"HOW TO DRAFT AND EFFECTIVE ARBITRATION CLAUSE IN AN INTERNATIONAL COMMERCIAL CONTRACT"

by

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INTRODUCTION

1. When drafting any clause in a contract it is necessary to bear in mind what is to be achieved by that clause. An arbitration clause in a cross border transaction is no different in this respect. The obvious answer is to ensure that any disputes are resolved by arbitration as distinct from any other form of dispute resolution. However whilst an arbitration clause may be based on the unstated premise that, in the circumstances of the particular transaction, arbitration is the preferred method of resolving disputes, those drafting an arbitration clause in an international transaction should also bear in mind why arbitration is the parties' preferred process (the positives), so as to ensure those benefits are attained and why in certain cases, arbitration is not preferred (the negatives) so as to ensure those disadvantages are avoided. Thus at the outset, an understanding of the positives and negatives is very useful for those drafting the clause, if not essential.

THE POSSIBLE BENEFITS ASSOCIATED WITH ARBITRATION

2. The possible benefits associated with arbitration are said to be:

   (1) arbitration is more *efficient* dispute resolution process than the judicial process;

   (2) arbitration is *less expensive* than the judicial process;

   (3) arbitration is faster and more likely to result in a *more expeditious* determination of the parties' rights and obligations;

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(4) arbitration allows the parties to directly or indirectly have a say in the *choice of the decision maker*;

(5) arbitration allows the rights of the parties to be determined by a *neutral* decision maker;

(6) an appeal is generally not available and rights to challenge *are restricted* in an arbitration;

(7) an arbitral award is *relatively easy to enforce* when compared to the enforcement of foreign court judgments;

(8) an arbitral award is likely to be enforceable *in a far greater number of countries* than would be a court judgment

3. Efficiency, cost and expedition are generally regarded as the main benefits of arbitration. Arbitration is frequently chosen as a means of containing costs and avoiding delay in resolving a dispute. Generally this will be the case with arbitration, however, they are procedural consequences which could equally by achieved by an experienced tribunal whether it be arbitral or judicial[2]. In both situations, the speed and efficiency of the process is heavily influenced by the particular persons involved in the process. Parties should choose their arbitrator wisely.

4. The choice of a neutral decision maker is vital in an international transaction. As a general proposition, it is in the interests of both parties that the decision maker be neutral and there be no concern that any dispute will be resolved with any actual, or appearance of, "*hometown bias*". In this respect international arbitration has a clear advantage over the national courts of one of the parties to the transaction.

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[2] An example of the fast track judicial process in seen in *Raguz v Sullivan* (2000) 50 NSWLR 236 and contrast the speed of the arbitral process in *Sea Containers Limited v ICT Pty Limited* [2006] NSWCA 327.

5. The limited rights of a party to challenge the outcome is also seen as a benefit. Arbitration involves the parties agreeing to submit their dispute to the determination of a chosen arbitral panel rather than to submit their dispute to the judicial process of a particular jurisdiction with the inevitable attendant hierarchy of appellate processes. An extreme illustration of this proposition is the decision of the High Court of Australia in the decision of *Old CGU Inc.*[3] In that case, *four* members of the High Court on 18 May 2006 upheld a preliminary objection taken by a defendant party to proceedings which had been commenced by the applicant in May 2001 and restrained the further hearing of the proceedings. The case had involved fourteen judges in the judicial process over the preceding five years. The *minority*, that is the ten other judges involved (which included the three dissenting members of the High Court and all seven members of the three courts below) disagreed with the *majority* and delivered judgments which would have allowed the applicant to proceed with his case. The only judicial decision which mattered was that of the ultimate appellate court. As one member of the US Supreme Court said "*we are not final because we are infallible; we know that we are infallible only because we are final*."[4] It is a feature of the arbitration laws of most legal systems that rights of appeal and challenge are generally very limited[5]. This is a significant consideration which can be enhanced, if not secured by a contractual provision whereby the parties agree that any award shall be final and binding and that there shall be no appeal of any nature from the award[6].

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[3] *Old CGU Inc. v Industrial Relations Commission of New South Wales in Court Session*, [2006] HCA 24, 18 May 2006, overruling *Old CGU Inc, v. Industrial Relations Commission* (2004) 60 NSWLR 620 (Court of Appeal), *United Globalcom v McRann* [2003] NSW IR Comm 318 (Full Bench) and *McRann v United Globalcom Inc* (2003) 142 IR 275 (Peterson J).

[4] *Brown v Allen,* 344 US 443, 9 February 1953, per Jackson J at 540

[5] such as s.38(5) of the Commercial Arbitration Act 1984 (NSW), *eg Sea Containers Limited v ICT Pty Limited* [2006] NSWCA 327, and s16 and Article 34 (1) of Schedule 2 to the International Arbitration Act 1974 (C'lth), ss68 and 69 of the Arbitration Act 1996 (UK) and clause 5 of Schedule 2 of Arbitration Act 1996 (NZ).

[6] As stated in Article 28(6) of the ICC Arbitration Rules, and in Article 33.2 of the ACICA Arbitration Rules.

6. Finally and most importantly, arbitration agreements and awards have the very significant advantage of being readily enforced and recognised in over 140 countries around the world who are signatories to the New York Convention[7] which is only applicable to the arbitration process.[8] The New York Convention provides an ability to *"effectively and efficiently enforce arbitration awards virtually throughout the world…Nothing remotely like that exists if one obtains a judgement from a court."*[9] The enforceability of any award in most countries is an overriding consideration in a cross border transaction. If the location of the assets of the other contracting party is known, drafting decisions should be made with a view to ensuring that any award will be enforceable in the jurisdiction where they are located.

7. Whilst the application of the New York Convention with its comparative ease of enforcement of arbitral awards around the world is the most obvious consequential benefit of an arbitration clause, the New York Convention itself does not contain any specific rules on arbitration clauses beyond requiring that the

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[7] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards which was originally adopted by diplomatic conference in New York on 10 June 1958

[8] Under Article 1.1, the Convention applies "*to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought*"

[9] Per Spigelman CJ, *Transaction Costs and International Litigation*, an address to the 16th Inter-pacific Bar Association Conference in Sydney on 2 May 2006. These remarks echoed the words of Lord Mustill in 1989 that the New York Convention could perhaps "*lay claim to be "the most effective instance of universal legislation in the entire history of commercial law* (M.J. Mustill, "*Arbitration: History and Background*" (1989) 6 Journal of International Arbitration, 43 at page 49 quoted recently by the Supreme Court of Canada in *Dell Computer Corporation v Union Des Consommaterus & Anor* [2007] SCC 34 per Deschamps J. at 39)

arbitration agreement be in writing[10] and leaves it to the national law to determine whether or not the arbitration clause is valid and binding[11].

8. The negatives traditionally associated with arbitration are said to be, first not all disputes between the parties may not be covered by the arbitration clause (problems of scope), and second, not all relevant parties may bound by the arbitration clause (problems of joinder). The former problem is less likely to arise in view of the current judicial approach to the proper construction of an arbitration agreement which is that the arbitration agreement *"should not be construed narrowly"*.[12]

WHAT PROCEDURAL RULES SHOULD BE USED?

9. There are a number of a sources of procedural rules to regulate the conduct of an international arbitration. The procedural rules may be found in an *ad hoc* arbitration agreement whereby the parties have agreed to arbitrate the particular dispute which has arisen between them according to specific procedures which they agree upon or incorporate into their agreement. Alternatively, the parties may choose "*institutional arbitration*" which requires the involvement of the arbitration institutions such as the International Chamber of Commerce ("ICC"), the Hong Kong International Arbitration Centre ("HKIAC"), the Singapore International Arbitration Centre ("SIAC"), and the Australian Centre for International Arbitration ("ACICA"),[13] each of which has formulated and adopted

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[10] Article II sub-article 2 of the *New York Convention* states; "The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." The requirements in this definition were analysed in the case of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd,* [2006] FCAFC 192, 20/12/06 which was then applied in the later case of *APC Logistics Pty Ltd v CJ Nutracon Pty Ltd* [2007] FCA 136, 19/2/07. It was held that Article II "requires bilateral recognition of an arbitration agreement … [I]t does not require that the contract be formed by an exchange of letters. Conduct might suffice. What is required is that the terms of the agreement and assent to these terms are in exchanged documents."

[11] Article II (3).

[12] The oft quoted words of Gleeson CJ in *Francis Travel Marketing Pty Limited v Virgin Altlatic Airways Limited* (1996) 39 NSWLR 160 at 165 which were recently applied in *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894 at [22]-[23].

[13] Further information on each of these institutions including their arbitration rules is published on their respective websites which may be found by googling their acronyms.

a set of procedural rules regulating the conduct of the arbitration process and which also ensures that the arbitration is administered by the particular institution. The arbitral institutions usually recommend use of a standard or template clause which has the effect of incorporating the particular institution's arbitration rules and resulting in an arbitration process administered by the institution.

10. Another source of a neutral and comprehensive set of procedural rules for an international arbitration, but which are not tied to any particular arbitration institution, are the Arbitration Rules which have been adopted by the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Rules are a *"neutral set of arbitration rules suitable for use in ad hoc arbitrations ...* [which were] *intended to be acceptable in both capitalist and socialist, in developed and developing countries and in common law as well as civil law jurisdictions.*"[14] The UNCITRAL Rules contemplate an administering or appointing authority to act in default of agreement or action by either of the parties. Arbitral institutions will, if requested by the parties, generally administer and supervise arbitrations using the UNCITRAL Rules. It has been said that these rules "*are in fact reflective of what actually transpires in international arbitration practice and provide a milestone for review in many arbitrations under other systems*."[15]

11. As a result, there is a threshold issue in the drafting exercise. Should the parties adopt the procedural rules of an established arbitration institution or craft a set of rules tailored for the particular contract, parties and disputes which are likely to arise. The later approach requires the apocryphal crystal ball. What sort of disputes will arise in the future? How will they best be resolved? Any such drafting exercise also requires time and co-operation. However, the opportunity to undertake this drafting exercise may not even arise or may be very limited. The drafting exercise may be cut short for reasons such as the dispute clause is

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[14] *Comparative International Commercial Arbitration* by Lew, Mistelis and Kroll, Kluwer, 2003 at para 2.34 quoting Sanders.

[15] *Comparative International Commercial Arbitration*, supra, at para 2.36.

often thrown into the negotiations at the last moment. Also it may result from one party's insistence to use a standard clause borrowed from one of the many international arbitral institutions or found in its standard terms and conditions. However even if the parties agree to use a model clause provided by an arbitral institution, this solution itself involves the parties making a conscious decision on a preliminary question, namely should the parties agree to institutional arbitration or ad hoc arbitration or a combination of both?

12. Those arguing in favour of institutional arbitration point to the procedures and practices embodied in the institution's arbitration rules, which have been developed over time and have benefited from first hand experience accumulated over time.[16] Nevertheless, the rules of the newer arbitral institutions such as ACICA have incorporated the lessons and practices from the more established institutions and reflect current best practice [17].

13. Arbitration institutions justifiably claim an advantage over ad hoc arbitration through the institutional support and administrative services which are provided to the parties and the arbitrator. Some proudly refer to their practice of independent scrutinising or checking the awards before they are made and issued to the parties.[18] A more persuasive argument in support of institutional arbitration is unspoken advantage gained when it comes to enforcing the award from the enhanced integrity and imprimatur of an award which emanates from the processes of a well known arbitral institution as compared to an award emanating from an ad hoc arbitration process.

14. On the other hand, an ad hoc arbitration agreement ostensibly allows the parties to draft an arbitration clause which may be tailored to the meet the needs of the parties and their particular transaction. The difficulty with this however is that, as

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16 E.g. the ICC from the 1920s up to 1988.

17 E.g. the ACICA rules which were adopted in 2005.

18 Either as a matter of compliance with the institution's rules such as Article 27 of the ICC Rules or as a matter of the informal, but claimed invariable, practice of institutions such as the LCIA.

the needs of the parties sometimes only become manifest when the disputes subsequently arise, the drafting of an arbitration clause appears to require the benefit of hindsight.

15. The reality is that most arbitration clauses are somewhere in between an ad hoc agreement and an arbitral institution's recommended clause. Even in the case of institutional arbitration, parties tend to vary or modify the template clause in an effort to customise the clause to meet their particular needs and circumstances.[19] Although it may seem unnecessary, if an arbitration institution is involved, care should be taken to ensure that matters of detail are attended to such as ensuring that the institution exists and that the correct name of the arbitration institution mentioned in the clause is used.

THE FUNCTION OF THE ARBITRATION CLAUSE

16. Another important preliminary consideration in drafting is to bear in mind the function of the arbitration clause. It has been said that the "*essential functions*" of an arbitration clause are threefold[20] and are (a) to produce mandatory consequences for the parties and (b) to exclude the intervention of State courts in the settlement of the dispute and give the powers to the arbitrators to solve it; and (c) to put in place a rapid and efficient procedure leading to an award susceptible of judicial enforcement. With these functions in mind there are some matters which need to be considered when drafting an arbitration clause in a cross border transaction. It goes without saying that any such clause should be clear and concise.

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[19] Significantly, it has been noted that "a survey indicated that out of 237 cases submitted to the ICC in 1987, only one precisely followed the ICC model clause ", *The International Arbitration Clause Essential and Optional Elements – an Update"* by Ugo Draetta, International Business Law Journal, No. 4, 2004, p.577.

[20] per P Eisemann as quoted by Stefano Azzoli, Secretary General, Chamber of Arbitration of Milan, Italy at a seminar on Arbitration Practice at the ICC, Paris on 13 November 2006.

WHAT MATTERS SHOULD BE ADDRESSED OR INCORPORATED IN THE ARBITRATION CLAUSE?

17. It is sometimes suggested by commentators that there are numerous matters which should be addressed in a "*well conceived and carefully drafted arbitration clause*"[21] in an international contract. These commentators assert that in order to achieve the "*often touted, but seldom achieved, objectives of the arbitration*"[22] it is necessary to specifically address in the arbitration clause a litany of diverse matters such as the number of arbitrators, the procedure for choosing the arbitral panel, what ethical rules control the arbitral panel and the parties' representatives, the issue of pre-hearing discovery, allowing pre-hearing dispositive motions, the issue of how costs and attorney's fees will be awarded in the arbitration, whether the award should be a reasoned award, what evidentiary rules will be applied and, even, matters of minutiae such as whether the hearing will occur on consecutive days! These extensive checklists sometimes reflect a particular legal culture or a desire to place the arbitration process under the contract in a straight jacket in the form of the court processes most familiar to the legal representative engaged in drafting the clause. In approaching the problem in this way, the legal representative runs the risk of forcing the parties into a mini-trial of their dispute which mimics or recreates the judicial process with which the advisor is most familiar. Where the parties are from different legal jurisdictions, this approach runs the risk of not achieving agreed result. It also risks not utilising current best international arbitration practice.[23]

18. Nevertheless these concerns over matters of apparent procedural detail such as time and hearing days are not the isolated concerns of lawyers emanating from particular foreign jurisdictions. These concerns have and do influence those

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21 *"Drafting international arbitration clauses to avoid unnecessary disputes and confusion"* by Steven Bizar and Paul Weiner, Mealey's International Arbitration Report, September 2004, Volume 19 at page 21.

22 Bizar and Weiner, supra at page 31.

23 Such as eg, the IBA Rules on the Taking of Evidence in International Commercial Arbitration, the UNCITRAL Notes on Organisation Arbitral Proceedings and the IBA Guidelines on Conflict of Interest in International Arbitration and which reflect an amalgam of various civil and common law approaches.

drafting arbitration clauses closer to home as the *Austeel* litigation in New South Wales revealed.[24] The judgments reveal that the arbitration clause in the contract imposed a 30 day limit from the start to finish of the arbitration relating to a project involving "*hundreds of millions of dollars*" and numerous factual and legal issues. The accepted consequences of such a limited timeframe in the clause[25] were graphically described by Palmer J in terms that if "*the dispute happens to be extremely complex, then the lawyers conducting the arbitration are required to adopt Procrustean measures to accommodate it to the available arbitration time."*[26]

THE SCOPE OF THE ARBITRATION CLAUSE

19. The scope of the clause determines the nature and extent of the disputes which the parties agree to be arbitrated. In order to avoid argument as to whether a particular dispute falls within the scope of the clause, it needs to be as wide as possible. This will also prevent some aspects of the relationship between the parties being the subject of judicial proceedings and the remainder being the subject of arbitration. The clause should be drafted to ensure all disputes between the parties are covered by the scope of the clause. Accordingly the clause should ideally cover all disputes of whatever nature between the parties arising out of or in connection with the transaction.

20. Until recently it was generally accepted that a clause which stated that it covered all disputes "*arising out of*" the contract or all disputes "*arising under*" the

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[24] See *State of New South Wales v Austeel Pty Limited* [2003] NSWSC 1077, Palmer J on 21 November 2003, *State of New South Wales v Austeel Pty Limited* [2003] NSWCA 392, Court of Appeal, 12 December 2000 and *State of New South Wales v Austeel Pty Limited* [2004] NSWSC 81, Bergin J on 23 February 2004.

[25] *State of New South Wales v Austeel Pty Limited* [2004] NSWSC 81 at [5].

[26] *State of New South Wales v Austeel Pty Limited* [2003] NSWSC 1077 at [24]. In Greek mythology, *Procrustes* (the stretcher), was a bandit from Attica. He had his stronghold in the hills outside Eleusis. There, he had an iron bed into which he invited every passerby to lie down. If the guest proved too tall, he would amputate the excess length; if the victim was found too short, he was then stretched out on the rack until he fit. Nobody would ever fit in the bed because it was secretly adjustable. Procrustes would stretch or shrink it upon seeing his victims approach. Procrustean measures are severe!

contract might not be wide enough to include disputes between the same parties arising out of pre-contractual negotiations and any pre-contractual conduct which was in breach of a mandatory applicable law and which might be the basis of a statutory claim such as one made under the misleading conduct provisions of the *Trade Practices Act.*[27]

21. A significant change in judicial thinking was brought about by the decision in December 2006 of the Full Court of the Federal Court of Australia in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd.*[28] when the Court rejected the assertion that the words "*all disputes arising out of*" this contract only covered those disputes which flowed from the contract itself and did not cover such matters as claims for misleading conduct occurring during the pre-contractual negotiations. The Court emphasised that standard form international contracts should be construed liberally and there was a sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes in their transaction being heard in two different places.

22. This landmark decision subsequently received the express endorsement of the House of Lords in 2007 which accepted that:[29]

"The time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. ... It seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. ... Although in the past the words "arising under the contract" had sometimes been given a narrow meaning, that should no longer continue to be so ... One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration."[30]

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27 see eg *Walter Rau Neusser Aul und Felt AG v Cross Pacific Trading Limited* [2005] FCA 1102.

28 [2006] FCAFC 192, 20/12/06.

29 See *Fiona Trust & Holding Corporation and Ors v Yuri Privalov and O*rs, [2007] EWCA Civ 20, 24/1/07, per Longmore LJ at [17] and [18] and which was adopted in the House of Lords in *Premium Nafta Products Limited v Fili Shipping Company* [2007] UKHL 40 per Lord Hope of Craigehead at [31].

30 Contrast the decision of the WA Court of Appeal in *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASC 110, 13 May 2008, where the "fragmentation" or duplication of hearings of the same claim against different parties, one in arbitration and the other in the court was used by the Court to support a restricted interpretation of the scope of disputes covered by the arbitration clause.

THE NUMBER OF ARBITRATORS

23. The number of arbitrators is something which needs to be addressed whether it be an ad hoc or institutional arbitration. Generally if the amount in dispute is below a certain level then costs considerations may lead to the appointment of a sole arbitrator as being most appropriate, particularly in an international arbitration where a panel of three will result in increasing the costs considerably and problems of co-ordinating the availability of the arbitrators which in turn may delay the resolution of the dispute and render the process less efficient and more costly. A clause may specify that if the amount in dispute is below a certain amount then it will be a sole arbitrator and if it is above a certain amount, it will be a panel of three. Most modern procedural rules of arbitration institutions contemplate these circumstances arising and will include a power by default for the institution to determine the appropriate number of arbitrators in the circumstances of the particular dispute.[31]

APPOINTMENT OF ARBITRAL PANEL MEMBERS

24. A default mechanism when one of the parties fails to appoint an arbitrator may be found in the rules of the arbitration institution if chosen and it may also be found in the applicable arbitration law.[32] The usual appointment mechanism of each party nominating an arbitrator and the two nominated arbitrators or the institution appointing the third and presiding arbitrator however may need to be varied in the case where a multiparty dispute is likely to arise and the parties are unable to

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[31] Rule 8 of the ACICA Rules provides that *"if the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the Respondent of the Notice of Arbitration the parties cannot agree, ACICA shall determine the number of arbitrators taking into account all relevant circumstances."*

[32] Eg s. 8 of the Commercial Arbitration Act 1984 and Article 11 of the Model Law which has force of law in Australia by s.16 of the International Arbitration Act 1974, see the discussion on the independent operation of the Model Law in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, 20/12/06 at [197] to [205].

agree on the constitution of the panel.[33] Again modern institutional rules usually address this problem.[34]

THE LAW APPLICABLE TO THE MERITS OF THE DISPUTE

25. The law which is applicable to the merits of the dispute is another matter which may be considered when drafting an arbitration clause although generally this will be the proper law governing the main contract between the parties. It is a matter which if specified, at the least, reduces the number of issues which must be addressed, and if not agreed, determined in any arbitration. More importantly it may also affect a party's decision as to which arbitrator to appoint. The process is more likely to be expeditious if the arbitrator is familiar with the applicable legal principles.

THE LANGUAGE OF THE ARBITRATION

26. The language of the arbitration invariably needs to be addressed in international transactions. Consider the situation where the language of the arbitration has not been considered or agreed. What is to happen when there is a contract between a Chinese party and an Australian party governed by English law and the notice of dispute is served in Chinese or vice versa?

27. The language used in an international arbitration can lead to significant additional translation costs for a party and can delay the hearing. The language to be used will also limit or influence a party's choice of arbitrator. Most arbitral institutions suggest that the language be agreed by the parties and their model arbitration

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[33] For a general discussion of the drafting problems associated with multi-party disputes and multi-contracts see "*Arbitration Clauses for International Contracts"* by Paul Friedland, 2004, Juris, Chapters 6 and 7.

[34] Eg Rule 11(2) of the ACICA Rules provides *that "if three arbitrators are to be appointed and the multiple Claimants or multiple Respondents do not act jointly in appointing an arbitrator, ACICA shall appoint each member of the Arbitral Tribunal and shall designate one of them to act as Chairperson, unless all parties agree in writing on a different method for the constitution of the Arbitral Tribunal and provide written evidence of their agreement to ACICA".*

clause usually addresses this issue.[35] Under the CIETAC Rules where the arbitration is taking place in China, the language used will be Chinese, see Article 67 of the CIETAC Rules. Under some institutional rules the language of the arbitration is left to the tribunal to decide.[36] This can lead to uncertainty and affect a party's preparation for any arbitration.

28. The compromise of a bilingual arbitration may undesirable as such arbitrations are generally more expensive and more time consuming in practice.

29. It is desirable to specify a language in the arbitration clause to avoid uncertainty if left to the tribunal and the additional costs of translation. However if a less common language is specified then the pool of experienced international arbitrators fluent in the language will be greatly reduced.

CONFIDENTIALITY AND PRIVACY

30. As mentioned above, arbitration is attractive because of its privacy[37]. Questions frequently arise as to how confidential the process (and any award) is or can be[38]. Questions arise as to the confidentiality of any documents produced in the arbitration and of the evidence given by the contracting parties and by third party

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35 E.g. the ACICA Model Clause contains the following sentence; *"The language of the arbitration shall be English [or choose another language]."*

36 Eg Article 17 of UNCITRAL Rules and Article 19 of SIAC Rules

37 Contrast the attendant publicity associated with the delivery of a judgment in open court eg on 27 July 2007 the Court in a public summary of the judgment in *Seven Network Limited v News Limited* [2007] FCA 1062 said *"38 By pointing to these matters I do not intend to imply that the behaviour of all the Respondents was exemplary. The [X} of News, Mr[X], for example, on his own account dishonestly attempted to mislead Telstra into contributing additional support to Fox Sports' bid for the NRL pay television rights. The evidence also shows that News was content to withhold important information from Telstra, in effect its partner in the Foxtel Partnership, and did so over a considerable period of time. 39 At the conclusion of the hearing, I asked whether Mr[X}was still employed by News and was told that he was. If, in the meantime, News has taken no action against Mr [X] in respect of his admitted dishonesty, it would reflect very seriously indeed on News' standards of commercial morality".* Arbitration does not provide an opportunity for an arbitrator to publicly and gratuitously speculate about facts and matters arising after and outside the hearing.

38 Eg *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10, *Transfield Philippines Inc v Pacific Hydro Ltd & Ors*[2006] VSC 175, 4/12/06 , *Michael Wilson & Partners Limited v John Foster Emmott* [2008] EWCA Civ 184 and *Mobil Cerro Negro Ltd v Petroleus de Venezuela SA* [2008] EWHC 532

witnesses. Contracting parties should consider what confidentiality regime best suits their commercial objectives and interests when drafting a dispute clause on an ad hoc basis. Any clause is only binding on the parties yet these issues may concern not only the parties but also third parties such as witnesses and the arbitral panel itself. Again most institutional rules address these issues.

31. An example of a modern comprehensive clause dealing with confidentiality and privacy is found in the ACICA Rules. Article 18 provides:

"18.1 Unless the parties agree otherwise in writing, all hearings shall take place in private.
18.2 The parties, the Arbitral Tribunal and ACICA shall treat as confidential and shall not disclose to a third party without prior written consent from the parties all matters relating to the arbitration (including the existence of the arbitration), the award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain except:
(a) for the purpose of making an application to any competent court;
(b) for the purpose of making an application to the courts of any State to enforce the award;
(c) pursuant to the order of a court of competent jurisdiction;
(d) if required by the law of any State which is binding on the party making the disclosure; or
(e) if required to do so by any regulatory body.
18.3 Any party planning to make disclosure under Article 18.2 must within a reasonable time prior to the intended disclosure notify the Arbitral Tribunal, ACICA and the other parties (if during the arbitration) or ACICA and the other parties (if the disclosure takes place after the conclusion of the arbitration) and furnish details of the disclosure and an explanation of the reason for it.
18.4 To the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party".

THE QUALIFICATIONS OF THE ARBITRATORS

32. Where specific qualifications or expertise is a matter which has led to the choice of arbitration as the means to settle the disputes, then the requisite criteria should be addressed and specified in the arbitration clause. Sometimes the qualifications

specified are professional qualifications such as a construction engineer or a practising lawyer with a certain number of years of experience.

33. Most dispute clauses omit any reference to qualifications. It can lead to unnecessary disputes and diversions to the courts as seen in the case of a loosely analogous situation of an expert determination clause, which unhelpfully stated that "*the Expert shall have a reasonable commercial, practical and technical experience in the area of dispute."*[39] Where expertise or professional qualifications are desired then care should be taken to avoid making the definition of the qualifications required excessively narrow as such persons may be hard to come by if and when a dispute arises.

SOVEREIGN STATE PARTY TO THE CONTRACT

34. Where a sovereign state or a state instrumentality is a party to the arbitration agreement, the nationality of the arbitrators is a relevant consideration. One of the advantages of arbitration is that "*arbitration is part of no State's judicial system*".[40] Arbitration is a creature that owes its existence to the will of the parties alone. One of its advantages is that the parties voluntarily choose the arbitrator either directly or indirectly through their arbitration agreement. Where a state or a state entity is a party it is advisable to adopt a negative qualification for any arbitrator, i.e. an arbitrator may not be of the same nationality as any party to the contract.

35. By agreeing to arbitration, a sovereign state is thereby taken to have waived any sovereign immunity which would prevent the state being bound by that process, however another issue which arises where a state is a party to a contract, is the question of waiver of any sovereign immunity in relation to the assets which may be involved in the enforcement of any resulting arbitral award. Written consent

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[39] *Straits Exploration (Australia) Pty Ltd & Anor -v- Murchison United Nl & Anor,* [2005] WASCA 241 (14 December 2005).

[40] *Dell Computer Corporation v Union Des Consommaterus & Anor.* [2007] SCC 34 at 51.

by a state to a dispute being arbitrated does not also amount to consent to the enforcement of any award or waiver of state immunity on the execution of the award against particular state owned assets[41]. Accordingly, if possible and practical, a waiver of immunity against execution should also be obtained at the time of contracting and obtaining the consent of the state to submit any dispute to arbitration.

SERVICE ON THE PARTIES

36. Service on the other contracting party is a significant issue which may arise at different times from the commencement of the arbitration through to the publication of the award. Recognition and enforcement of an award may be refused under the New York Convention where the party against whom the award is sought to be enforced "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case."[42] This should be borne in mind not only when drafting the clause but at all times during the arbitral process so as to not provide a basis for non enforcement of the award.

37. Where there is litigation before the courts then the rules of court will facilitate the service of documents on the other party and will indicate in what circumstances personal service is required. There are no rules of court which apply in an international arbitration which may involve cross boarder procedures. Again the rules of most arbitration institutions address this issue and prescribe what is required for effective service during the course of the arbitration.

THE PLACE [SEAT] OF THE ARBITRATION

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41 See the discussion in *Orascom Telecom v Republic of Chad* [2008] EWHC 1841 at [26] to [49]

42 Article V (1)(a)

38. The place of arbitration is one of the most important matters to be addressed and specified in an arbitration clause in an international transaction. This determines *"*the rules of the game*"*. There are two concepts involved here. This is not only a geographical issue but also raises a critical legal issue with serious consequences for any future arbitration. First, it should be appreciated by the parties that in choosing a geographical location as the venue for the arbitration then that will carry with it the applicability of the laws of that jurisdiction to the extent that any mandatory laws will always apply to arbitrations conducted at that place and it may include laws relating to such critical matters as the removal of arbitrators.[43]

39. Apart from the geographical considerations, the question of the legal situs of the arbitration needs to be considered. Where is the international arbitration taking place as a matter of legal theory? An international arbitration may take place physically in more than one location or jurisdiction at the same time. An international arbitration frequently takes place by videoconferencing involving people in a range of different jurisdictions. It is necessary in such circumstances for the parties to choose which arbitration law will regulate the procedural aspects of the arbitration as the common law "*does not recognize the concept of arbitral procedures floating in the transnational firmament unconnected with any municipal system of law."*[44]

40. This choice of the place of the arbitration is generally expressed as the choice of the "seat" of the arbitration[45]. It is the parties' agreement of the juridical home of the arbitration. The choice of the seat will have a major effect on any enforcement as the award is generally regarded as being made at the seat of the arbitration and the courts of that place as having primary supervisory responsibility for the arbitration and any award.[46] The law of the seat selected by

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43 *Raguz v Sullivan* (2000) 50 NSWLR 236 per Spigelman CJ and Mason P at 249 para [54].

44 *Bank Mellat v Helliniki Techniki SA* [1984] 1 QB 291 per Kerr LJ at 301, and see also *Dallal v Bank Mellat* [1986] 1 QB 441 at 458.

45 The law of the seat is variously referred to as the *"lex arbitri", "curial law", "law of the arbitration"* and the *"procedural law"* of the arbitration.

46 See eg *Hiscox v Outhwaite* [1991] 1 WLR 545.

the parties may be a different law to that chosen by the parties as the law governing the merits of their dispute. The seat identifies *"the country whose job it is to administer, control or decide what control there is to be over an arbitration."*[47] There is an implied term in the parties agreement of the seat of the arbitration, that the courts of that place have exclusive supervisory jurisdiction.[48] Accordingly an attempt to invoke the courts of another jurisdiction to set aside the award is in breach of the parties' contractual rights and may be restrained by an anti-suit injunction[49].

41. Thus the choice of the seat *"is akin to an exclusive jurisdiction clause [n]ot only is there agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over [the] arbitration".*[50] Any challenge to the award is likely to be made under the laws of the seat except where the challenge arises on an application for enforcement of the award under the New York Convention. *"It is the curial law which governs the validity of the award and challenges to it."*[51]

42. Apart from the general amenity and neutrality of a prospective venue of the arbitration, when selecting the location in which the arbitration is to take place, it is necessary to consider whether or not that place:

(i) has a modern, national legislation dealing with arbitration;

(ii) provides for minimal interference by domestic laws and the courts;

(iii) recognises a broad interpretation of what disputes can be arbitrated;

(iv) recognises the validity of the arbitration clause[52];

(v) respects the parties' autonomy to allow the parties the flexibility to vary the arbitral process as the need arises. ;

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47 *Braes of Doune Wind Farm (Scotland) Ltd v Alfred Mc Alpine Business Services Ltd* [2008] EWHC 426 (TCC)

48 *C v D* [2007] EWHC 1541 at paragraph [52], affirmed on appeal at [2007] EWCA 1282 per Longmore LJ at [16]

49 *C v D*, supra, where the injunction was also based upon an infringement of the statutory rights and an abuse of process of the court.

50 *C v D* supra, at [29] and see *Weissfisch v Julius* [2006] 1 LLR 716

51 *C v D* , supra at [43]

52 see Article V.1(a) of the New York Convention.

(vi) allows the parties the freedom to use lawyers of choice who may not be admitted in that jurisdiction, eg s 29(2) of the International Arbitration Act 1974 confers this freedom; it states that a person *"while acting on behalf of a party to an arbitral proceeding ..., including appearing before an arbitral tribunal, shall not thereby be taken to have breached any law regulating admission to, or the practice of, the profession of the law within the legal jurisdiction in which the arbitral proceedings are conducted";*

(vii) provides the parties with assistance from the local courts in aid of the arbitration e.g. on substantive matters such as granting and assisting with interim measures, and on procedural matters such as compelling the attendance of third persons to attend as witnesses and produce documents,[53]

(viii) ensures as far as is possible the enforceability of the award outside the country of origin.[54]

43. Once the seat has been chosen, additional care should be taken to express this choice precisely where the place or seat is in a country which does not have a unitary system of law such as a federation. In such a case it requires the specification of a particular city such as Melbourne or Sydney and not the federal state[55]. If the parties were to choose Australia as the seat of the arbitration then the law of the seat would be uncertain as the law will depend on which state within Australia was intended by the parties.

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[53] *Eg Clough Engineering Limited v origin Energy Resources [2006] VSC 349 at [2] where* the arbitration was being conducted on a "stop clock" basis. Another example of possible support is to provide a mechanism for the appointment of arbitrators where one of the parties defaults in making an appointment.

[54] Check to see if there is the reciprocity reservation or the commercial reservation. Article I.3 states "*When signing, ratifying or acceding to this Convention, or notifying extensions under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration*". An attempt to resist being ordered to arbitrate a dispute in China on the basis that dispute did not have a commercial character was rejected in *Zhang & Anor v Shanghai Wool and Jute Textile Co Ltd* [2006] VSCA 133, see at [21] and [22].

[55] Such as the model clause recommended by ACICA which requires the parties to "*choose* [a] *city*"

A COMBINED OR STAGED DISPUTE RESOLUTION PROCESS ENDING IN ARBITRATION

44. Most modern dispute clauses provide for a staged dispute resolution process involving possibly consultation, mediation or expert determination and ultimately, arbitration. When drafting an arbitration clause a question arises as to whether these more informal and less compulsive processes should be addressed and included. After all, the parties are free at any time to talk and try to mediate their dispute. On balance however, it should be recognized that when the parties have reached the stage of a formal dispute, either party may be reticent about suggesting that they try mediation to resolve their dispute as it may be misunderstood and seen as a sign of weakness or an indication of a lack of a belief in the strength of that party's case. Accordingly, it is generally advisable to include specific and enforceable provisions to mediate although strict time limits should be included in the contract to prevent any unnecessary delay. Otherwise the parties run the risk of loosing the advantage of an expeditious and efficient dispute resolution process through arbitration.[56]

45. An agreement to mediate is enforceable in principle, if the conduct required of the parties for participation in the process is sufficiently certain. *"What is enforced is not co-operation but participation in a process from which co-operation and consent might come."*[57] An agreement to mediate as a pre-condition to arbitration may be indirectly enforced by the stay or adjournment of the arbitration proceedings. An agreement expressed merely as *"a commitment to attempt in good faith to negotiate towards a settlement of the dispute*" will not, as it is only describes *"conduct of unacceptable uncertainty*".[58]

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[56] An example of a staged clause is also found in the judgments in the *Austeel litigation, supra.*

[57] *Hooper Bailie Associated Ltd v. Natcon Group Pty Limited* (1992) 28 NSWLR 195 at 206.

[58] *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 at 716, and see the discussion in *Holloway & Anor v Chancery Mead Ltd* supra, and *Aiton Australia Pty Ltd v. Transfield Pty Ltd.* (1999) 153 FLR 236 at 246 to 250 and contrast *Computershare Limited v. Perpetual Registrars* [2000] VSC 233 where similarly worded clause was enforced.

46. Another consideration which arises when there are prequisite consultation, conciliation or mediation processes prior to a right to arbitrate is that any delay may impact on a limitation period and effect the parties substantive rights. In such a situation the parties may wish to consider including a "standstill" clause that stops the clock running on any applicable limitation period or deadline, pending the completion of any prerequisite dispute resolution process.

47. Where there is a staged resolution process there is an increased risk that there may be a need for urgent interim relief pending the ultimate resolution of the dispute by arbitration. In certain circumstances an arbitral tribunal may grant interim relief[59], alternatively the parties may wish to preserve a right to seek the urgent assistance from the courts. To meet any such concerns the parties may wish to consider including a provision expressly stating that pending any such process, any party shall be at liberty to apply to the court for injunctive, provisional, conservatory, or other interim or emergency relief. To avoid any response that such an application amount to a waiver of a party's right to enforce an arbitration clause it would be advisable to state that any such application shall not amount to a waiver of a party's rights under the arbitration clause. Care should also be taken not to avoid such a provision does not conflict with or alter the meaning of other provisions in the arbitration clause as occurred in *Seeley International Pty Ltd v Electra Air Conditioning*[60]. In that case the provision which apparently was intended to preserve the right to seek interim relief from the courts, was held to amount to a complete carve out of the dispute from the scope of the arbitration clause with the result that the court held that the parties had not agreed to submit the particular dispute to arbitration. Care should be taken when drafting to avoid inconsistent provisions.

CONSOLIDATION OF ARBITRATIONS

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59 Eg S.23 of the International Arbitration Act

60 [2008] FCA 29

48. Those drafting the clause should consider whether if the parties were to find themselves in a future arbitration, they may benefit from consolidation with other arbitration proceedings or even holding concurrent hearings with other arbitrations. For example,[61] in a construction project a main contractor may make a number of sub-contracts each of which contains an arbitration clause. A dispute arises in which a claim is made against a sub-contractor who seeks to blame another. In these circumstances, consolidation or concurrent hearings may be desirable in avoiding conflicting awards and the time and costs of duplicated hearings.

49. A builder may have a similar dispute with a third party such as an architect or a subcontractor. Consolidation or concurrent hearings may be in all parties' interests. The problem is easily solved if all parties agree but this may not be achievable at a time when the parties are locked in dispute.

50. If this is likely to arise, a clause (or clauses) permitting the arbitral tribunal (or tribunals) to consolidate or order concurrent hearings in appropriate cases, should be considered and if appropriate, incorporated into the contract (or contracts). Some arbitration institutions have addressed these issues in their rules, see London Maritime Arbitrators Association Rules, R 14, which gives the arbitral tribunal special powers in the following terms:

> *"14. In addition to the powers set out in the Act, the tribunal shall have the following specific powers to be exercised in a suitable case so as to avoid unnecessary delay or expense, and so as to provide a fair means for the resolution of the matters falling to be determined:*
>
> *(a)…*
>
> *(b) Where two or more arbitrations appear to raise common issues of fact or law, the tribunals may direct that the two or more arbitrations shall be heard concurrently. Where such an order is made, the tribunals may give such directions as the interests of fairness, economy and expedition require including:*
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> *(i) that the documents disclosed by the parties in one arbitration shall be made available to the parties to the*

[61] See Departmental Advisory Committee on Arbitration, chaired by Lord Saville, Report February 1996 at paragraphs [179] to [181].

other arbitration upon such conditions as the tribunals may determine;

(ii) that the evidence given in one arbitration shall be received and admitted in the other arbitration, subject to all parties being given a reasonable opportunity to comment upon it and subject to such other conditions as the tribunals may determine."

51. An example of an arbitral tribunal having power to order concurrent hearings is also seen in *Lafarge Redland Aggregates Ltd v. Shepherd Hill Civil Engineering Ltd*.[62] In that case there were separate contracts, each with its own arbitration clause, between employer and main contractor and main contractor and subcontractor. An institutional rule, applying when disputes arising under more than one contract were concerned with the same subject matter and were dealt with by the same arbitrator, empowered the arbitrator to order that they be heard together.[63] The problems associated with multi-party and multi-contract transactions and dispute require particular care and consideration[64].

CONCLUSION

52. It is sometimes said that there is no miracle clause or that the perfect arbitration clause is an illusion. With the benefit of hindsight a clause might turn out to be too simple or too complicated. Sometimes in an effort to deal with every possible consequence, a bespoke arbitration clause may become too sophisticated and itself be a source of disputes.[65] "*Simple, clearly drafted arbitration clauses will avoid uncertainty and disputes as to their meaning and effect"*.[66] Nevertheless, it is advisable both to understand and to at least consider each of the matters

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62 [2001] 1 WLR 1621.

63 Contrast the situation where there was no power to consolidate such as in *The Bay Hotel and Resort Limited v Cavalier Construction Co. Ltd* [2001] UKPC 34 at paras [44] to [47].

64 For a general discussion of the drafting problems associated with multi-party disputes and multi-contracts see "*Arbitration Clauses for International Contracts"* by Paul Friedland, 2004, Juris, Chapters 6 and 7

65 These are the so called "*pathological clauses*," those that are unenforceable because they are unintelligible or internally inconsistent such as the clause considered in *Sonatrach Petroleum Corporation (BVI) v Ferrell International Limited* [2002] 1 All E R (Comm) 627.

66 *Techniques for Controlling Time and Costs in Arbitration,* a report by the ICC Comission on Arbitration, 2007 at page 14

discussed above in the light of the circumstances of the case and the parties' needs and instructions.

53. Then perhaps a modern institutional template clause[67] may be a good starting point[68]. Although caution is called for if any change is thought desirable and clarity is essential. Alternatively, a template clause may appear more attractive and appropriate. It may represent an informed choice and good drafting in the circumstances.

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[67] An example of a standard template is the ACICA Model Arbitration Clause; *"Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia* **[or choose another city]**. *The language of the arbitration shall be English* **[or choose another language]**. *The number of arbitrators shall be one* **[or three, or delete this sentence and rely on Article 8 of the ACICA Arbitration Rules]."**

[68] eg see how the ACICA Model Clause was customised to meet the particular needs of the contracting parties in *AWB (International) Ltd v. Tradesmen International (PVT) Ltd* [2006] VSCA 210 at [4], The contract was for the sale and delivery by an Australian party of goods to an overseas buyer. The arbitration clause was in the following terms;

*"**ARBITRATION***

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the UNCITRAL Arbitration Rules for the time being in force. The administering authority shall be the Australian Centre for International Commercial Arbitration, Melbourne. Each party shall appoint an arbitrator, the two arbitrators thus appointed shall choose a third arbitrator who shall act as the presiding arbitrator of the tribunal.

The language of the arbitration shall be English and the place of arbitration shall be Melbourne. The arbitration shall be governed by the Commercial Arbitration Act 1984 of the State of Victoria.

(ii) Any notice of arbitration or other claim alleging a dispute must be made in writing and the claimants arbitrator appointed within six (6) months of the vessels [sic] arrival at the final port of discharge, otherwise the claim shall be deemed to be waived and no proceedings whatsoever whether by way of arbitration or litigation shall be commenced."