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An Introduction to ICC Arbitration in Australia: Some Current Issues in International Arbitration

Abstract

It is now more fully appreciated than used to be the case that arbitration is an important and useful tool in dispute resolution. The former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created. It used to be thought that difficult questions of law or complex questions of fact presented a sufficient reason for relieving a party from the obligation to abide by an arbitration clause That approach should be treated now as a relic of the past. The courts should be astute in ensuring that, where parties have agreed to submit their disputes to arbitration, they should be held to their bargain even if this may involve additional costs and expense.

Keywords

ICC, International Chamber of Commerce, international, arbitration, Australia, conflict resolution

AN INTRODUCTION TO ICC ARBITRATION IN AUSTRALIA: SOME CURRENT ISSUES IN INTERNATIONAL ARBITRATION



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Introduction

It is now more fully appreciated than used to be the case that arbitration is an important and useful tool in dispute resolution. The former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created. It used to be thought that difficult questions of law or complex questions of fact presented a sufficient reason for relieving a party from the obligation to abide by an arbitration clause.... That approach should be treated now as a relic of the past. The courts should be astute in ensuring that, where parties have agreed to submit their disputes to arbitration, they should be held to their bargain even if this may involve additional costs and expense.¹

The Australia of the 1970's was a country less than enamoured of arbitration as a means of resolving international commercial disputes.² Its lack of enthusiasm for arbitration manifested itself in several ways.³

It could be seen, for example, in the (lack of) legislative efforts of the state and federal governments prior to 1980. Save for Queensland,⁴ state legislation on the subject remained outdated, primarily modeled on UK legislation from the turn of the century.⁵ Federal legislation was almost non-existent. Only once had the Federal Government exercised its constitutional power to legislate on *international* commercial arbitration, passing the Arbitration (Foreign Awards and Agreements) Act 1974 (which gave effect

- 1 Rogers J in *Qantas Airways v Dillingham Corporation* [1985] 4 NSWLR 113 at 118. See also M Pyles, *Legal Issues Concerning International Arbitrations* 64 ALJ 470 (1990).
- 2 National Report: Australia, Dr John Goldring II *Yearbook Commercial Arbitration ('Yearbook')* (1977) 1 at 3:
'Except in a limited area arbitration is favoured neither by the legal profession nor by commercial interests in Australia. It is regarded as cumbersome, expensive and less efficient in most cases than litigation. ...Quality arbitration as such does not exist in Australia.'
- 3 Most notably in the dearth of literature at the time on the subject. In fact until recently the standard reference in the country remained the UK text *Russell on Arbitration*.
- 4 Queensland overhauled its arbitration law in 1973.
- 5 Smit and Pechota *World Arbitration Reporter* (1987) at p 699.

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to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).⁶

Even if one had considered arbitration as a means of resolving a particular dispute, there was no formal body to accommodate the process. Assistance, when required, was generally found through the International Chamber of Commerce, and its various chambers.⁷ It seemed as though arbitration was useful only in a few, specialized, areas outside the mainstream of international and domestic commerce.

While the reasons for Australia's lack of enthusiasm for arbitration are not particularly clear, several factors seem relevant. Australia's trade tended to involve commodities for which structured dispute settlement procedures were uncommon. Also, disputes under international contracts were usually administered in England or the United States, making it unnecessary for Australia to develop its own arbitration system.

Whatever the reasons however, the situation began to change in the early 1980's and continues to change. Today, international arbitration is frequently considered a 'natural' and viable means of dispute resolution, and a workable alternative to domestic litigation.

The reasons for this change of heart are as difficult to define as those concerning the nation's former reticence. They probably stem, at least in part, from Australia's increased trade with its neighbours in the Asian Pacific region, who have traditionally favoured the resolution of disputes without recourse to domestic courts.⁸ Few of these new trading partners are English speaking, and most have political and legal systems quite different from that of Australia. The unfamiliarity of these alien systems makes Australian businessmen and women apprehensive about subjecting their disputes to foreign law and foreign courts. Likewise, some of Australia's new trading partners are reluctant to engage in traditional litigation within Australia for the same reasons.

At the same time, as these new trade relations and their concomitant problems were evolving, the practice of international arbitration worldwide

6 As Dr Goldring pointed out in 1977:

'... in agreements between Australian and other parties which contain an international element arbitration is increasingly accepted as it may lead to the avoidance of problems arising from the conflict of laws especially since the adoption of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.' See above 2.

7 Australia was chosen as the seat of arbitration in ICC arbitration in the period of 1980-1982 on only one occasion and there were only 4 Australian parties to ICC arbitrations during the same period. See Craig, Park & Paulsson *International Chamber of Commerce Arbitration* (Oceana 1st ed 1985) Appendix I Tables 5 and 7.

8 In a paper delivered at the August 5 session of the 1989 Annual Meeting of the American Bar Association at Honolulu Professor Alfredo Tadiar, Professor of Law at the University of Philippines, pointed out his country's preference for conciliation and mediation as opposed to litigation for the resolution of inter-party disputes. At the same seminar Korean law Professor Choi Dai-Kwon of Seoul National University pointed out that about one-third of all civil cases in his country are disposed by mediation. See also M Pryles and K Iwasaki *Dispute Resolution in Australia-Japan Transactions* (Sydney Law Book Co 1983).

was itself undergoing rapid development.⁹ Doubtless these reforms in arbitration played their own role in developing Australia's interest in arbitration.

At Australian governmental level, the states and territories acted first. In 1984, all the states (except Queensland) overhauled their legislation on arbitration in a cooperative exercise in uniform reform.¹⁰ In 1989, the federal government acted on its own initiative and enacted the UNCITRAL Model Law on arbitration.¹¹

Both State and Federal governments also funded various institutional bodies, set up to assist the conduct of (international and other) arbitration.¹² Sydney, for example, has the Australian Commercial Disputes Centre, Barton (ACT) hosts the National Committee for the ICC, while Melbourne has both the Australian Centre for International Arbitration and the Institute of Arbitrators, Australia.¹³

Australia's national courts have also played a role in arbitration's increased acceptance. In 1982, for example, the High Court, in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,¹⁴ gave effect to an arbitration clause, even though one of the issues before the court was

9 See eg Section 34 of the *Malaysian Arbitration Act* (amended in 1980) quoted in VI *Yearbook* 194 (1981); and more recently the 1984 International Arbitration Code of the Republic of Djibouti reprinted (in French) in 1984 *Revue de l'arbitrage* at 533; G. Hermann 'UNCITRAL Adopts Model Law on International Commercial Arbitration' 2 *Arb Int* 2 (1986); E. Chiasson & M Lalonde 'Recent Canadian Legislation on Arbitration' 2 *Arb Int* 370 (1986); P Sanders 'The New Dutch Arbitration Act' 3 *Arb Int* 194 (1987); P Lalive 'The New Swiss Law on International Arbitration' 4 *Arb Int* 2 (1988); not to mention the well documented reforms around 1980 in England, France, Austria and Italy and the adoption of the UNCITRAL Model Law in a variety of jurisdictions.

10 'National Report: Australia' Goldring and Christie XIII *Yearbook* (1988) 381. The legislation in New South Wales: *Commercial Arbitration Act* 1984; Victoria: *Commercial Arbitration Act* 1984; South Australia: *Commercial Arbitration Act* 1986; Western Australia: *Commercial Arbitration Act* 1985; Tasmania: *Commercial Arbitration Act* 1986; Northern Territory: *Commercial Arbitration Act* 1985; Australian Capital Territory: *Commercial Arbitration Act* 1986. As mentioned above Queensland had already done so in 1973.

11 *International Arbitration Amendment Act* No 25 of 1989 forming Part III of the International Arbitration Act 1974 (Cth) and implementing the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration. See Najar and Polkinghorne 'Australia adopts UNCITRAL Model Law' in 4 Mealey's International Arbitration Report (March 1989) 21.

12 See for a short discussion on the question of Australia's increased recourse to arbitration the introduction to an article by K Klaric 'Judicial Intervention and International Commercial Arbitration: the Australian Perspective' 16 *Australian Business Law Review* December 1988, 440.

13 Apart from healthy competition between these centres competition on an international level has never been keener as Australia and its neighbours vie for the honour of being the centre of Pacific arbitration. See the address by Sir Laurence Street at the Trustee Companies Association National Council Dinner on 6 September 1988 'Dispute Resolution in the Pacific Region' reproduced in that year's Spring issue of *Bar News* (NSW) p 12.

14 (1982) 56 ALJR 459; commented upon by S Hibbert in 1 *Building and Construction Law* (1985) at 16. (Not following the Privy Council's decision in *Hirji Mulji v Cheong Yeu Steamship Co* [1926] AC 497).

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whether the contract containing the arbitration clause existed at all.¹⁵ Essentially, the court gave effect to the universally accepted *Kompetenz-Kompetenz* doctrine and allowed the arbitrator to rule on his own jurisdiction (i.e. competence to hear the dispute). Decisions since that time, reflecting a similar 'laissez-faire' attitude, are numerous.¹⁶

All this being said, however, Australia remains a relative novice in the conduct (and hosting) of international arbitration. As one distinguished commentator has stated, in the context (pertinent to Australia) of the adoption of the UNCITRAL Model Law:

Adoption of legislation based on the [UNCITRAL] Model Law provides only the statutory part of the necessary hospitable environment. It should be, and in practice often is, accompanied by any needed organizational measures improving the infrastructure and by programmes of training and information which should help arbitrators, lawyers, judges and, in particular, businessmen to better understand and appreciate the arbitral process.¹⁷

It is in this context that recourse to established arbitral institutions may have a fundamental role in ensuring that promising beginnings may lead to concrete results.¹⁸

The International Chamber of Commerce

ICC Arbitration and its Historical Evolution

Of the numerous institutions around the world which offer their services for administered arbitrations,¹⁹ the International Court of

15 The issue was whether the contract had been terminated by frustration.

16 Other decisions also demonstrate a similar recognition of legislative (and commercial) desires to promote arbitration as a means of dispute resolution. See for an early example *Flakt Australia Ltd v Wilkens and Davies Construction Co Ltd* 25 ALR 205 (NSW Supreme Court); and more recently *White Industries Ltd v Dravo Corp* and others (1984) ALR 780 (Federal Court) and *Elders CED Ltd v Dravo Corp* (1984) ALR 206 (NSW Supreme Court) and in October 1988 in *Brali v Hyundai Corp*; *Biakh v Hyundai Corp*; reported in Vol 3 12 International Arbitration Report (1988) at 4 and Section B in which the New York Convention's application to the enforcement of two British interim awards was confirmed by the New South Wales Supreme Court in a case with clearly persuasive arguments on either side.

17 Hermann G 'Overcoming Regional Differences' an unpublished paper delivered at the ICCA Tokyo Conference June 1988 p 13.

18 As Sir Laurence Street put it:

"These words have particular relevance for Australia. Our geographic location, our stability and our neutrality place us in a clearly favourable position in comparison with other Pacific nations that already are moving into this field...With the support of Australian commercial interests, lawyers and arbitrators we should be able to establish a major presence in this particular aspect of the flow of Pacific commerce. Achievement of this goal will play a significant part in projecting our Australian nation into a pivotal place in international commerce in the Pacific' (above 13).

19 Eg the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Geneva Chamber of Commerce and Industry or the American Arbitration Association (AAA). About the latter H McLaren and Earl E Palmer QC wrote in *The Law and Practice of Commercial Arbitration* (Carswell Toronto 1982) that the AAA is 'in its domestic sphere the world's largest institution; however it plays a much lesser role in international commercial arbitration' (at p 147).

Arbitration²⁰ of the International Chamber of Commerce ('ICC') has emerged as the apparent leader, with over 7,000 cases submitted to arbitration under its auspices.²¹

The current edition of the Rules was adopted in 1975 and modified as of 1988.²² These changes reflected a growing awareness of the needs of international commerce, and the ever-increasing use of ICC Rules. In 1989, about 309 cases were submitted to ICC arbitration.²³ Claims and counterclaims in ICC arbitrations today total around US \$10 billion, with 60% of the disputes involving claims exceeding US \$1 million. Over half of the cases submitted to arbitration concern sales agreements. Another 20% or so arise out of construction contracts, while most of the remainder concern transfers of technology and licensing agreements. Also, the ICC has just entered the health field, with cases concerning, for example, medical technology agreements (about 8 such cases are currently pending).

Parties from Eastern European countries have started to participate in ICC arbitration with increasing frequency.²⁴ About twenty former Eastern Bloc countries participated in ICC arbitrations in 1989.²⁵ In total, parties from approximately 90 different countries participated in ICC arbitration in 1989, with arbitrations taking place in 32 countries and involving arbitrators of 41 nationalities.

Between 1980-1988, 5,676 parties from 141 countries participated in ICC arbitration, involving arbitrators from 81 countries. During the same period, places of arbitration were fixed in over sixty countries, with France and Switzerland (particularly Geneva) being the most frequently chosen sites.²⁶

During those years, however, only 35 Australian nationals took part in ICC arbitration, representing less than 1% of the over 5,000 parties appearing before arbitral tribunals.²⁷

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- 20 As it is now called since 1989 when the word 'International' was added to the Court's name.
- 21 Paper (unpublished) by S R Bond, Secretary-General of the ICC Court of International Arbitration delivered at a US Council for International Business luncheon meeting in New York 2 May 1990 (hereinafter 'the Bond Paper'). See also 'Arbitration Notes: ICC Caseload Hits 7000 Mark' 5 Mealey's Int Arb Rep October 1990, 15.
- 22 See Circular Letter by S R Bond, Secretary-General to all Parties, Counsel and Arbitrators in ICC Arbitration Proceedings 1 January 1988 reproduced in Craig Park Paulsson *ICC Arbitration* (2nd ed Oceana 1990) Appendix II p 20. References hereafter to this work are to the second edition unless otherwise indicated.
- 23 The Bond Paper above 21. The statistical information that follows is unless otherwise indicated also taken from that paper.
- 24 The preferred means of international institutional arbitration for parties from Eastern Europe has been the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (see J C Najar 'Where the East Meets the West': Stockholm Arbitration' in 5 Mealey's Int Arb Rep p 21 March 1990).
- 25 1989 was also the first time a case was brought by a claimant from the Peoples' Republic of China.
- 26 Craig, Park, Paulsson above 7 App I.
- 27 Of these Australian parties 12 were claimants and 23 were defendants. Australians were selected as arbitrators on 14 occasions, 4 by claimants, 4 by defendants (twice by defendants of a nationality other than Australian) 2 jointly by claimant and defendant and 4 by the ICC Court. Finally Australia was chosen 5 times as the place of arbitration, 3 times by common agreement between the parties and twice by the ICC Court.

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A comparison between the statistical information for 1980-1988 and a survey covering only the first three years (1980-1982),²⁸ shows a marked increase, however, in Australian participation in ICC arbitration. During 1980-82 there were only 4 Australian parties and 4 Australian arbitrators. Only once in those three years was Australia chosen as the place of arbitration.

It remains to be seen, however, whether from such modest beginnings (and their still-modest usage) ICC and other means of alternative dispute resolution will enjoy a significant role in the manner in which (Australian) parties adjudicate international disputes.

The ICC: Some Common Misconceptions

To start with, it appears useful to dispel two common misunderstandings about ICC arbitration. The first misunderstanding concerns the very meaning of the term 'ICC arbitration'.

Submitting a dispute to 'ICC arbitration' does not mean that the International Chamber of Commerce, as an institution, will decide the case. The International Chamber of Commerce is not a court in the traditional sense: it is rather an association, founded in 1919, formed of some 7,000 enterprises and organizations from 114 countries, whose purpose is to promote international commerce worldwide.

In most countries, the ICC members have created national committees, which serve as the interface between the members and the ICC's headquarters in Paris.²⁹ The ICC has formed numerous commissions, committees, and joint working-parties to fulfill its goals. It has also established five bodies concerned with the settlement of international commercial disputes, the most important of which is the International Court of Arbitration.³⁰

The second frequently encountered misunderstanding about the ICC stems from the name of the 'International Court of Arbitration'. It is not a 'court' in the ordinary sense of the word, since it does not decide cases. The Court is merely an administrative body, whose main function is to supervise, through its Secretariat, arbitrations conducted under the aegis of the ICC Rules of Arbitration.³¹ The Court's main activities are: (i) to determine the existence of a prima facie agreement to arbitrate; (ii) to appoint arbitrators; (iii) to

28 Included in the first 1984 edition of Craig, Park, Paulsson above 7 App I.

29 In Australia the address of the Australian Council of the ICC (not limited to matters concerning arbitration) is PO Box E118 Queen Victoria Tce ACT 2600. The Council has recently established an Arbitration Committee chaired by Professor Michael Pryles.

30 The other four are:

- The Commission on International Arbitration;
- The International Maritime Arbitration Organization (IMAO);
- The International Centre for Technical Expertise;
- The Standing Committee on Regulation of Contractual Relations.

31 This paper does not deal with the ICC's other roles such as its role as appointing authority for UNCITRAL disputes, a matter of some relevance to Australia given its recent adoption of the UNCITRAL Model Law.

determine the place of arbitration; (iv) to determine fees and expenses of arbitrators and establish the amount of the deposits; (v) to approve arbitrators' Terms of Reference; (vi) to decide challenges against arbitrators; (vii) to extend time limits; and (viii) to approve awards.³²

Characteristics of ICC Arbitration

The essential characteristics of ICC arbitration may be summarized under five proposals:³³

Universality

Any type of dispute may be submitted to ICC arbitration regardless of the nature of the dispute, the nationality of the parties, or the public or private character of the parties.³⁴

Neutrality and impartiality

ICC arbitrators are of a wide array of nationalities and the places of arbitration are well distributed geographically. Parties are entirely free to choose either their counsel or their arbitrators. These factors, along with the international character of the court's staff and activities, all contribute to the neutrality and impartiality of ICC arbitration.³⁵

The flexibility of ad hoc arbitration combined with the advantages of administered arbitration³⁶

When it comes to organizing an arbitral tribunal, the ICC allows the parties a great deal of autonomy. Once the tribunal is formed, however, the institution's attitude becomes much less *laissez-faire*. The Secretariat and the Court supervise the proceedings, dealing with administrative issues such as the parties' payments of fees and expenses. This frees the tribunal to focus on more substantive issues.

The Terms of Reference

This is a unique feature of ICC arbitration.³⁷ Article 13 (1) of the ICC Rules provides that once the parties have submitted their initial submissions to the tribunal, the arbitrators have to draw up 'Terms of Reference', containing matters such as the names and addresses of the parties and, more particularly:

32 See also Craig, Park, Paulsson above 7 p 31.

33 The Bond Paper above 21.

34 *Pro* see Craig, Park, Paulsson above 7 p 3.

35 Craig, Park, Paulsson qualify this characteristic as 'geographic adaptability' and 'openness' above 7.

36 Yves Derains, ex Secretary-General of the ICC Court makes this point also; see 'ICC Arbitration' in 5 Pace L Rev 591 at 596 (1985).

37 See for more background and explanation JC Goldsmith 'How to Draft Terms of Reference' 4 Arb Int (1988) 298.

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- ...
- c) a summary of the parties' respective claims,
- d) [a] definition of the issues to be determined, ...
- ...
- g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitrator to act as amiable compositor, [and]
- h) such other particulars as may be required to make the arbitral award enforceable in law, or may be regarded as helpful by the Court of Arbitration or the arbitrator.

Common law practitioners may look upon Terms of Reference with some disdain; indeed, the most virulent critics of the Terms of Reference have come from common law countries,³⁸ where the existence of discovery³⁹ eliminates the need for early development of the facts. However, experience has shown that early definitions of the parties' respective positions, the issues to be decided and the main procedural rules to be used help shape the proceedings by clearly defining the relevant issue right from the outset.

Furthermore, the Terms can eliminate defects in the original arbitration clause and can constitute an agreement to arbitrate which is enforceable, especially in those countries of the Middle East and Latin America which do not consider an agreement to arbitrate a future dispute valid. Common law courts have also decided that the Terms of Reference constitute an agreement, or at least a waiver of objection, regarding the place of arbitration, the relevant rules and the applicable law.⁴⁰ Additionally, definition of the issues to be decided may help protect against allegations that the arbitrators exceeded their authority.⁴¹

The Terms have, however, been severely criticized by the eminent Swedish scholar J Gillis Wetter who argues that the benefits of the Terms do not justify the time and money spent preparing them. Emphasizing the rigidity of the Terms, which under the ICC Rules can be amended only by mutual consent and approval of the tribunal, Mr Wetter goes so far as to conclude that they should be abolished.⁴²

38 But see J G Wetter who while offering criticism of the Terms of Reference mechanism states that 'the terms of reference have many supporters even among common law lawyers' (in 'The Present Status of the International Court of Arbitration of the ICC: An Appraisal' 1 American Review of International Arbitration 91 at 101 (1990).

39 *Re discovery in arbitration* see J G Wetter 'The Conduct of the Arbitration' 2 J of Int'l Arb (1985) 7 at 14; L H Willenken 'The Often Overlooked Use of Discovery in Aid of Arbitration' 35 Bus Lawyer (1979).

40 See *American Construction and Machinery Equipment Corporation Ltd v Mechanised Construction of Pakistan Ltd* 659 F Supp 426 (SDNY 1987).

41 The Terms constitute an agreed determination of issues to be decided *Steel Authority of India Ltd v Hind Metal Inc* [1984] Lloyd's L Rep 405.

42 'A troubling aspect of the practice is the time and thus the expense that the exercise entails mostly without producing tangible results toward advancing a resolution of the case. A second problem is that the ICC Rules do not contain a provision for amendment of claims; hence neither party can amend its claims as fixed in the terms of reference without the approval of the tribunal and the other party. This is not an acceptable procedural rule in some jurisdictions, especially not in arbitration where the expense of commencing a second proceeding may be prohibitive' above 39 at p 101.

Scrutiny of awards

This is another 'novel' feature of the ICC Rules (Art. 21), which allow the International Court of Arbitration to appose its imprimatur on awards, in an effort to provide them with more extensive international currency.

During its scrutiny, the Court may not lay down substantive modifications (to do so would be to interfere with the arbitrators' freedom) but it can, and does, review procedural defects). This formal review is mostly administrative and clerical in nature, and is intended to guarantee the currency of the award, as is discussed in more detail below (within the framework of judicial review of awards in Australia).

The extent of the Court's scrutiny of an award has been illustrated in its refusal to approve the (draft) award in the *AB Gotaverken v General National Maritime Transport Company* (GMTC) of Libya case⁴³ of 1978, arising from GMTC's refusal to take delivery of three vessels built by a Swedish shipyard. The Court's refusal was based on an apparent contradiction in the award, and a formal defect.⁴⁴

Some contemporary problems in Arbitration and how the ICC attempts to deal with them

Multi-Party Arbitration

The ICC Rules generally presuppose disputes between one claimant and one defendant. Neither the standard ICC arbitration clause, nor the Rules themselves (which speak of 'the Defendant' in the singular) appear to have considered the possibility of multiple claimants or defendants. The same can be said for literally all institutional and *ad hoc* arbitration rules.

However, the realities of international commerce have led to multi-party contracts, such as joint venture agreements or construction contracts, involving horizontal or vertical multiplicity of parties. While the ICC Rules, like the rules of many institutions, require a dispute to be submitted to either a sole arbitrator, or to a tribunal composed of three arbitrators (Article 2.2 ICC Rules), problems arise where there is more than one party on each side. The insertion of a standard arbitration clause in such a contract could well, in such situations, trigger more problems than it solves.

Does each of the claimants/defendants have the right to nominate its own arbitrator? Prima facie, the answer to this question is no since disputes can be submitted to a tribunal of no more than three arbitrators: one appointed by the claimant, one by the defendant, and the third (acting as the Chairman) appointed by the Court. How can this requirement be reconciled with the language of Article 2.4 of the ICC (and many other standard) Rules, which provides that '*each party shall nominate... respectively one arbitrator*' (emphasis added)? Would failure by one party to appoint an arbitrator constitute a fundamental breach of procedural rights under the ICC Rules?

43 III *Yearbook* (1978) p 133.

44 The arbitrators had omitted to state whether the award was unanimous or a majority award (*ibid* at 140). It should be added that in its subsequent review the Court while approving the award still dictated formal modification.

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Further, when one claimant wishes to commence proceedings against a multiplicity of defendants, should he initiate a single arbitration against all the defendants; or does he begin separate actions against each defendant, requesting joinder of the cases at a later stage?

The problems become even more complicated when the case involves the joinder of parties not having signed the arbitration clause, or when the dispute involves more than one agreement, with different parties having signed some, but not all, of the agreements involved.⁴⁵

The challenge, then, is to come up with a manageable procedure for multi-party arbitration.

The ICC Court has long been conscious of these problems and, in 1982, issued a *Guide on Multi-Party Arbitration*. However, the task of coming up with a standard solution was so complex that the drafters refrained from setting forth a model clause (and instead attempted to define the rights of 'adhering parties').⁴⁶

Aware of this increasingly frequent problem in international commercial arbitration, some legislatures, including those of the US⁴⁷ Hong Kong⁴⁸ and the Netherlands,⁴⁹ have allowed for the compulsory joinder of parties to arbitral proceedings. Some other countries have used case law to achieve the same result.⁵⁰

45 See also D Gogek R Seppala 'Multi-Party Arbitration under ICC Rules' Int'l Fin L R Nov 1989 p 32.

46 The Guide was reduced to concluding that parties facing the problem should seek the advice of counsel!

47 For a recent example see *Builders Federal & Josef Gartner v Turner Construction Co* 655 F Supp 1400 (SDNY 1987); see also F B McKellar 'To Consolidate or Not to Consolidate; a Study of Federal Court Decisions' 44 Arb Int 194 (1987).

48 See Section 6B of the Hong Kong Arbitration Ordinance which gives the High Court wide powers to consolidate arbitration proceedings.

49 See P Sanders 'The New Dutch Arbitration Act' 3 Arb Int 194 (1987).

50 *BKMI Industrieanlagen GmbH et al v Dutco Construction*, a French Court of Appeal decision of 5 May 1989 is a case in point. (For a discussion of the case see Gogek and Seppala above 45). The contract in this case contained an ICC arbitration clause. Dutco initiated arbitration proceedings against Siemens and BKMI and the two defendants argued that Dutco should have initiated two separate arbitration proceedings thereby allowing each party to name its arbitrator. The ICC Court rejected this assertion and requested both defendants to jointly appoint an arbitrator which they did. Once appointed the arbitral tribunal faced a challenge to its jurisdiction and constitution. It held that since nothing in the ICC Rules excludes multi-party arbitration the parties had implicitly accepted this possibility. In deciding the appropriateness of its appointment the tribunal interpreted the phrase 'each party' in Article 2.4 of the ICC Rules to include the possibility of one or more claimants or defendants. The tribunal further held that its interpretation did not violate the principle of equal treatment of parties.

BKMI and Siemens appealed the award before the Paris Court of Appeal. In rejecting the challenge the Court also held that the arbitral tribunal's interpretation was the only one which would give full effect to the arbitration clause because the ICC Rules provide only for three arbitrators. The Court also held like the arbitral tribunal that the *ordre public* (public policy) principle of equal treatment of parties had not been violated. In their discussion of the case Seppala and Gogek mention a 'parallel case' (above 45 p 33) where a different arbitral tribunal apparently found that no implied consent to multi-party arbitration had existed. It would have been interesting to have more information on this case and to compare the diverging views of two arbitral tribunals seized with the same problem.

Dissenting Opinions

Dissenting opinions, a familiar feature of common law systems, and therefore in Australia, are unknown in civil law systems, where courts and tribunals speak with one voice. However, in international arbitration, where arbitrators from both civil and common law traditions mingle, dissenting opinions have tended to become, if not a common occurrence, at least familiar.

The ICC Rules do not address the issue of dissenting opinions. The ICC has, through its Working Party on Partial and Interim Awards and Dissenting Opinions however, held the view that it is neither practical nor desirable to suppress dissenting opinions in ICC arbitrations, and has promoted the adoption of guidelines to regulate the subject.⁵¹

The present practice seems to be that, where a dissenting opinion has been submitted while the award itself is being scrutinized, the Court, in reviewing the award, looks at the dissenting opinion at the same time it scrutinizes the award. Ultimately, the dissenting opinion is simply kept in the case file.⁵²

The ICC is powerless to prevent a dissenting arbitrator from communicating his opinion to the parties, making it seem undesirable for the ICC to try to impose a policy on arbitrators. Where communication of a dissenting opinion may imperil the validity of the award, the Court - in compliance with its duty under Article 26 to 'make every effort to make sure that the award is enforceable at law' - informs arbitrators of the status of dissenting opinions under the laws of the place of arbitration. In the authors' opinion, where a dissenting opinion is not communicated (as indeed it should not or cannot under various legal systems), the award should at least mention its existence.

A last question deals with notifying the parties about dissenting opinions. Almost no jurisdiction allows an appeal on the merits. In general, awards may only be challenged for lack of jurisdiction or lack of due process. Therefore, when a dissenting opinion asserts procedural misconduct, it seems proper to notify the parties of the contents of the dissenting opinion. In all cases, the contents of the dissenting opinion will enable an aggrieved party to assess its chances of success in appellate proceedings.

Law Applicable to the Merits of the Dispute Absent Choice by the Parties

The ICC Rules provide that parties are free to determine what law the arbitrator applies in deciding a dispute (Article 13(3)). Generally, parties

51 The 1987 Report of the Working Party established that dissenting opinions were admissible under the laws of Czechoslovakia, Finland, Sweden, Germany, France, (although there is no such practice) Great Britain, Australia, Canada, Lebanon and The Netherlands. Interestingly the Australian member of the Working Party was of the opinion that dissents should not be considered part of the award.

52 However the Court of Arbitration sometimes uses the dissenting opinion to draw the majority's attention to any point of substance raised in a dissent which indicates a weakness in a majority's opinion. In the past few years several majority awards have been amended as a result of this process.

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include an applicable law clause when they draft a contract. Occasionally parties agree on the applicable law only after a dispute arises. ICC arbitrators are required, of course, to respect such choice.

When parties have not agreed what law will govern their contractual relationships, Article 13(3) of the ICC Rules stipulates that:

In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict *which he deems appropriate*. (Emphasis added.)⁵³

Therefore, while an arbitrator acting within the framework of the ICC Rules may choose to apply the conflict of laws rule of the place of arbitration, he is under no obligation to do so. Nor is he under any obligation to use a conflict of laws rule from any other particular (national) system of conflict of laws.

Scrutiny of ICC arbitral practice shows that there are four most common methods of determining the applicable law.⁵⁴ Some of these methods can, at times, be used simultaneously.⁵⁵

Use of the Law Designated by Conflict Rules of the Seat of Arbitration

While the ICC Rules release the arbitrator from the obligation to apply the conflict rules of the seat of arbitration, they do not, of course, *prevent* him from using them if he finds them appropriate.⁵⁶

In practice, today, few arbitrators choose to rely solely upon the rules of conflict of the *lex fori*. There is no justification for an international arbitrator to consider himself bound by the same rules as a municipal judge, who has to apply the conflict of laws rule of the *lex fori* because these are the rules of the State which grants him his powers. This freedom from the *lex fori* is especially appropriate considering that arbitration, as a contractual creature, is designed to give effect to the intentions of the parties. It can hardly be presumed that, by agreeing to arbitrate in a particular place, perhaps totally

53 Note that with arbitrations conducted under the UNCITRAL Model Law (see footnote 11 above) the arbitrators have a *legal* basis (rather than simply an institutional rule) for exercising a broad discretion in finding the appropriate law. Where there is no choice of law by the parties Article 28(2) of the Model Law provides that:

the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

54 See generally O Lando 'The Law Applicable to the Merits of the dispute' 2 Arb Int 104 (1986) and more recently a selection of rulings from various ICC cases in 'Extracts of ICC Award the Law Applicable to the Merits of a Dispute in the Absence of Contractual Specifications' 1 The ICC Bulletin (vol 2) 22 (1990). For an interesting discussion concerning the law to govern the interpretation and validity of the arbitration agreement itself see M Pryles above 1 at p 470-472.

55 A possible fifth category, reference to [no particular law but rather an] international *lex mercatoria* (or the new 'law merchant') is dealt with subsequently in this paper.

56 For the numerous cases applying the private international law rules of the seat of arbitration most of which antedate the 1975 edition of the ICC Rules see J Lew *Applicable Law in International Commercial Arbitration* (Oceana 1978) pp 201-202, 239-240 and 255-272.

54

unconnected to the transaction in question, the parties intended to follow the conflict rules of that place.⁵⁷ This is especially true when the parties fail to designate a site and the ICC Court chooses the place of arbitration. In short, there is no real connection between the seat of arbitration and either the contract of the arbitrators.⁵⁸ Thus, ICC arbitrators have frequently rejected any comparison with municipal judges and have held that they are under no obligation to apply the (conflicts) law of the seat as an assimilated *lex fori*.⁵⁹

The Cumulative Approach

Arbitrators have often resorted to a comparative study of the various conflicts systems which have some connection with the litigation, adopting the rule which seems most consistent with all of them.⁶⁰

A recent example is a 1986 ICC arbitration award,⁶¹ in which the parties were French and Italian. The arbitrator first compared the conflicts rules of France and Italy, and concluded that they were mutually exclusive. The Italian rule designated Italian law (since the contract was signed in Italy). The French rule designated French law (since France was the place of performance). Under these circumstances, the cumulative approach in the strict sense could not be used. The arbitrator, however, chose to apply the conflict rule which he considered most consistent with comparative private international law, and decided that the place of performance is more significant than the place of signature. (In arriving at his decision, the arbitrator also resorted to the so-called 'general principles' approach, as is discussed in more detail below).

Some arbitrators apply the substantive laws of all the places connected with the dispute. In *ICC Case No 2272*,⁶² involving an Italian claimant and a Belgian defendant, the arbitrator, sitting in Paris, compared the provisions of Belgian and French law invoked by the respective parties. He found that the laws of both countries appeared 'to coincide satisfactorily' and applied the substantive rules common to both laws.

Commentators have recently observed two trends in the cumulative approach:⁶³

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- 57 See J Lew above 56 at pp 253-254; A Redfern and M Hunter *International Commercial Arbitration* (Sweet & Maxwell 1986) at p 95.
- 58 As pointed out in the award in *ICC Case No 1422* (1976) for example the connection of the law of the forum with the case as the arbitrator put it was 'purely fortuitous' (*Journal du Droit International* 1974, 884 in French).
- 59 *ICC Case No 1689* (1970) reported (in French) by Y Derains in 1972 *Rev Arb* 104 (extracts from award in *ICC Case no 1512 I Yearbook* 128 (1976), where the sole arbitrator stated: 'The International arbitrator does not dispose of any *lex fori* from which he could borrow rules of conflicts of laws'). See the award in *ICC Case No 4381 Journal du Droit International* 1986 1102 and case note by Y Derains p 1109 (in French).
- 60 This approach was highlighted in an (early) article by Y Derains '*L'application cumulative par l'arbitre des systemes de conflit de lois interesses au litige*' *Rev Arb* 1972, 99 (in French).
- 61 *ICC Case No 2730* reported in *Journal du Droit International* 1986, 1131 (in French).
- 62 Reported in *II Yearbook* 151 (1977).
- 63 See Craig, Park, Paulsson above 7 p 291.

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- tribunals which emphasize the contractual nature of the dispute have tended to emphasize the laws of the parties' countries and of the country where the transaction took place;⁶⁴
- tribunals favouring a more procedural approach consider the conflicts system of the place of arbitration first, occasionally looking at the laws of the parties' countries, to confirm their decision to use the rule of the place of arbitration.⁶⁵

'General Principles' of Conflicts of Law

As seen above, there are times when the potentially relevant conflict rules are totally irreconcilable. At such times, the arbitrator can choose either (i) to adopt the choice of law rule that he finds most appropriate, or (ii) to adopt a solution that seems most consistent with the general principles of private international law. This second method is also based on comparison, but focuses much less on the connection between the relevant laws and the disputed contract.

In ICC Case No. 2730 the arbitrator, faced with a choice between French law (place of performance of the contract) and Italian law (national law of the parties and law of the place of signature), opted for the rule that he thought was most consistent with the general trend in comparative private international law - namely that the place of performance is a more significant connecting factor than the place of signature. In his decision, the arbitrator cited various private international law treaties as being applicable to the issue at hand.⁶⁶ Then, as a last 'check' on his reasoning, the arbitrator examined the substantive Italian law relating to the litigated agreement and, following the principle *ut res magis valeat quam pereat*, rejected the Italian rule because it might have nullified the contract (the agency agreement had not been registered in Italy as required).⁶⁷

'Voie Directe' ⁶⁸

As a corollary of not being bound to apply any particular conflicts system, international arbitrators have often opted not to apply any conflicts rules at all, choosing instead by a 'direct route' the system of law with which the transaction or the dispute is most closely connected according to a center-of-gravity or grouping-of-contracts test.⁶⁹ This approach has elicited criticism

64 See for example awards in ICC Cases No 1759 and 1990 of 1972 cited in Derains above n 59 at p 105.

65 Award in ICC Case No 2438 (1975) in *Journal du Droit International* 1976, 969.

66 Above at p 1131.

67 In the interim award in ICC Case No 4145 (XII Yearbook 97 (1987) at pp 100-101) the Tribunal went so far as to exclude the law of country X which was expressly chosen as one of two laws applicable to the contract because under that law the contract in question would have been not only void *but illegal*. The Tribunal therefore applied the law of country Y and was thus able to enforce the contract.

68 The expression has been coined by P Alivé '*Les règles de conflits de lois appliquées au fond du litige part l'arbitre international siégeant en Suisse*' Rev arb 155 at 181.

69 Recent examples include ICC Case No 4650 interim award on applicable law reported in XII Yearbook 111 (1987); ICC Case No 3130 reported in *Journal du Droit International* 1981 p 932 (in French); and ICC Case No 2879 reported in *Journal du Droit International* 1979 p 989 (in French).

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that the "rule of conflict" stipulated in Article 13 (3) of the ICC Rules is not truly respected. Thus far, however, the few attacks against awards upholding the *voie directe* approach have failed.⁷⁰

A Note of Caution

While the above measures may all have been used at one time or another, in various jurisdictions around the world, a cautionary note is struck by Professor Michael Pryles in an article published recently in the Australian Law Journal.⁷¹

In that article, Professor Pryles reminds the reader that while the courts give a fair deal of leeway to the parties in the manner in which they conduct their arbitration, the rules of the ICC do not of themselves have the force of law. He states, therefore, in the context of Article 13 (3) of the Rules:

This, of course, is only an arbitration rule and not a law. In an international arbitration conducted in Australia under the ICC rules caution would have to be exercised. If the Model Law were excluded and an arbitrator decided to apply choice of law rules of a country other than Australia, there would be a strong argument that the arbitrator had committed an error of the law. However, if the Model Law applied, the arbitrator would be freed from the obligation of applying local conflict of laws rules.⁷²

While the choice of ICC *and* UNCITRAL Rules would be sufficiently unwieldy as to be unworkable this dilemma might not be as serious as it first seems. As will be seen below, the exclusion of appeals on questions of law (arguably automatic under the ICC Rules; *see*, Part IV(1) herein) will go a long way in solving problems of review in the courts of the forum. Remove the possibility of domestic review, and the only issue which remains is that of enforceability in those jurisdictions where execution of the award might be sought.⁷³

The ICC's Contribution to the Lex Mercatoria

Unlike Gerald Aksen's interjection as to the arrival of international arbitration,⁷⁴ the coming of the *lex mercatoria* cannot, as yet, be heralded as an established fact in international arbitration. While this new, widely

70 For an example - in which the Austrian Supreme Court rejected an appeal against an award in *ICC Case No 3131* (1979) in a dispute arising out of a contract between a French manufacturer and its Turkish agent where the arbitrators sitting in Vienna declined to apply any national rules of conflict and relied on *lex mercatoria* - *see Norsolor v Pabalk Ticaret*, a decision of 18 November 1982, *IX Yearbook Commercial Arbitration* 159 (1984).

71 Pryles above n 1.

72 *Ibid* at p 474.

73 The grounds for refusal to recognize a foreign award under the 1958 New York Convention (to which Australia is a signatory) are limited to five procedural grounds and two substantive defences, these latter two being that the subject matter is not arbitrable and/or that enforcement would violate the forum's public policy. Both of these additional grounds are generally construed narrowly.

74 'International Arbitration: Its Time Has Arrived!' in 14 *Case W Res J Int'l L* 247 (1982).

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debated, body of law has emerged as a serious topic of conjecture in the past decade, every one of its aspects from its definition to its scope - remains a subject of controversy.

In one of the most authoritative articles written on the subject, Mustill LJ exposes the problem by stating that:

The Common Lawyer will not look kindly on an addition to the extensive literature on what he may be tempted to regard as a non-subject, having no contact with reality save through the medium of a handful of awards which could well have been rationalized more convincingly in terms of established legal principles.⁷⁵

Labelling (in our view uncontroversially) the *lex mercatoria* a 'doctrine lying outside the tradition of Anglo-Saxon jurisprudence,'⁷⁶ Mustill LJ explores the confines of this new, and challenging, legal concept, which was fleshed out primarily through the contribution of ICC arbitral case-law.⁷⁷ The following - short - discussion draws heavily on this analysis.

What is *lex mercatoria*? It may be simplistically defined as the old law merchant, in its new, late 20th century attire.⁷⁸ According to one of the fathers of the concept, the *lex mercatoria* is an autonomous legal order, consisting of a set of general principles and customary rules spontaneously referred to or elaborated on in the framework of international trade, without reference to a particular national system of law.⁷⁹ The *lex mercatoria* has also been defined as a body of rules sufficient to decide a dispute, operating as an alternative to an otherwise applicable national law, and arising as a result of the gradual consolidation of usage and settled expectations in international trade.⁸⁰

A few tenets can be established with some degree of certainty.

The *lex mercatoria* is 'a-national,' in that the rules governing an international contract are not directly derived from any national body of law, and in that the rules of the *lex mercatoria* have a normative value truly independent of any one national legal system.⁸¹ The main sources feeding the *lex mercatoria* are the principles of law common to trading nations and the usages of

75 The New *Lex Mercatoria*: the First Twenty-Five Years' in *Liber Amicorum for Lord Wilberforce* (Clarendon/Oxford 1987) p 149.

76 Ibid

77 This arose partly as a result of the sympathetic interpretation of Article 13(5) of the ICC Rules which commands arbitrators in all cases to 'take account of...the relevant usages'.

78 See the definition already contained in one of the first articles on the subject H J Berman and C Kaufman 'Law of International Commercial Transactions (*Lex Mercatoria*)' 19 *Harvard Int'l L J* 221 (1978).

79 B Goldman *Contemporary Problems in International Arbitration* (London Conference papers) p 192 at 196 (1985). The subject of *lex mercatoria* was first brought into the limelight by this eminent author in his influential discussion '*Frontieres du droit et lex mercatoria*' 9 *Archives de philosophie du droit* (1964) (in French). See also N Fabri 'The Legal Nature of Petroleum Agreements: A Comparative Analysis' [1986] *AMPLA Yearbook* 1 28 and Professor Michael Crommelin 'Choice of Law,' a paper delivered at the 1990 Law Asia Energy Section conference in Melbourne 2-5 October 1990.

80 Craig, Park, Paulsson above 7 Chap 35 at pp 603 and following.

81 Mustill J above n 76 at p 151.

international trade.⁸² The latter is one of the most important, as is illustrated by the three leading cases which have established *lex mercatoria* as a serious topic for discussion.

The first was rendered in an arbitration between French and Lebanese parties, *Fougerolle v Banque du Proche Orient*.⁸³ The arbitrators were authorized to decide what law was applicable. Without the possibility being mentioned by or to the parties, the tribunal decided the dispute according to the principles generally applicable in international commerce. The French Supreme Court rejected an attack on the award, thereby establishing a path, soon to be followed.⁸⁴

The second instance is a case involving Turkish and French parties, *Pabalk Ticaret v Uginor/Norsolor*.⁸⁵ The arbitrators found it difficult to choose between two national laws, and therefore elected to choose neither, applying instead the rule of the *lex mercatoria* which in their view required the parties to act in good faith in the execution of the contract. Deciding on the facts that one party (Uginor) had abused its position of strength in a manner which had led to the breakdown of the agreement, they awarded damages to the other party. The award came under scrutiny in the courts of France and Austria, but challenges failed in both countries.⁸⁶

The third decision, arising in the '*DST Case*', between a German claimant and an Emirate of the United Arab Emirates, was delivered by the Court of Appeal in England.⁸⁷ A government and a government oil company agreed with a consortium of companies (registered in various countries) for exploration for oil and gas. The contract terms included an ICC arbitration clause providing for the arbitration to be held in Geneva, but there was no applicable law clause. In deciding on the allegation of misrepresentation by the government and the oil company (which they rejected), the arbitrators held that the law applicable to the agreement was of little significance, but went on to express a choice. Rejecting the law of the state where the agreement was to be performed, they held that internationally accepted principles of law governing contractual relations constituted 'the proper law.' The oil company's resistance to the enforcement of the award in England, based on the allegation that enforcement of an award premised on such uncertain principles would be contrary to public policy, failed before the Commercial Court and the Court of Appeal.⁸⁸

As can be seen from the brief discussions above, the subject is quite complex. The *lex mercatoria* is in its initial stages, but already scholars are

82 Mustill J draws an interesting comparison between the 'macro' *lex mercatoria* based upon laws which are common to all the states which are engaged in international trade and 'micro' *lex mercatoria* a law merchant generated with specific references to an individual contract; above 76 at pp 156-157.

83 9 Dec 1981 Rev Arb (1982) 183 and note thereon G Couchex at 187 (in French).

84 Ibid.

85 See [1983] Rev Arb 525 (in French).

86 Ibid.

87 *Deutsche Schachtbau- und Tiefbohrergesellschaft MDH ['DST'] v Ras Al Khaimah National Oil Co* [1987] 2 All ER 769.

88 Ibid.

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theorizing about its components. It would be too bold to attempt to discuss the subject within the context of the present overview. Suffice it to say that the authors endorse Mustill LJ's view that there are only a 'handful of awards' dealing with this concept, all of which could have been 'rationalized more convincingly in terms of established legal principles.' Therefore the only logical conclusion is that until more awards discussing the concept have been published and until more national courts have tested its currency, it is too early to assert the existence of the *lex mercatoria* as a new legal order.

The Role of the Judiciary: Intervention and Appeal

It is an unfortunate fact not all parties to arbitration wish to conclude the matter as promptly as others. Frequently, counsels' and parties' (more often defendants!) ingenuity is engaged, for various reasons, in trying to postpone the day of reckoning (i.e. judgment) for as long as possible. Delays in the resolution of any dispute are maligned by lawyers and commentators alike, but this does not avoid the fact that one party may use all the means available to slow matters down if it perceives some advantage - tactical or psychological - in doing so. These delays are at best merely annoying; they are almost inevitably expensive.

One means by which this has been achieved is an over-indulgence in the use of judicial intervention in the arbitral process, particularly by use of the appeal mechanism.⁸⁹ What better way to prolong an arbitration than by swanning about in the courts for months, or years, even on applications that are doomed to failure?

While concerns are always expressed as to the need to retain some control over 'arbitrators-gone-wild' (whose existence is always possible, even if never seen by these writers), there is a general consensus that parties choosing arbitration rather than traditional litigation have a right to have their choice respected. In short, their intention to not find themselves before national courts should be honoured, particularly where to disregard that choice is a source of delay in the resolution of a dispute.

The uniform state legislation of the mid-1980's reflected this philosophy, and removed the right of a party to ask a court to review an award on the grounds of error of law or fact on the face of the award. The replacement of the 'case stated' procedure also helped curb a great deal of this abuse.⁹⁰ Parties may now agree in writing to exclude the jurisdiction of the court to entertain an appeal even on a point of law,⁹¹ and it is in this context that the ICC Rules have an additional role.

Before such a discussion, however, we briefly summarize the present situation under the 'uniform' State Legislation.

89 See Craig 'Uses and Abuses of Appeal from Awards' 4 *Arb Int* (1988) 174.

90 (Except in Queensland) See for example Sections 38 and 39 of the Commercial Arbitration Act 1984 (Vic).

91 Except on matters concerning the admiralty jurisdiction of the court or arising from an insurance contract or a (specified) form of 'commodity agreement'. See for example Section 40 of the NSW Legislation. (References in the following section are to the NSW legislation).

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Part V of the 'uniform' legislation has had a dramatic effect on the courts' power to entertain challenges to arbitral decisions and awards. Under the legislation, the court no longer has the power to set aside or remit an award on the ground of error of law apparent on the face of the award (s 38 (1)).

An appeal still lies to the court on any question of law arising out of an award (s 38 (2)) *unless* there is a valid exclusion agreement. (Note that such agreements may be made only when at least one of the parties to the arbitration agreement is not domiciled or ordinarily resident in Australia).

The other cases in which a court may intervene in the arbitral process are when: (a) application for leave to enforce the award is opposed, (b) a party applies for a determination of a preliminary point of law under s 39, (c) there is 'misconduct' by an arbitrator or umpire generally construed as a denial of natural justice, or (d) an arbitrator has failed to perform his functions or has exceeded his powers.

After hearing an appeal, the court may either confirm, vary or set aside the award (s 38(3)(a)). If it is varied, the new award shall have effect as if it were the award of the arbitrator (s 38(6)).

As to when a court will grant leave to appeal, Section 38(5) of the NSW Act provides:

The Supreme Court (a) shall not grant leave [to appeal]...unless it considers that, having regard to all their circumstances, the determination of the question of law concerned could substantially affect the right of one or more of the parties to the arbitration agreement; and (b) may make any leave which it grants...conditional upon the applicant for that leave complying with such conditions as it considers appropriate.⁹²

Exclusion Agreements

It is fair to say that the majority of national courts have tended to respect parties' agreements to oust the jurisdiction of the domestic courts, and to lean in favour of the finality of institutional arbitral awards.

In 1983, for example, the English High Court ruled that the mere reference in a agreement to the ICC Rules (which, under Article 24, expressly exclude any right of appeal)⁹³ constituted a valid 'exclusion agreement' waiving the parties' right of appeal.⁹⁴ It is the writers' hope and expectation that

92 See for a discussion of some of the more recent cases dealing with the point Goldring and Christie *above* n 10 at p 389.

93 Article 24 states:

'1. The arbitral award shall be final.

2. By submitting the dispute to arbitration by the International Chamber of Commerce the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made'.

94 *Arab African Energy Corp (Afafenco) v Olieprodukten Nederland (OPN)* [1983] 2 Lloyd's L Rep 419.

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Australian courts will follow suit.⁹⁵

One writer has suggested that, given the Court's power to remit awards for consideration where there has been 'misconduct',⁹⁶ the effect of an exclusion agreement will be severely limited.⁹⁷ It is our view however, that such a view is unduly pessimistic, and that Australian courts are likely to adopt the English approach of restricting judicial intervention.⁹⁸ As other commentators have noted in the English context:

The High Court [of England] has shown itself unwilling to let its residual power to set aside an award for 'arbitrator misconduct' be used as an avenue for 'backdoor' appeal of awards, subject to an exclusion agreement.⁹⁹

On a similar note, the legal correspondent of the UK Financial Times in 1983 pointed out that the context of a statutory provision's application may be just as important as its wording:

No manner of legislation will remove...the professional zeal of [London] solicitors and barristers who transplant into arbitration proceedings the habits acquired in the courts. Only competition from such institutions as the ICC will make them adopt more relaxed attitudes.¹⁰⁰

(Until the point is resolved by an Australian court, however, the writers recommend that parties specifically state in their contracts whether they wish to exclude or retain the possibility of appeal).¹⁰¹

95 Compare judicial attitudes to appeal in the cases of *Qantas Airways Ltd v Joseland and Gilling* (1986) NSW Court of Appeal (unrep) and *Thompson v Community Park Devis Pty Ltd* (1987) SC of Vic (unrep); both discussed in 'National Report: Australia' Goldring and Christie above n 10 at 389.

96 See for example section 42 of the NSW legislation. It is not 'misconduct' however to make an error of law, to make an award which is wrong or wrongly to admit or refuse to admit evidence (Goldring and Christie above).

97 Klaric above n 12 p 460.

98 See Pryles above n 1 at 477 citing Street J (as he then was) in a 1969 decision: 'Where parties to an agreement regulating international trading activities make provision for the arbitration of disputes by an international organization such as this Chamber of Commerce the domestic courts of the countries concerned so far from allowing their own processes to be invoked in disregard of the arbitration agreement should lend their aid to its enforcement. Although the court has a discretion to grant or refuse an order staying proceedings in an action commenced in disregard of such an arbitration agreement it is a discretion to be exercised with this consideration to the foregoing. Parties to international trading agreements should be able to be confident that if they deliberately and advisedly stipulate for arbitration by a tribunal of their choice this stipulation will be respected'. (*Joy Manufacturing Co v AE Goodwin Ltd* (1969) 91 WN (NSW) 671 at 674). See also *Tanning Research Laboratories Inc. v O'Brien*, (1990) 64 ALJR 211 at 215.

99 Craig, Park, Paulsson above 7 480.

100 A Herman *Financial Times* 20 Oct 1983 at p 38.

101 It remains the view of the various commentators that in some countries (eg Switzerland) only an express exclusion of appeal will be sufficient to oust the jurisdiction of the courts in this regard; see for example S Bond 'How to Draft an Arbitration Clause' 1 *The ICC Bulletin* (vol 2) 14 at 21 (1990).

Scrutiny of Awards by the ICC Court

It is within the context of trying to limit the role of the judiciary that one aspect of the ICC system, already discussed briefly in Part 1(3) above, merits further consideration. It is an aspect which is intended to render it more difficult for parties to successfully appeal ICC awards, particularly in cases where the appeals do not really touch on the substance but rather the form of the award.

This feature is the Court's scrutiny of awards under Article 21. As has been indicated above, the purpose of this provision is to assist in the enforcement of ICC awards by endeavouring to ensure that those awards are valid as to their form and, to a limited extent, their content. While the Court's role of scrutinizing awards has often been challenged before national courts, those courts have usually sustained the ICC and upheld its prerogatives.¹⁰²

Thus, in *Bank Mellat v GAA Development Construction Company* before the English Commercial Court,¹⁰³ an application was made to set the award aside for arbitrator misconduct. The ICC Court had requested further explanations after receiving a draft majority award and a dissenting opinion. A revised majority award had then been circulated among all arbitrators, although the arbitral tribunal never physically convened. The English Commercial Court found that this exchange of views was valid. As Steyn J stated in that case:

The supervisory function which is germane to the issues in the present case is the Court's power of scrutiny of awards before they are published...*It is regarded as the first imperative of the ICC system that awards under it should be enforceable...The system of scrutiny of awards by the Court contributes to the enforceability of ICC awards.* The Court has a mandatory power to 'lay down modifications as to the form of the award'....The Court also has an advisory power. It may 'without affecting the arbitrator's liberty of decision', draw the arbitrator's attention to 'points of substance'...The process of scrutiny is directed at the internal coherence and consistency of the award. But it may also sometimes reveal a procedural flaw which can be corrected... This is then a general description of the nature of the system of scrutiny of awards which parties accept when they agree on arbitration in accordance with the ICC Rules'.¹⁰⁴ (Emphasis added)

The ICC International Court of Arbitration system of checks and balances, by which the Court accepts awards or remands them to the arbitrators protects the parties as well as the ICC. It ensures that final awards conform to the fundamental principles of international commercial law which businessmen expect to cover their disputes, and with the spirit of the ICC Rules embedded in Article 26.¹⁰⁵

102 See Craig, Park, Paulsson above 7 section 20-05 pp 347 and following.

103 Q.B. Division (Commercial Court) decision of 12 January 1988 [1988] 2 Lloyd's L Rep 44; See also 3 Mealey's Int Arb Rep 9 (1988).

104 Ibid at 48.

105 Article 26 cited above requires the ICC Court to make every effort to ensure that the award will be enforceable.

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The three most commonly cited grounds for rejecting a draft award are the following:

First Ground for Rejection: Clerical Errors/Formal Flaws

The ICC wants the arbitral decisions it approves to be untainted by any procedural flaws that might hamper enforcement in a municipal jurisdiction. The ICC's goal is to provide a system whereby the parties get to the extent possible, an incontestably valid and enforceable decision. Where this is not readily apparent from the award, the Court will remand the award, for the arbitrators to expand their draft award to correct any clerical errors (e.g. computation), or to show how they conformed to the minimum standards of due process.

Second Ground for Rejection: Insufficient Reasons

Another ground for rejection is insufficient reasoning. An arbitral decision which simply affirms that party A is liable to party B for X dollars, without giving some minimum legal analysis on which to base the conclusion of liability, is more likely to encounter enforcement difficulties than a decision which includes a fully reasoned opinion of fact and law. 'Unmotivated' arbitral awards are unacceptable in a number of countries, including France, Poland, Germany and Italy.

Where the arbitrators have failed to indicate reasons in an award, in a jurisdiction which requires reasoning, or if the arbitrators propose an award which is astoundingly large compared to the original claim (eg. by providing punitive damages) without adequate reasoning, the Court will send the award back for explanation.

Third Ground for Rejection: Manifest Errors of Procedure

A third ground for rejecting an award is when there have been manifest errors of procedure committed during the course of the arbitration which taint the actual arbitration decision. For example, the ICC Court would probably disapprove of an arbitration decision that the parties could not use legal counsel. Also, where the losing party showed that it was not given adequate opportunity to present its defence, the ICC would be unlikely to approve the award.

The Importance of Scrutiny by the Court

The ICC Court's role of review was underscored in a recent decision of the New Zealand Court of Appeal, involving what was reputedly the largest construction project (a refinery) ever undertaken in that country.¹⁰⁶ A partial ICC award had been rendered by a retired judge of the New Zealand High Court, and was challenged by the loser, a New Zealand subcontractor.

The Court of Appeal noted that the sole arbitrator's draft award had been submitted to the ICC Court in accordance with its Rules, and that 'it was

106 *CBI New Zealand Ltd v Badger BV and Chiyada Chemical Co Ltd* [1982] 2 NZLR 669.

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returned so that he might examine it again on a point relating to interest'. The award was revised and delivered. The question arose as to whether this was an unwarranted interference with the adjudication process. In his opinion, Cooke P of the Court of Appeals recognized the ICC Court's intervention as being a 'supervisory [not adjudicatory] function.' He referred approvingly to Steyn J's comment (quoted above) to the effect that the ICC system is 'the most truly international of all arbitral systems.'¹⁰⁷ The five-judge panel unanimously ruled that public policy was in no way violated by the ouster of ordinary court jurisdiction in favour of ICC arbitration. Two further comments by individual judges sitting in this case are notable. Barker J stated:

International trade is undertaken in countries where the rule of law is not well recognised or where the prevailing legal system leaves much to be desired in terms of efficiency, speed, or impartiality. The existence of well-respected and established international arbitration regimes, such as the one of the ICC, assumes importance.¹⁰⁸

And McMullin J noted:

The whole process of arbitration under ICC Rules is one which imposes its own safeguards against erroneous awards whereby the appointment of the arbitrator and any award which he makes is subject to supervision.¹⁰⁹

Whatever faults one might find in such a system,¹¹⁰ *anything* which can be done to help ensure the enforceability of an arbitrator's award should be applauded. As Stephen Bond of the ICC stated in a recent article:

As is written in the Federalist Papers, 'If men were angels, no government would be necessary'. If arbitrators were angels, no scrutiny would be necessary.¹¹¹

Given the number of parties to ICC arbitration in comparison with other institutions, these views appear to be shared by a number of others.

107 See above 104.

108 Ibid at 694.

109 Ibid at 689.

110 For a trenchant criticism of this role see the 1988 Monograph of Antoine Kassis '*Reflexions sur le Reglement d'arbitrage de la Chambre de commerce internationale*'; eloquently responded to by J Paulsson in his article entitled 'Vicarious Hypochondria and Institutional Arbitration' 1990 Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce 96. See also the Rules of FOSFA (The Federation of Oils Seeds and Fats Association Limited London) which has a similar process of review (described by B Chapman in 2 Arb Int 323 (1986). See for further criticism of the ICC's approach J Gillis Wetter above n at p 105.

The similar five-member appeals body of the *Chambre arbitrale de Paris* is referred to in E Bucher 'Arbitration under the ICC Rules in Switzerland and the concordat' in Swiss Essays on International Arbitration 127 at 136 (1984) (in connection with an unnamed Swiss case where that process was held by the Federal Tribunal not to infringe upon the independence of the arbitrators).

111 'The Present Status of the International Court of Arbitration of the ICC: A Comment on an Appraisal' (a response to Gillis Wetter's article mentioned above) 1 American Review of International Arbitration (1990) 108 at 121.