement.

On separate occasions, Justice Allsop, who is now the Chief Justice of the Federal Court, and Justice Warren, the Chief Justice of Victoria, have each referred to cases such as *Comondate* to conclude that "it is incumbent upon a party […] to demonstrate why the resolution of the particular dispute by private arbitration would be injurious to the public interest, or impermissibly encroach on the rights of third parties, or otherwise justify curial resolution".[13] In other words, a matter will not be incapable of settlement by arbitration merely because an area of commercial law might have a public interest element. The courts will adopt a liberal approach to the interpretation of the arbitration clause to ensure as many matters as possible will fall within it, and a narrow approach to the notion of public interest to ensure as many matters as possible will be arbitrable. In doing so, the courts seek to give effect to the method of dispute resolution as bargained for by the parties.

The finality and enforceability of arbitral awards is of central importance to the commercial success of any arbitration. Other than non-arbitrability, a further exception to the finality of an arbitral award is provided by Art 34(2)(b)(ii) of the Model Law. That article provides that a party may, by application within three months of the date of the award, apply to a court to set aside an award on the ground that the award is in conflict with the public policy of the relevant jurisdiction.

[12] [2011] NSWSC 268

[13] Justice James Allsop, 'International Arbitration and the Courts – the Australian Approach' (2012) 17 *Quarterly Bulletin of The Chartered Institute of Arbitrators Australia* 1, 22 cited by Justice Marilyn Warren AC, 'Australia as a "safe and neutral" arbitration seat', *ACICA*, 6-7 June 2012, 21.

A similar provision is contained in Art 36(1)(b)(ii), which provides that recognition or enforcement of an arbitral award irrespective of the country in which it was made may only be refused on certain specified grounds, including the ground that recognition or enforcement of the award would be contrary to the public policy of the relevant State. These articles have been incorporated into the legislative regime in Australia. Sections 8(7A) and 19 of the International Commercial Arbitration Act contain a gloss on the Model Law. They state that for the avoidance of doubt an award and the enforcement of an award would be contrary to public policy if a breach of the rules of natural justice occurred in connection with the making of the award.

Earlier this year, an appeal was heard by the Full Federal Court concerning the scope of the public policy exception contained in Arts 34 and 36 of the Model Law in the case of *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*[14] and, in particular, what is meant by the rules of natural justice in ss 8 and 19 of the Act.

In that case, the appellant, TCL, a Chinese company, entered into an agreement with the respondent, Castel, an Australian company, for the distribution in Australia of air conditioning units manufactured by the appellant in China. A dispute arose after an alleged breach by the appellant of that agreement. The parties submitted the dispute to arbitration in Australia. An award was made in the respondent's favour. The appellant sought to set aside the award under Art 34 of the Model Law and also sought to resist its enforcement under Art 36, relying on the public policy

[14] [2014] FCAFC 83 (Allsop CJ, Middleton and Foster JJ).

exception. It claimed that it had not been accorded procedural fairness by the arbitrator with the result that there had been a breach of the rules of natural justice in connection with the making of the award. The asserted breaches of natural justice arose from the making by the arbitrator of three factual findings, which, it was said, were made in the absence of probative evidence and were matters on which the appellant was not afforded an opportunity to present evidence and argument. The appellant argued that, in considering these questions, the Court should examine afresh the facts of the case to determine whether or not probative material supported the factual conclusions.

The Court unanimously dismissed the appeal. In doing so, it said the following:

> [I]f the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitration system will be undermined by judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been conducted regularly and fairly.[15]

For that reason, the Court held that international commercial arbitration awards "will not be set aside or denied recognition or enforcement under Arts 34 and 36 of the Model Law (or under Art V of the New York Convention) unless there is demonstrated real unfairness or real practical injustice in how the [arbitration] was

[15] Ibid [54].

conducted or resolved, by reference to established principles of natural justice or procedural fairness".[16]

The Court also warned against the interpretation of "public policy" in a broad fashion "that might pick up particular national domestic policy manifestations".[17] Instead, it accepted that public policy should be restricted to the state's most basic, fundamental principles of morality and justice to ensure commonality of approach to the question irrespective of the jurisdiction in which the arbitration occurs. The Court also said that, given the international nature of the Model Law and the goal of uniformity and harmony at the heart of it and the New York Convention, it "is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, …the New York Convention and the Model Law".[18]

On the facts of the case before it, the Court ultimately held that the complaints made by the appellant were about evaluation of the factual material. The evidence revealed that the appellant received "a scrupulously fair hearing in a hard fought commercial dispute".[19] As a result, no rule of natural justice was breached.

A final case worthy of mention in this context is a decision in 2011 of the Supreme Court of New South Wales in *teleMates Pty Ltd v Standard SoftTel Solutions Pty Ltd*.[20] In that case, a matter was referred to arbitration pursuant to an arbitration clause in the contract between the parties. The plaintiff claimed that, under the

[16] Ibid [55].
[17] Ibid [64].
[18] Ibid [75].
[19] Ibid [167].
[20] [2011] NSWSC 1365; (2011) 257 FLR 75.

clause, any arbitration had to be the subject of a separate agreement and that it had not consented to the referral to arbitration nor the appointment of the arbitrator. The relevant article of the Model Law was Art 16, which provides that the arbitral tribunal can rule on its own jurisdiction. Art 16(3) provides that, if the arbitral tribunal ruled as a preliminary question that it had jurisdiction, any party could request within 30 days after having received notice of that ruling that a specified court decide that matter. On 18 January 2011, the arbitrator ruled that he had power to rule on his jurisdiction, that he had been properly appointed and that he had jurisdiction to determine the dispute. On 22 February 2011, the plaintiff filed a summons requesting the Court to make declarations regarding the validity of the appointment of the arbitrator.

The Court relied on Art 5 to hold that it could only intervene in accordance with the Model Law. Although Art 16 enabled a court to determine the question of jurisdiction of the arbitrator, a request within the time limit specified by that article was "an essential condition of the plaintiff's right to have the Court decide the matter".[21] Therefore, absent a request within the 30 day period specified in Art 16(3) of the Model Law, no court could intervene to determine the matter of an arbitral tribunal's jurisdiction where the tribunal itself had determined the matter in favour of jurisdiction as a preliminary question.[22] In reaching that conclusion, the Court said that its decision "reflects two of the underlying policies of the Act, namely, that disputes which the parties have submitted to arbitration should be speedily resolved and that intervention of the Court should be minimised".[23]

The arbitration scene in Australia

[21] Ibid [53].
[22] Ibid.
[23] Above n 27, [54].

Lastly, I want to say something about the arbitration scene in Australia.

Arbitration, particularly international commercial arbitration, is increasingly taught at both the undergraduate and postgraduate level in Australian law schools. There has also been growth in the number of conferences and seminars on arbitration and other forms of alternative dispute resolution held in Australia. Both of these developments indicate the continuing cultural shift within the Australian business and legal communities, which view arbitration as an essential method of dispute resolution.

The large number of academic publications devoted to the topic of arbitration also demonstrates the active interest on the part of the Australian legal and business communities in that topic. At the local level, Professor Jones has published a second edition of his text, *Commercial Arbitration in Australia*, which now sits alongside other texts on international arbitration in Australia. This, of course, is in addition to many international publications, such as the Journal of International Arbitration and the Australasian Dispute Resolution Journal. The consumption of this material by Australian practitioners demonstrates their interest in alternative dispute resolution, and the inclusion of articles published by Australian practitioners and academics on the Australian experience is indicative of the international community's interest in Australia as an arbitration jurisdiction.

Also on the subject of the legal profession, Australian lawyers have substantial international experience. It is common for young lawyers in Australia to obtain

experience working in other jurisdictions. Traditionally, they most often went to London or New York. Increasingly, however, lawyers from the graduate level through to partnership spend time in regional jurisdictions including Singapore, Hong Kong and China, and increasingly Australian law firms have opened offices in Asia or formed associations with legal firms based in Asia. That international experience is readily translated and applied to commercial arbitrations in Australia and assists in assuring that Australia brings an international and regional perspective to commercial arbitration.

Conclusion

A survey conducted in 2010 found that the most important factor influencing the choice of seat for arbitration was the "formal legal infrastructure" of the seat. [24]

Australia has a well-established legal system committed to the rule of law. In the past, Australian courts, consistently with the attitude of the Common Law to arbitration, adopted a more interventionist approach to arbitrations. However, in recent times there has been a major shift in attitude. That change in attitude started before the adoption in Australia of the Model Law, but has been reinforced since then by both the changes in the legislation and decisions which have applied it. The courts, as demonstrated by the short overview of some recent cases, now adopt an approach of non-interference with arbitral awards through a broad interpretation of arbitration clauses and a restrictive interpretation of the grounds available for setting aside awards or refusing to recognise them. This achieves the purposes of the

[24] The *Queen Mary – 2010 International Arbitration Survey: Choices in International Arbitration* 17; see also Justice Clyde Croft, 'Commercial Arbitration in Australia: the Past, the Present and the Future' (paper prepared for the *Chartered Institute of Arbitrators*, London, 25 May 2011).

international instruments (which underpin the Australian legislation). It places Australia in line with other potential seats for commercial arbitrations by harmonising its governance and court supervision of arbitrations with its regional alternatives and makes it, and Sydney in particular, an attractive place to arbitrate.