

## RESOLUTION OF TRADE DISPUTES IN THE ASIAN PACIFIC REGION

Notwithstanding its rather broad title, this paper is limited to a description of the various means of dispute settlement and an examination of a few of the issues faced by businessmen and lawyers, as well as legislators, in providing suitable mechanisms for dispute resolution in the region.

Of necessity, I have approached the subject from a largely Australian perspective — although one which hopefully proceeds from an adequate recognition of the need for Australia to be looking very much to trade in the region, and of the importance of taking account of the attitudes and facilities of countries in the region in the process of dispute resolution. Thus, in addition to discussing dispute resolution and particular issues from an Australian viewpoint, I will also consider briefly the situation in China, Japan, Hong Kong and Malaysia.

The disputes to which I refer are commercial in nature; that is, broadly speaking, disputes arising from commercial relationships including trade transactions of goods and services, financial transactions concerning, for instance, factoring, leasing, licensing, investment, insurance, agency and shipping, and other economic transactions. In the light of my mandate to examine dispute resolution in a regional context this paper concentrates on the resolution procedures for international commercial disputes.

As an island nation Australia has always been actively involved in and relied heavily upon trade with other nations. The pattern of our trade has, over the last 20 or 30 years, shifted away from British and European markets towards our Asian neighbours. In 1983-84, for instance, Australia's exports to Japan equalled \$6570m fob and imports \$5366m fob, while exports to the UK were \$1134m fob and imports \$1740m fob.<sup>1</sup> Commentators uniformly expect that this trend will continue given Australia's geographical location in the Pacific region. Our Asian neighbours are developing and have demonstrated an increasing need for resources which Australia can supply. Further, as a result of reduced transport costs based on geographical proximity and the interaction of regional specialization in the use of resources, trade between the Asian countries and Australia is logical, feasible and in the right commercial and political climate, should increase.

With these factors in mind I shall comment on a variety of means of dispute settlement, their usefulness in settling commercial disputes between nations with different backgrounds and philosophies, and the

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Australia maintains substantial dealings with the EEC and the USA and other countries, for instance, exports to the EEC being \$3,116m and imports \$4,382m (1982-83) and to the USA, \$2,241m (exports) and \$4,764m (imports) (1982-83). Yearbook Australia 1984. However, it is clear that substantial Asian markets are developing, e.g., China and Korea, and that Australia is interested in entering those markets, see for instance, "High hopes for market expansion" (in China), in The Australian, 25 January 1985.

potential for arbitration as perhaps the most viable means of dispute resolution in the international commercial situation. Where arbitration is concerned I shall refer to recent developments at both an Australian and international level.

Internationally, reference will be made to the work in this area by the United Nations Commission on International Trade Law (UNCITRAL) which has adopted the UNCITRAL Arbitration Rules in 1976, the UNCITRAL Conciliation Rules in 1980 and most recently the Model Law on International Commercial Arbitration, in 1985. UNCITRAL's initiatives are likely to be favourably received by nations in the Asian Pacific Region. This is because many nations, including those in the region, have taken part in discussions in UNCITRAL for the purpose of drafting these instruments and because they are generally perceived as being "neutral" as between developed and developing countries.

It is increasingly acknowledged that Australia should have a system of dispute resolution which offers a number of alternatives. Businessmen and their legal advisers can then choose which mechanism to adopt, based on the appropriateness of a particular means to the case at hand, rather than on preconceived notions of "A is always better than B". In this way, it is suggested, trade will be facilitated and perhaps encouraged.

## METHODS OF DISPUTE RESOLUTION

There are, of course, various methods of dispute resolution, ranging from submission, negotiation, mediation or conciliation, to arbitration and litigation. Although largely self-explanatory, a brief description of each method may serve to illustrate the essential differences between them.

Submission or "settlement by inertia" involves a unilateral action consisting primarily of one party abandoning its rights in respect of a failure of the other party to abide by their agreement. In negotiations the parties try to resolve their disputes by discussions between themselves, whereas in conciliation or mediation a third party is introduced to hear both sides and suggest possible solutions which the parties may reject, alter or accept in the process of reaching further agreement.<sup>2</sup>

Arbitration and litigation consist of more formal procedures whereby a third party hears and decides the merits of the dispute in question and seeks to impose a binding decision upon the parties.

In litigation a court, after conducting a hearing and analyzing the available and admissible evidence, hands down a decision. The matter is heard in accordance with the relevant rules of court and the decision is appealable according to the rules which govern appeals from the court in question.

Arbitration on the other hand is essentially a contractual means of dispute resolution, regulated by arbitration legislation, which provides a framework within which certain forms of arbitration may operate. Arbitration is a technique of resolving a dispute by referring it to one or more persons for a decision which is final and binding within the terms

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<sup>2</sup> See generally P J O'Keefe, *Arbitration in International Trade*, Prosper Law Publications, 1975, at pp 10-11.

of the reference. A reference may be effected only with the initial agreement of all parties.<sup>3</sup> Parties may agree to submit their disputes to an arbitral institution, on the one hand, or a specified person or ad hoc tribunal of their own creation. They can, for the most part, choose the tribunal, the procedures to govern their "hearing" and maintain a degree of informality and secrecy in the conduct of the proceedings.

The major part of the paper which follows deals with the means of dispute resolution involving third parties (ie conciliation, litigation and arbitration), concentrating on the advantages and disadvantages of each, the regional facilities and procedures developed in the context of international trade and some of the important issues which arise in this area.

## CONCILIATION

Conciliation, in contrast with litigation and arbitration, involves the use of a third party in an attempt to obtain agreement between the disputants in order to avoid any resort to the "imposed" solution of an outside person or body. It is therefore a means of dispute resolution available regardless of whether the parties finally resort to more formal dispute settlement procedures, including arbitration and litigation, in the event that conciliation is unsuccessful.

Conciliation is particularly useful in cases where formal adjudication, of an adversary kind, may drive the parties apart. It has been said that there is no such thing as "friendly litigation". I note in this regard, in particular, disputes arising in joint ventures and long term contracts where the parties are in a long term relationship and where use of an "imposed" solution may adversely affect that relationship. The other major advantage of conciliation is of course the potentially very substantial cost saving if arbitration or litigation or both are avoided.

It is important to note that conciliation is a traditionally accepted means of dispute resolution in Asian countries, in particular in Japan and China.

In conciliation, a third party, the conciliator, is introduced into the dispute to assist the parties reach agreement. The conciliator is not expected to decide on the parties' rights, but only to make proposals which the parties may accept or reject. Accordingly, if a conciliation settlement is reached, its content is not laid down in any official award and is not enforceable in the same manner as arbitral awards and court orders (unless, where there is an arbitration pending, the arbitrator adopts the settlement and makes an award by consent). Rather the settlement is drawn up as an agreement between the parties and signed. By the same token the voluntary agreement by parties should ensure that their business relations remain intact and importantly, especially in the context of trade with Japan and China, that no one loses "face".

There has been substantial international work designed to foster the use of conciliation. The Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC Rules") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965 (which established the International

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3 Ibid, at p 1.

Centre for Settlement of Investment Disputes, and which is hereinafter cited as the "ICSID Convention") are discussed in more detail later under the heading, "Arbitration Rules". Both provide rules for the conduct of conciliation proceedings. In 1980 the General Assembly of the United Nations recommended the use of the UNCITRAL Conciliation Rules.

The rules developed in this area relate to both institutional and ad hoc conciliations. The UNCITRAL Conciliation Rules provide rules of a general character suitable for 'ad hoc' conciliations whereas the ICC and ICSID regimes are linked with their respective institutional facilities. The UNCITRAL Rules may however be adopted by institutions, or utilized by those institutions where the parties so choose.

Both the UNCITRAL and ICC Rules recognize that parties have to be willing to conciliate their dispute.<sup>4</sup> The rules provide for initiation, conduct and termination of the proceedings. They also recognize the need to keep the matters relating to the conciliation separate from any other hearing of the matter and in general to keep them confidential.<sup>5</sup>

Perhaps the most important issue where conciliation is concerned, apart from the question of adopting conciliation as an appropriate means of dispute settlement in the first place, lies in the selection of a conciliator who may later act as an arbitrator.

The traditional view is that conciliation is no part of an arbitrator's function, nor indeed part of arbitral proceedings.<sup>6</sup> Negotiation is for the parties and their advisors alone. The arbitrator considers the material put before him by the parties, treats them fairly and equally and generally does not see or speak to them individually, especially without the other party's knowledge.

In China on the other hand, conciliation is conducted as a pre-arbitration exercise which can also be combined with arbitration.<sup>7</sup> The steps of Chinese dispute settlement, in an international context, have been stated to be "First, combining mediation with arbitration . . . Second, joint mediation: if there are disputes the Chinese investors take the disputes to the Chinese Arbitration Commission and the foreign investors take the disputes to their own country's arbitration separately, and the two commissions then mediate. Third, investigation and study: making an on-the-spot investigation of the bilateral agreements or inviting both Chinese and foreign arbitrators to join in the work".<sup>8</sup> Even if matters reach a judicial stage, the judicial process is inquisitorial, not adversarial, and judges, up to the hearing itself, will continue the conciliation process. In their capacity as inquisitor and conciliator, the judges will see the parties alone and with other witnesses. In an

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4 See also Article 34(2) ICSID Rules. A useful comparison of Rules is provided in F. Eisemann, "Conciliation as a means of Settlement of international Business Disputes: the UNCITRAL Rules as compared with the ICC System", in the *Art of Arbitration*, at p 122.

5 See Articles 14 and 20 UNCITRAL Conciliation Rules and Article 5(2) ICC Rules. See also Article 35 ICSID Rules.

6 See Mr Justice Hunter: "Hong Kong International Arbitration Centre" paper presented at the National Conference, The Institute of Arbitrators Australia, Singapore, 22-23 June 1985, at p 13. Also F. Eisemann, footnote 4.

7 See E H K Lee, "How to Settle Commercial Disputes in China", *International Financial Law Review*, February 1985.

8 *Ibid*, at p 33, where reference is made to 'Forum on China's Foreign Trade Arbitration', Ta Kung Pao, October 2, 1980, 15.

arbitration, conciliation may, with the parties' consent, also be conducted concurrently.<sup>9</sup>

Not surprisingly, therefore, Eastern and Western nations have until recently observed substantially different rules for the control of the conciliator/arbitrator function. China's rules allow a mixture of the two roles. The UNCITRAL and ICC Rules,<sup>10</sup> to take two examples, do not. Indeed the UNCITRAL Rules take the matter even further. Article 19 of the UNCITRAL Rules provides that the parties and the conciliator undertake that the latter shall abstain, not only from acting as arbitrator in the dispute concerned, but also from acting as a representative of or counsel for a party or from being used as a witness.

Hong Kong has recently departed from the traditional Western approach. Its *Arbitration Ordinance*, 1982 expressly contemplates that an arbitration agreement may provide for the appointment of a conciliator and may further provide that the conciliator shall act as arbitrator if the conciliation proceedings fail. (This means that the potential arbitrator could see the parties separately, when acting as conciliator.) The Ordinance provides that, if the conciliator acts as arbitrator no objection can be taken to the appointment of such a person as an arbitrator or his conduct of the arbitration, solely on the ground that he previously acted as conciliator (s.2A(2)(a)).<sup>11</sup>

In addition, the Rules Committee of the recently established Hong Kong Arbitration Centre is presently considering a new conciliation rule which will enable the presiding arbitrator, at the request of all parties, to act as conciliator and attempt to assist the parties to reach an agreed settlement of their dispute.<sup>12</sup> For that purpose the arbitrator would be given a free hand to see the parties alone or together and a discretion as to the secrecy of information disclosed to him.

This approach has been based on the perceived need for flexibility in the settlement of disputes and the view that party autonomy should prevail. From a costs and expediency point of view, it may also be seen as a welcome attempt at improvement.

While not going as far as Hong Kong, NSW and Victoria have also embarked on the path of allowing an arbitrator to have a dual arbitrator/conciliator function.

Section 27 of their respective *Commercial Arbitration Acts* of 1984<sup>13</sup> permits the arbitrator, unless otherwise agreed in writing by the parties, to take such steps as he thinks appropriate to achieve a settlement of the

9 See Hunter J, footnote 6, at p 15.

10 China would not favour ICC Rules in general as Taiwan is a member of the ICC: per F C Ingriselli, "International Dispute Resolution and the People's Republic of China", *International Business Lawyer*, October 1984, p 379.

11 For a general discussion of new Hong Kong law see: Sir R Denys, Chief Justice, Hong Kong, "The Development of Arbitration in Hong Kong", 1984 *Arbitration* 27.

12 Hunter J, footnote 6, at p 21.

13 Section 27 of the *Commercial Arbitration Act*, Victoria, states:

"27.(1) Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall have power to order the parties to a dispute which has arisen and to which that agreement applies to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration.

dispute, including attendance at a "conference", to be conducted by the arbitrator, without proceeding to arbitration or continuing with the arbitration. Section 27(2) provides that no objection shall be taken to the conduct by the arbitrator of any subsequent arbitration proceedings solely on the ground that the arbitrator had previously conducted a conference in relation to the dispute.

Although the term "conference" is used it is clear that a conciliation style procedure is envisaged. This can be done even though the parties not consented to this course. In contrast the Hong Kong Ordinance requires the prior agreement of the parties for the conciliator to act as arbitrator. Suppose the arbitrator in exercising his discretion under the Australian legislation wishes to see one of the parties alone. Yet at common law such conduct would normally constitute misconduct, and misconduct, it may be noted, is a ground for setting aside an arbitral award (s 42 in the NSW and Victorian Acts). I believe that an arbitrator would be well advised not to pursue such a course in the absence of a clear indication in the legislation that such conduct is allowed. As to whether there should be such legislation, I would say that such conduct should not be allowed, at least unless the other party fully and freely consents to it.

## LITIGATION

I move now to litigation which is, of course, at the other end of the scale in terms of the dispute settlement system.

The essential features of litigation and court systems in the different jurisdictions are beyond the scope of this paper. However, it may be worthwhile to discuss some of the perceived disadvantages of litigation in the context of international dispute resolution and refer briefly to recent developments designed to make litigation more desirable in respect of commercial disputes.

While litigation has tended to be the main form of dispute resolution in common law and "Western countries", it is not the recognized mechanism for this purpose in many Asian countries. Two of our most prominent neighbours, namely Japan and China are reluctant to litigate.<sup>14</sup> The reasons for this are many, but include the fact that friendly negotiation and mediation (conciliation) have traditionally been

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### 13 Continued

#### (2) Where—

- (a) an arbitrator or umpire conducts a conference pursuant to sub-section (1); and
- (b) the conference fails to produce a settlement of the dispute acceptable to the parties to the dispute

no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously conducted a conference in relation to the dispute.

(3) The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration shall not be affected by a conference conducted by an arbitrator or umpire pursuant to sub-section (1).

(4) Nothing in sub-section (3) shall be construed as preventing the making of an application to the Court for the making of an order under section 48."

See also NSW *Commercial Arbitration Act*, s 27.

14 See A C McLelland, "A Survey of Pacific Rim Commercial Arbitration", Vol 40, No 1, *The Arbitration Journal*, March 1985 at pp 5, 10-11 and E H K Lee, footnote 7, at p 33.

the preferred means in these countries for the settlement of all disputes. In a formal sense there is no "loser" if either of these two mechanisms are utilized successfully.

It is generally acknowledged that in many cases arbitration is potentially more effective and attractive than litigation as a means of solving international trade disputes.<sup>15</sup> Some of the advantages claimed for arbitration include speed (the matter can be disposed of quickly and a final result known without the parties becoming involved in drawn out litigation), lower cost (a quick hearing may reduce costs) and the fact that parties can choose experts as arbitrators. In the context of international commercial disputes, where parties come from different countries, resort to litigation will inevitably require at least one party to submit to a foreign legal system. That party is clearly disadvantaged in terms of convenience, cost, lack of familiarity with the system, and in some cases a lack of confidence in the impartiality of the system. In addition, when parties agree to arbitration they can consent to a hearing of their dispute in a jurisdiction suitable to both parties; there is then no fear of litigation in an "unacceptable" foreign jurisdiction.

An agreement for international arbitration, in conjunction with bilateral or multilateral treaties, can also be an effective means of ensuring that resulting awards are final, binding and enforceable. These factors taken together will in many cases make arbitration a preferable alternative for traders.

On the other hand, there can be disadvantages with arbitration. The quality of an arbitration depends very much on the particular arbitrator. It is often the case that confidence in the quality of the judiciary is greater than confidence in the quality of arbitrators. In relation to costs, the parties to an arbitration must generally pay for the cost of the facilities and arbitrators, with the result that arbitration may be more expensive to the parties than litigation, unless the use of experts or informal procedures shortens the hearing considerably.

Delay can also be a problem with arbitrations, especially where part-time arbitrators, such as lawyers and businessmen with other commitments, are involved. The delay involved in litigation will of course vary from country to country<sup>16</sup> and within Australia, from one jurisdiction to another. There have, however, been attempts to overcome these problems and to make litigation more attractive for the settlement of commercial disputes.

Thus, NSW has maintained since 1903 a separate commercial list for commercial matters.<sup>17</sup> In 1985 the NSW Parliament took one step further

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15 O'Keefe, footnote 2, at p(i).

16 The Court of Cassation in Italy is said to have a waiting list of approximately 30,000 cases (approximately 2-3 years). P D McSweeney in: "Commercial Arbitration in Japan and Australia", a paper presented at the Inaugural Seminar of the Asian Law Centre, Melbourne, 2 June 1985, indicated that in Japan the waiting time for a hearing at first instance is 3 years. In Los Angeles, California, USA, the normal waiting period before a hearing is 4-5 years, see R Gnaizda, "Secret Justice for the Privileged Few", (1982) Vol 66 No 1. *Judicature* 6.

17 NSW: *Commercial Causes Act* 1903; Victoria, Order 14, Supreme Court Rules, since 1 February 1979, and Queensland, since *Commercial Causes Act* 1910, have also maintained Commercial Causes Lists. The ACT also, on an informal basis, maintains a list, composed mainly of commercial matters but which is described as "non-personal injuries matters".

and passed the *Supreme Court (Commercial Division) Amendment Act* to amend the *Supreme Court Act, 1970*, thereby replacing the old commercial list by a new Commercial Division of the Court. Although this Act is not yet in force it represents an important development in this area of the law.

The creation of commercial divisions (and before that commercial lists) is aimed at speeding up the resolution process and developing a special judicial expertise in relation to commercial matters. Where specialised courts or divisions do not exist, a criticism frequently levelled at the court system is that, although judges may be expert criminal lawyers, they are not commodity or engineering experts, and yet they may have to adjudicate upon an intricate sale of goods or construction dispute.

The new NSW procedures provide for the Court to give directions "for the speedy determination of the real questions between the parties to proceedings in the Commercial Division" (section 76A, *Supreme Court Act, 1970*).

I also understand that in NSW a Committee has been established to look into the question of special rules for the new Commercial Division, as well as the general issue of alternative methods of dispute resolution.<sup>18</sup>

## ARBITRATION

Arbitration takes perhaps the median role in the scale of means of dispute resolution and of late has been much in the minds of traders, lawyers, legislators, and international commercial organizations.<sup>19</sup> It is, as indicated at the outset, arguably the most important and viable means of international trade dispute settlement procedures.<sup>20</sup> In this regard, I shall refer to recent developments in the area, both in Australia and overseas, and indicate, hopefully, the potential for a greater utilization of arbitration in dispute resolution in the Asian Pacific Region.

A number of factors must be present before there can be a viable system for the conduct of international commercial arbitrations. These include: a system for the enforcement of arbitral awards world-wide — parties will not arbitrate unless they can be assured that the resulting arbitration award will be binding and enforceable. There must be suitable applicable national laws to assist arbitrators in reaching final and binding decisions. These laws must be clear, provide for "appropriate" court supervision or intervention and be viewed as just and impartial. Additionally, there must be acceptable arbitration rules that provide rules of procedure for the arbitral tribunal and there must be adequate facilities for conducting arbitrations. Importantly, there must also be suitable arbitrators who are impartial experts in their fields, able to conduct and control arbitrations of complex commercial disputes.

With these factors in mind, I propose to look at the recent developments in relation to international commercial arbitration in the

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18 See *Justinian* No 38, March 29, 1985, p3. An international study is to be commissioned by the NSW Government in 1985 to see what is available by way of quick, informal dispute resolution procedures in the major overseas trading countries.

19 This is not to say that arbitration has not been used for a substantial period of time for the resolution of disputes; it was used as early as 280 BC by the Romans: J M H Hunter, "Arbitration Procedure in England: past, present and future", Vol 1, No 1, *Arbitration International*, 82.

20 O'Keefe, foornote 2, at p(i).

region, concentrating on the work undertaken by UNCITRAL, and the position in Australia and a few important countries of the Asian region. These recent developments include the recent creation of arbitration centres and the acceptance of arbitration-related conventions by countries in the region.

### THE UNCITRAL MODEL ARBITRATION LAW

In 1979 UNCITRAL commenced the task of drafting a model law on international commercial arbitration. The law, which was finalised at UNCITRAL's 18th Session in June 1985, synthesises elements of Anglo/American, Continental, Eastern Bloc and other nations' laws and ideas. It basically provides a framework for future national legislation in this area and should be a particularly useful reference point for those developing nations which do not presently have substantial arbitration laws. It also has potential to provide direction for those nations who do have such laws, as to how they can be improved or adapted to provide for the special features of international, as opposed to domestic, arbitration.

The Model Law deals with a number of issues that have arisen in the practice of international commercial arbitration. The law defines the scope of its application, i.e. to international commercial arbitrations and looks in some detail at the conflict between party autonomy (i.e. the ability of parties to choose entirely a contractual framework within which their commercial disputes may be solved) and the need or desire for some judicial intervention, assistance or control of the arbitral proceedings. There has been much debate on how best to balance these two factors.

One area that received detailed discussion at UNCITRAL's 18th Session concerned the arbitral tribunal's competence to rule on its own jurisdiction. The Article in question is Article 16 of the Model Law.<sup>21</sup> Although it deals with a number of important issues, I will, for present purposes, concentrate on the issue of court control in relation to a plea that the arbitral tribunal does not have jurisdiction.

The draft of the Model Law considered at the 18th Session provided that a ruling by the arbitral tribunal that it has jurisdiction can only be contested in court when the final award on the merits is made. After much debate, UNCITRAL finally adopted a provision in Article 16(3) enabling "instant" court control in relation to jurisdictional matters. The power of the court to intervene is however dependent on the arbitral tribunal first having made a ruling as a preliminary question that it has jurisdiction, or having made an award on the merits (i.e. the arbitral tribunal has to act in one or other of these two ways before the court has jurisdiction to hear the matter). In the former case a party may request the specified court, within thirty days of receiving notice of the ruling, to decide the matter in a decision not subject to appeal. (Hence, the use of the term "instant" court control.) In the latter case, once an award is made the "setting aside" procedures under which an application can be made to the court are available. In reaching these decisions UNCITRAL accepted the principle that the competence of the arbitral tribunal to rule on its own jurisdiction is subject to court control.<sup>22</sup>

21 See generally UNCITRAL document: A/CN.9/XVIII/CRP.14.

22 See generally UNCITRAL document: A/CN.9/XVIII/CRP.2/Add 9, at pp 3-4.

As a result, a balance was drawn between parties using court proceedings merely as dilatory tactics and parties seeking court intervention at an early stage in a case where the arbitral tribunal has arguably made a mistake. To allow proceedings to continue where a mistake has been made would clearly result in additional and unnecessary expense.

Court assistance (as opposed to intervention or supervision) is envisaged throughout the Model Law. The court may grant interim measures of assistance including pre-award attachment of assets at the request of a party (Article 9). A balance is provided in Article 8(1) whereby the court is obliged to refer the parties to arbitration if a claim is brought before it on a matter which is the subject of an arbitration agreement. Assistance is also envisaged in Article 27 whereby the arbitral tribunal or a party with the approval of the arbitral tribunal may request court assistance in the taking of evidence.

It is clear that the degree of court involvement in arbitration proceedings is high in the minds of businessmen when entering into an arbitration agreement. For this reason, it has been stated “the crucial consideration is not whether the arbitration is conducted under the LCA, UNCITRAL, or ICC Rules, but that the parties enjoy the advantages of a legal system that does not subject international arbitration to significant judicial interference prior, during or after the proceedings so foreign parties may expect to avoid unfamiliar federal and state procedures and laws”.<sup>23</sup>

At one extreme, judicial intervention can result in delays and increased costs. I note in this regard the widespread disenchantment with London as an arbitration centre among foreign parties prior to the abolition by the *Arbitration Act* 1979, of the case stated procedure. Too little involvement, on the other hand, gives the arbitration tribunal unlimited powers. While this may not be a bad thing in all cases, the general view is that some degree of accountability improves the standard of the work done, and is necessary in more extreme cases of misconduct.

Another important feature of the Model Law is that, as indicated, it includes provisions prescribing the setting aside of arbitral awards and also for their recognition and enforcement.<sup>24</sup> These provisions are in substantially the same terms as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). The New York Convention provides for the recognition and enforcement of foreign arbitral awards and lays down exhaustive grounds upon which an award may be refused.<sup>25</sup> Thus it fulfils the

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23 S J Stein and D R Wotman “International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules”, Vol 38, No 4, *Business Lawyer* 1985, at p 1687. (LCA refers to the “London Court of International Arbitration”).

24 Articles 34, 35 and 36.

25 Article V of the New York Convention is relevant. It states:

“1. Recognition enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

important function of providing a scheme for enforcement internationally of arbitral awards. As of June 1985, 68 States had ratified or acceded to this Convention. Ten of these States are in the Asian Pacific Region, namely, Australia, India, Indonesia, Japan, Kampuchea, New Zealand, the Philippines, the Republic of Korea, Sri Lanka and Thailand.

When the Model Law provisions were considered by the Commission at the recent UNCITRAL meeting some fears were expressed about the duplication of the New York Convention. However, on balance, it was agreed that a Model Law should "cover the field" and that to leave out such important provisions would result in a substantial gap in the law. Indeed, it was recognized that it may be easier for some nations to adopt the Model Law in national legislation than to accede to the New York Convention.

## ARBITRATION IN AUSTRALIA

Commercial arbitration in Australia is regulated by both State and Commonwealth legislation.

The Commonwealth legislation is essentially concerned with the binding nature of foreign arbitration agreements and arbitral awards and their international recognition and enforcement. The *Arbitration (Foreign Awards and Agreements) Act 1974* gives effect within Australia to the New York Convention.

Also, the *Foreign States Immunities Bill* recently introduced into the Commonwealth Parliament will when enacted remove immunity in supervisory court proceedings in relation to local arbitrations to which a foreign State is a party (cl.17(1)). In addition, a foreign State will not be immune in proceedings for the enforcement of an arbitral award if the arbitration concerns a matter in respect of which the foreign State would not have been immune in court proceedings (cl.17(2)). This includes in particular matters concerning a commercial transaction. Awards for this purpose include awards made outside Australia.

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### 25 Continued

- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
  - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
  - (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

State and Territory legislation, which provides a framework for the conduct of arbitration throughout Australia, is presently being revised in a number of jurisdictions. A new uniform commercial arbitration law has recently been agreed by the Standing Committee of Commonwealth and State Attorneys-General for adoption by each of the Australian States and Territories. The new law commenced operation in Victoria on 1 April 1985 and a similar law in New South Wales on 1 May 1985.<sup>26</sup> It is anticipated that other jurisdictions will follow suit and indeed similar legislation has already been introduced into the Parliaments of Western Australia and the Northern Territory.

Until the model uniform law was enacted by the Victorian and NSW Parliaments, commercial arbitration law in Australia at the State level rested on the 19th Century concept of commercial arbitration reflected in the *Arbitration Act 1889*, UK.

The changes which have been made to the existing law relate to the concept of party autonomy and the role of the courts in the arbitral process. Without rejecting the premise that the courts are essential to the overall effectiveness of the arbitral process, the new legislation redefines the limits of the courts' role in accordance with current attitudes to arbitration. The underlying philosophy may be illustrated in the prominent use of the words "unless otherwise agreed by the parties" and the ability of parties to limit, in certain listed circumstances, appeals to the Courts. The new legislation is thus designed to highlight the autonomy of the parties, rather than the role of the courts.

Although this law reduced (at least if the parties so choose) the previously high level of judicial intervention, it retains and develops the need for courts to assist the conduct of the arbitral process by, for example, collecting evidence on behalf of the arbitrator,<sup>27</sup> filling vacancies in the office of arbitrator in the absence of any agreement by the parties<sup>28</sup> and in enforcing arbitral awards.<sup>29</sup>

While the court maintains its supervisory role in the context of the setting aside of arbitral awards<sup>30</sup> and even its power to remove arbitrators or umpires,<sup>31</sup> the grounds on which it may intervene are circumscribed. Likewise, the ability of a party to appeal an arbitral decision on the ground of error of law has been limited.

It is important to note that, in both the Victorian and NSW legislation, the opportunity for a "stated case" no longer exists. Nor is there a right of appeal to the Supreme Court on a question of law arising out of an award unless both parties give their consent or the Court grants leave (s.38(2) and (4)). Furthermore, the Court cannot grant leave "unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement".<sup>32</sup>

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26 NSW has made minor variations to the Commercial Arbitration Bill adopted by the Standing Committee of Attorneys-General.

27 Section 17, Vic; section 17, NSW.

28 Section 18, Vic; section 10, NSW.

29 Section 33, Vic; section 33, NSW.

30 Section 42, Vic; section 42, NSW.

31 Section 44, Vic; section 44, NSW.

32. Sub-section 38(5), Vic; Sub-section 38(5), NSW.

Subsequent appeals do not lie without leave and a certificate from the Supreme Court. Section 38(7) provides that leave will only be granted if the question of law is "one of general public importance" or is one which, for some other special reason, should be given further consideration. Additionally, section 40 recognizes that the parties may, by agreement, exclude the right of appeal. The exclusion of the right of appeal is however limited somewhat in cases of questions or claims falling within the Admiralty jurisdiction of the Court or disputes arising out of insurance or commodity contracts. In these cases section 41 provides that the exclusion agreement will only have effect if it is entered into after the commencement of the arbitration or if the award or question relates to a contract which is expressed to be governed by a law other than the law of the State in question (i.e. the State whose *Arbitration Act* is being applied).

In this regard there has been an increasing recognition that the power of local courts in controlling the decisions of arbitrators, for instance by the use of the case stated procedure, has been open to abuse. I refer again to the concern about using London as an arbitration centre prior to the *Arbitration Act* 1979 in which this procedure, allowed by the *Arbitration Act* 1950, was repealed.

The availability of the case-stated procedure clearly paved the way for a disputant, unhappy with the decision or ruling of an arbitral tribunal, to reopen the matter before a court, with a consequent duplication of proceedings and resulting delays and increased costs. Attempts by potential disputants to agree that they would not seek an order for special case stated failed — as such agreements were held by the courts to be unenforceable,<sup>33</sup> largely on the grounds of public policy. There was a fear that such agreements would allow arbitrators to develop and administer codes of law in various trades that differed substantially from, for instance, English mercantile law.<sup>34</sup>

The shift away from substantial supervision by the courts on questions of law (and, as a result of reopening a case, on questions of fact) which has been increasingly criticized over recent years, can be attributed in some measure to a greater awareness of the need to make our arbitration systems more attractive to parties choosing a centre for international arbitration. The advantages of one forum over another, in the case of international commercial arbitration, depends as much on the ability of domestic law to grapple with commercial reality as it does on the backing of a sound legal system.

A further factor which has influenced the review of Australia's domestic arbitration law has been the international (but particularly amongst civil law countries) movement for the harmonization and unification of national laws and procedures for the conduct of international arbitrations. If it has done nothing else, UNCITRAL's work on the Model Law has served as a barometer of what countries are likely to accept as a level of court supervision. For Australia, it has also

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33 See *Re Hansloh and Reinhold, Pinner & Co.*, (1895) 1 Com Cas 215; *Czarnikow v Roth, Schmidt & Co.* (1922) 2 KB 478; *Messrs Ltd v Heidner & Co.* (1961) 1 Lloyd's Rep 107; *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* (1977) 1 Lloyd's Rep 166; and see the discussion in Sir M J Mustill and S C Boyd, *Commercial Arbitration*, Butterworths, London, 1982, at pp 694-703.

34 Per Atkin LJ in *Czarnikow v Roth, Schmidt and Co.* [1922] 2 KB 478, at p 491.

demonstrated that, while there are differences between the Model Law and the new uniform domestic law (for the most part omissions of subject matter by one or the other) the balance which both have achieved between arbitral autonomy and court control over issues of law is remarkably similar. This is not to say, however, that Australia should not consider both its existing arbitration laws and the Model Law to see if the latter provides useful provisions that can be picked up in future Australian legislation.

In this regard I would point out a number of areas that may require further consideration in an international, as opposed to domestic arbitration context. The first point is the question of legal representation at an arbitral hearing. Under the somewhat controversial section 20 of the Victorian and NSW *Commercial Arbitration Acts*, representation is not a right but is subject to leave of the arbitrator or umpire. Article 4 of the UNCITRAL Arbitration Rules on the other hand, states that "The parties may be represented or assisted by persons of their choice. . .". In the Model Law the issue falls within the ambit of the important equal treatment of parties article, Article 18, which provides that: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

Even if section 20 can be justified in a domestic context, it may be questioned whether it is necessary or desirable in the case of international arbitration. Apart from the likely large scale nature of international commercial disputes, the fact that one of the parties is unfamiliar with the system is likely, except in the most unusual case, to justify the exercise of a discretion in favour of representation. While such problems may be overcome in practice, it could be asked whether the parties should be required to address this question, either in advance by agreeing to legal representation in their contract or by seeking "permission" from the arbitral tribunal.

Secondly, under section 42 a court may set aside an arbitral award on the ground of "misconduct" on the part of an arbitrator. "Misconduct" is defined in sub-section 4(1) to include "a breach of the rules of natural justice". I have already indicated that problems may arise in this regard in respect of the conciliation provisions in section 27 of the Act. However, it is not, in my view, inconceivable that problems in terms of the broader context of "misconduct" may arise with the terms of section 22(2), where the parties may have agreed that the arbitrator determine the issue by "reference to general considerations of justice and fairness".<sup>35</sup> Perhaps some form of overriding provision such as Article 18 of the Model Law (which ensures the equality of the parties and their right to present their case) is required here also.

Finally, I refer to section 38(2), which enables appeals to the Supreme Court on questions of law by agreement or with leave of the court. While section 38(1) removes error of law or fact on the face of the award as a ground of appeal, and section 40 provides for exclusion agreements, the ambit of section 38(2) remains potentially wide. In the context of international arbitration, there may be some advantage in limiting the scope of court intervention to the maximum extent possible,

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35 See further: Mustill & Boyd, footnote 33, at pp 605-617.

while taking into account the need to ensure fair and just arbitration tribunals.

In terms of facilities and arbitrators, Australia has recently witnessed the establishment in Melbourne of the Australian Centre for International Commercial Arbitration. The Centre is located in the World Trade Centre in Melbourne's central business district. It is equipped with substantial facilities for hearing arbitrations, including an arbitrator nomination service, air-conditioned, sound-proofed hearing rooms, arbitrators' rooms, consulting rooms for use by parties, witness waiting rooms, telex, telephone and recording facilities, transcription and interpretation services and a library.

While the Centre is based in Melbourne, it is planned that it be represented in all of the Australian capital cities and that arbitrations may be conducted by the Centre in those cities.

The Australian Centre has adopted the Rules of the London Court of International Arbitration ("LCA Rules") for the conduct of international arbitrations although parties may choose other rules, notably the UNCITRAL Rules. While in my view the UNCITRAL Rules are most suitable for use in international commercial arbitrations in the region, due largely to their clarity and perceived "neutrality", the LCA Rules are also likely to be regarded as suitable. The latest edition of the LCA Rules was promulgated earlier this year and takes into account the UK *Arbitration Act 1979* and previous drafts of UNCITRAL's Model Law.

The Australian Centre's Rules provide for substantial party autonomy and, where the parties fail to agree, confer the widest possible discretion on the tribunal to conduct the proceedings in a manner which it considers to be the most efficient and effective in the particular circumstances of the case.

The Centre will be serviced by experts in technical, legal and other fields. The Institute of Arbitrators Australia ("IAA"), established in 1974 along the lines of the equivalent UK body, is increasingly playing a role in the development of arbitral skills in its arbitrators. Training courses, examinations, conferences and seminars are being used to establish a strong body of arbitrators in Australia. The IAA and the Centre, although separate legal entities are also closely related. The Centre is registered as a company limited by guarantee in Victoria. Its members and directors are four nominees of the IAA and one nominee each of the Victorian Attorney-General, the Australian Bar Association and the Law Council of Australia.

## **ARBITRATION IN OTHER COUNTRIES IN THE REGION**

### **a) Hong Kong**

Recognizing the potential for the growth in the need for arbitration and other means of dispute settlement in South East Asia, the Hong Kong International Arbitration Centre ("H.K.I.A.C.") was established in 1985. It is anticipated that the Centre will be used by: parties from Asia who have commercial disputes with parties elsewhere in the world, parties from China and elsewhere who have disputes involving joint venture and other contracts involving the People's Republic of China, and parties in Hong Kong. Whether Hong Kong remains a viable centre after 1997 when it rejoins China is a matter that is not yet clear, although the

Sino-English Agreement, 1984, does of course provide that Hong Kong will retain its commercial independence.

The H.K.I.A.C. has recently adopted its own rules for the conduct of domestic arbitrations and the UNCITRAL rules for international arbitrations. Like other centres, it can act as an appointing and administering authority. It maintains a panel of available arbitrators who are specialized in various technical fields and also accepts arbitrators requested by parties to undertake an arbitration.

The Hong Kong *Arbitration Ordinance*, which is based on the English Acts of 1950, 1975 and 1979, was amended in 1982 to form a modern legislative framework for the conduct of arbitrations. The Ordinance applies to arbitrations involving domestic and foreign parties, private parties and the Crown.

Some of the 1982 amendments effected important changes in Hong Kong's law of arbitration,<sup>36</sup> including enabling parties to exclude the right of reference or appeal to the courts. The parties, by agreement, may however contract back in to court jurisdiction at any time (section 23B *Arbitration Ordinance*). Section 6B enabled consolidation of related arbitration proceedings, section 13A allows Hong Kong judges to accept appointment as an arbitrator under certain conditions, section 23A enables a party to request that appeals on questions of law be held *in camera* and sections 23C and 29A enable the High Court, on the application of the arbitrator, the umpire or any party, to make an order terminating the arbitration proceeding and preventing the claimant from commencing any further arbitration proceedings on the same issue, if the party has shown undue delay in prosecuting its claim under the arbitration agreement.

Section 2A, as already indicated,<sup>37</sup> also provides a framework for conciliation where, in designated cases, a conciliator may later act as arbitrator in the same case.

In addition, the 1958 New York Convention applies in Hong Kong, so that arbitration awards made in Hong Kong may be enforced world wide pursuant to its terms.

## b) Japan

Japan has exhibited a generally progressive attitude towards dispute settlement. Japanese leaders have adopted the view that it was necessary, in the interests of expanding trade, to put aside their cultural objections to binding third party determinations.

Accordingly, Japan is a signatory nation to the 1958 New York Convention and the 1965 ICSID Convention. In addition, reciprocal recognition and enforcement of arbitral awards is provided for in many of its bilateral trade treaties. The nation's modern arbitration practice is regulated by the Code of Civil Procedure enacted in 1890. This Code is based on similar German legislation, although it has been influenced by Confucian principles, French Codes and Anglo-American Common Law

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36 For a general discussion of the Hong Kong *Arbitration Act* see: "Hong Kong", R T Greig and N Kaplan, QC, unpublished paper and "The Development of Arbitration in Hong Kong", Sir Denys Roberts, footnote 11, at p 27.

37 See p 7 *infra*.

practices.<sup>38</sup> Under the Code there is no right of appeal from an arbitral award to a court. Arbitral awards can, however, be set aside on the grounds provided in Article 801, para 1 of the Code.<sup>39</sup>

The most prominent arbitral body in Japan is the Japanese Commercial Arbitration Association.<sup>40</sup> It was incorporated as a non-profit association in 1953 by authorisation of the Ministry of International Trade and Industry and its jurisdiction is limited to legal disputes arising from, or relating to, commercial transactions.

Importantly, the Association has established a large network of formal co-operation agreements with many national and international arbitration institutions including those of the USA, USSR, Sweden, Korea and Thailand.

Between 1972-1978 an average of 5.6 claims were filed with the JCAA each year. 91 cases were concluded between 1950 and 1982. Of these 64 were disposed of by the rendering of an award, 19 by conciliation and 8 by withdrawal of claims.<sup>41</sup> It has also been stated that despite these figures, many disputes appear to have been settled by conciliation rather than by award with at least five of the last 14 awards delivered being in substance formal recognitions of conciliations.<sup>42</sup>

The average time taken from the filing of the claim until delivery of the award is 17.5 months. Where the award was in substance a

38 See: A C McLelland, footnote 14 at p 6 and generally M Pryles and K Iwasaki, *Dispute Resolution in Australia Japan Transactions*, Law Book Co. 1983.

39 Article 801, para 1:

- “(1) Where the arbitration procedure is impermissible;
- (2) Where the arbitral award orders one of the parties to perform an act prohibited by law;
- (3) Where one of the parties was not represented in the arbitration procedure in accordance with the provisions of the law;
- (4) Where the parties were not examined in the arbitration procedure;
- (5) Where the arbitral award does not contain reasons;
- (6) Where conditions for an action for retrial exist under Article 420, numbers (iv) to (viii).

Numbers (iv) to (viii) of Article 420 mentioned in Article 801, para 1, ground no 6 permit one of the parties to a litigation to bring an action for retrial against a final and conclusive judgment. They are as follows:

- (iv) When the judge who participated in the trial has committed a crime in connection with his relating to the case;
- (v) When the party was induced to make a confession or prevented, by a criminally punishable act of another person, from producing an objection or defence which would have affected the decision;
- (vi) When a document or other object used as evidence in the judgment was forged or fraudulently altered;
- (vii) When the judgment is based on the false statement of a witness, expert witness, interpreter, or a sworn party or his legal representative;
- (viii) When the civil or criminal judgment or any other judicial decision or administrative disposition which has become the basis of the judgment has been changed by a subsequent decision or administrative disposition.”

Under ground no 6 of Article 801, para 1, one of the grounds (iv)-(viii) can also be asserted in an action for the setting aside of an arbitral award.

Commercial Arbitration Yearbook, 1979, National Reports, Japan, pp 134-135 and see also M Pryles and K Iwasaki, footnote 38, at p 175.

40 I note also the existence of the Tokyo Maritime Arbitration Centre and the Central and Perceptual Tribunals for the Settlement of Construction Work Disputes.

41 P D McSweeney, footnote 16, at pp 11-13.

42 Ibid at p 11, reference being made to H Hattori's article, “Kokusai Shoji Chusai Kyokai no Toriatsulkatta Chusai Jiken” in a November 1983 edition of JCA Journal.

conciliation the average time taken was 32.4 months. Litigation on the other hand frequently takes 3 years to obtain a judgment at first instance. Appeal time then runs after this period.<sup>43</sup>

### c) People's Republic of China

China's increasing role as an international trading nation brings with it greater potential for commercial disputes with her trading partners. To provide a mechanism in which to solve these disputes, China has expanded its legislative framework and shown a readiness to accept arbitration as a viable means of dispute resolution.

The latest legislative development relevant to international economic contracts is the PRC Foreign Economic Contract Law which came into force on 1 July 1985. This law was "enacted to protect the legitimate rights and interests of the parties to economic contracts for deals involving foreign businesses and to promote (China's) foreign economic relations" (Article 1) and sets out a number of rules dealing, broadly, with the making, fulfilment, transfer and termination of such contracts and the settlement of disputes.

The first official Chinese arbitration body, the Foreign Trade Arbitration Commission, was established in China in 1954. Its powers were expanded and the body renamed the Foreign Economic and Trade Arbitration Commission ("FETAC") in 1980. FETAC's jurisdiction extends to contractual disputes arising from foreign trade, particularly where one party is foreign. By Article 2 of its Rules its jurisdiction may also extend to arbitration between foreign firms, companies or economic organizations and between Chinese firms, companies or other economic organisations.<sup>44</sup> The other arbitral body in the foreign trade sphere is the Maritime Arbitration Commission ("MAC") set up in 1958. MAC deals largely with disputes arising in the fields of navigation, sea transport and foreign trade and insurance as related to the preceding two matters. Both FETAC and MAC operate under the aegis of the China Council for the Promotion of International Trade ("CCPIT").

Where, however, there is no arbitration clause in an economic contract (other than an international transport contract) between enterprises or other economic institutions of China and foreigners, and a dispute arises, the parties may bring their dispute to the People's Court.<sup>45</sup>

The members of FETAC and MAC are selected and appointed by the CCPIT for yearly and two yearly terms, respectively. They have special knowledge in relevant fields including commerce, industry, general insurance, agriculture, navigation, sea transport or marine insurance, as the case may be.<sup>46</sup>

The main characteristic of both FETAC and MAC is that they will strive for conciliation, even if disputes are submitted for arbitration.<sup>47</sup> However, not all cases go into a conciliation stage. If no agreement can be reached in conciliation or if either party does not wish to conciliate, FETAC and MAC will proceed with the hearings in accordance with the

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43 Ibid at p 13.

44 See E H K Lee, footnote 7, at p 33.

45 Article 38, PRC Foreign Economic Contract Law, 1985.

46 See: Jen Tsien-Hsin and Liu Shao-Shan, "People's Republic of China", in Commercial Arbitration Yearbook 1984, and E H K Lee, footnote 7.

rules of arbitral procedure and issue an arbitral award. If, on the other hand, conciliation is successful a "conciliatory statement" which binds the parties will be made.

The FETAC and MAC rules provide details of how hearings are to be held and arbitral tribunals constituted. (For domestic disputes the Arbitration Rules made under the Economic Contract Law, 1982, apply.)

Arbitral awards are binding and non-appealable.<sup>48</sup> A time limit, within which awards are to be executed, is provided and, if the award is not satisfied within this time, the successful party may petition the Chinese Courts for its enforcement.

It is worth noting that China is not a party to the 1958 New York Convention, although there have been suggestions that China may accede to it in the near future. China's non-adoption of this Convention has, not surprisingly, been the cause of some concern on the part of traders and their lawyers. Notwithstanding, all awards since 1949 have apparently been respected without the need to have recourse to the courts.<sup>49</sup>

Steps have been taken by a number of Governments to ameliorate the potential effects of this non-membership of the New York Convention. The USA has, for instance, negotiated an arbitration Article in the 1979 U.S.-China Trade Agreement.<sup>50</sup> It is also proposed that Australia amend its Trade Agreement with China, concluded in 1973, to include a Statement of Principles on Arbitration.

The purpose of the Statement of Principles, which closely resembles the corresponding provision in the U.S.-China Trade Agreement, is to provide guidelines for the resolution of commercial disputes through conciliation and arbitration. It is expected that the Statement of Principles will provide for Australia and China to encourage the use of friendly consultations and conciliation, and, where this is not possible, arbitration. Express reference will be made to the possibility of having an arbitration conducted in a third country and to the use of the UNCITRAL Arbitration Rules. Both countries will be required to seek to ensure that arbitration awards are recognized and enforced by their competent authorities in accordance with applicable laws and regulations.

It has been proposed also that a Model Clause on Arbitration be drafted for use by Australian businessmen in contract negotiations with the Chinese. The Model Clause would complement the Statement of Principles and hopefully provide a framework for contractual clauses governing dispute resolution between businessmen in the two countries.

Early doubts that China would not allow arbitration to take place outside China have now been resolved. With the shift in political and economic philosophy and with the perceived need for trade with the west

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47 E H K Lee, footnote 7, at p 34, see also A C McLelland, footnote 14, at p 12.

48 Decree of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the CCPIT, adopted in 1954 s 10:

"The award given by the Arbitration Commission is final and neither party shall bring an appeal for revision before a court of law or any other organization." in Coudert Bros: F Chu, M Moser and O Nee, Vol II, Pt 15, in *Commercial Business and Trade Laws, People's Republic of China*, at p 5.

49 E H K Lee, footnote 7, at p 34.

50 See Article VIII: Agreement on Trade Relations between the U.S. and the People's Republic of China (signed on 7 July 1979 and ratified on 1 February 1980).

and foreign investment,<sup>51</sup> China has indicated a willingness to accept non-Chinese arbitration bodies, see for instance, Article 37, PRC, Foreign Economic Contract Law 1985. China has accepted third party arbitration clauses nominating, for example, Stockholm (Arbitration Institute of the Stockholm Chamber of Commerce), Paris (ICC Court of Arbitration), London (London Court of International Arbitration), Zurich (Zurich Chamber of Commerce), New York (American Arbitration Association), Japan (Japan Commercial Arbitration Association), and The Hague (using Rules of Conciliation and Arbitration of the ICC).<sup>52</sup> Although the position is not clear, it seems likely that Hong Kong will also be acceptable.<sup>53</sup>

Stockholm appears to be the currently preferred site for arbitration particularly in view of its development as a centre for arbitration of East-West trade disputes involving Chinese parties.<sup>54</sup> Although there are certain problems with the Stockholm Rules, and the cost involved in going to such a far off place, Sweden is neutral and a party to the New York Convention.

It may be, however, that Hong Kong's proximity and language, its modern facilities and recently amended law, will prove more attractive to the Chinese and their trading partners, in future. Hong Kong's future, however, especially after 1997, may inhibit its ability to provide the requisite neutral environment for the conduct of arbitration.

#### d) Malaysia

A Regional Centre, as distinct from a national centre, was established in Kuala Lumpur in 1978 at the initiative of the Asian African Legal Consultative Committee ("AALCC"). (Another AALCC centre was established in Cairo in 1979 with the same functions as the Kuala Lumpur Centre.) The Centre's function is primarily to promote international commercial arbitration in the region; co-ordinate and assist the activities of existing arbitral institutions, particularly among those within the region; and provide for arbitration under its auspices where appropriate.<sup>55</sup>

The Centre has its own accommodation and can provide secretarial assistance and interpreters. It was funded by the Malaysian Government until July 1984 and since then has been funded by the AALCC.

More specifically, the Regional Centre was entrusted with broad-based functions including the provision of arbitration under its rules<sup>56</sup> (The rules are basically the UNCITRAL Arbitration Rules.)

51 See A C McLelland, footnote 14, p 10.

52 See F C Ingriselli, "International Dispute Resolution and the People's Republic of China", *International Business Lawyer*, October 1984, 376 at p 380; M C Doty, "An Evaluation of the People's Republic of China's Participation in International Commercial Arbitration: Pragmatic Prospectus", 12 *California Western International Law Journal* 128, at pp 135-6.

53 M C Doty, footnote 52, at p 139. Also "Dispute Settlement in US-China, Another Look", in *Legal Aspects of Doing Business with China* 1985, Practising Law Institute, at pp 283-284.

54 F C Ingriselli, footnote 52, at pp 378-380.

55 See Dr B Sen, Introductory note, Asian African Legal Consultative Committee Agreements Promoting Arbitration, *International Legal Materials*, 522, at p 524.

56 *Ibid* at p 521.

A panel of arbitrators is maintained by the Centre from which names will be drawn when the Centre acts as an appointing authority. It appears, however, that the Kuala Lumpur Centre's list of available arbitrators consists mainly of lawyers, a fact that may not be regarded as totally satisfactory from the businessman's point of view. Engineers, experts in quantity surveying, architecture, commodity trader and insurance experts as well as lawyers, to name but a few, would normally be expected on such lists.

In terms of the legislative framework and degree of court intervention in respect of arbitrations held at the Centre, it should be noted that awards made by the Centre are not appealable to the Malaysian High Court. In addition, the Malaysian Government has accorded the Centre diplomatic privileges and immunity, including immunity from judicial processes and inviolability of its premises and archives.

To assist in the provision of these functions, the Regional Centre, acting through the AALCC, entered into arrangements with the International Centre for Settlement of Investment Disputes for the conduct of disputes settlement under the ICSID Convention, 1965.

However, despite all of these advantages and facilities, I understand that to date little or no work has come to the Centre. The reasons for this are not entirely clear. While long lead times are to be expected in the full utilization of such centres, it is thought that Malaysia's non-adoption of the New York Convention has not helped to make Kuala Lumpur attractive as a centre for arbitration.<sup>57</sup>

## ARBITRATION RULES

The above regimes use various rules to determine the procedures to be adopted in their conduct of arbitrations. The Chinese and Japanese regimes all use domestic arbitration rules. I will not discuss the advantages and disadvantages of such rules except to say that the risks associated with the acceptance of litigation in a foreign country may presumably be transferred, in part, to accepting arbitration according to foreign domestic arbitration rules.<sup>58</sup> I say "in part" because the rules are more clear cut than the intricacies of domestic litigation and, in fact, some domestic rules, such as the rules of the American Arbitration Association Arbitration Rules and the LCA Rules, are highly regarded.

In terms of international arbitration rules, the UNCITRAL Arbitration Rules and the ICC Rules<sup>59</sup> are perhaps the most prominent. In terms of

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57 Awards made by the Centre would not be enforceable in countries who had acceded to or ratified the New York Convention subject to the reciprocity reservation.

58 See for instance: R Coleman: "A Preliminary Investigation of Possible Areas of Discrimination Against Foreign Litigants in Japanese Court and Arbitration Practice"; in *Business Transactions with China, Japan and South Korea*; P Saney and H Smit (editors); Matthew Bender 1983, chapter 9, at pp 9-40 and 9-45. Also A C McLelland, footnote 14, at p 6.

59 ICC: The ICC provides not merely a set of rules for conciliation and arbitration but also an entire system of arbitration and conciliation for any business dispute of an international character. Proceedings under its auspices may be held in any part of the world and be conducted by experts. An average of 250 requests for arbitration are submitted to the ICC Court of Arbitration each year.\* These disputes fall mainly into the categories of construction, supply of industrial equipment and public works, foreign trade and industrial co-operation. ICC awards are final and any party is deemed to have waived its right of appeal.

charges and fees, the UNCITRAL Rules compare favourably with the ICC Rules as they fix costs to cover only the actual costs of the arbitration and require only periodic deposits as costs accrue whereas the ICC requires a deposit covering the full costs of the arbitration to be made in advance. The ICC costs also tend to be fixed on the basis of a graduated schedule based on percentage of the amount of the total claim<sup>60</sup>. I note in passing that an Australian, Mr Patrick Donovan, former Australian Ambassador to the Organization for Economic Co-operation and Development, has been appointed as a member of the ICC Court of Arbitration. In a regional context reference should also be made to the Arbitration Rules adopted in 1966 by the Economic Commission for Asia and the Far East (now the Economic and Social Commission for Asia and the Pacific).

The UNCITRAL Arbitration Rules were adopted by UNCITRAL and the General Assembly of the United Nations in 1976 following extensive work by UNCITRAL in which countries in this region, including Australia, participated. The rules were drafted primarily to provide a framework within which ad hoc arbitrations could be conducted.

The UNCITRAL Rules form a detailed set of rules which cover arbitration from the agreement of parties to arbitrate under the UNCITRAL Rules through the procedures for the conducting of any such arbitration to the final award of the arbitral tribunal. Their most notable use was in a modified form by the USA-Iran Claims Tribunal.

They have however proved reasonably popular and been adopted by a number of national and international arbitral institutions, including the Institute of Arbitrators Australia. Additionally a number of Arbitration Centres in the Region, notably Kuala Lumpur and Hong Kong, have accepted the UNCITRAL Rules as their rules for the conduct of international commercial arbitrations.

Reference has previously been made to the 1965 ICSID Convention. As already indicated, this Convention creates a public international institution, the International Centre for Settlement of Investment Disputes, to administer the Convention, and provides rules for conciliation and arbitration as means of settling investment disputes. The Convention only applies to disputes arising directly out of a foreign investment and is only available to parties where one of them is a Contracting State (or a designated constituent subdivision or agency of a Contracting State) and the other is a national of another Contracting State. Moreover, its facilities can only be used if both parties to the

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In 1982 the origins of parties to ICC arbitrations were, in percentage terms, 54% Western Europe, 10% Eastern Europe, 17% the Americas, 10% the Arab countries, 2% Africa, 7% Asia.\* These figures clearly indicate a worldwide acceptance of the ICC as a dispute resolving mechanism. However its drawbacks from our Region's point of view are clear. The ICC base is in Paris and while hearings may be conducted worldwide awards are issued from Paris. Costs are therefore inbuilt into the system. In addition, there is no provision for direct or cross examination of witnesses by disputing parties. From a Chinese point of view, there is another impediment to the use of the ICC, namely, Taiwan's membership of the ICC.

\* See, "Guide to Arbitration and Related Services Offered by the ICC", 1983, at p 49.

60 See D J Branson and W M Tupman, "Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration," Vol 24, n 4, *Virginia Journal of International Law*, 917 at pp 930-934.

dispute agree in writing to submit to ICSID, notwithstanding that they may already adhere to the Convention.

The purpose of the Convention is basically to promote worldwide investment, by providing a framework for dispute resolution in respect of investments to protect that investment. As such it aims to facilitate capital flows from developed to developing countries and in so doing promote trade.

The Convention was adopted in 1965 when it was submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development and entered into force on 14 October 1966. In 1978 the Administrative Council of ICSID authorized Additional Facility Rules which expand the jurisdiction of ICSID to disputes beyond the Convention's. Arbitrations held pursuant to the Additional Facility Rules are, however, contractual proceedings and do not enjoy the status of full ICSID proceedings.<sup>61</sup>

Because of the way in which the Convention's scope is defined, its success depends on the degree of adherence to it by States. Clearly, on this basis it has been extremely successful, with 91 countries party to the Convention as of 30 January 1985. Eleven of these States are in the greater Asian Pacific Region: Fiji (1977), Indonesia (1968), Japan (1967), Korea (1967), Malaysia (1966), New Zealand (1980), Papua New Guinea (1978), Philippines (1978), Singapore (1968), Solomon Islands (1981), Western Samoa (1978).<sup>62</sup>

Australia is one of the only 4 countries to have signed (in 1975), but not ratified the Convention.<sup>63</sup> It is hoped that after some years of delay (caused in part by a need to clarify the position of the Australian States) the Convention can be ratified in the not too distant future.<sup>64</sup>

Articles 62 and 63 of the Convention provide for the place of ICSID proceedings. At the parties' request, the proceedings may be held at the Cairo or Kuala Lumpur Regional Arbitration Centres, the Permanent Court of Arbitration of The Hague or at any other place approved by the tribunal after consultation with the Secretary General. If the parties fail to agree on any of these locations the proceedings are to be held at ICSID's headquarters in Washington, D.C.

Awards made by the tribunal are final and binding (Articles 53 and 54) and all Contracting States are required by Article 54 to recognize and enforce ICSID awards as if they were final judgments of domestic courts. This is so even if they or their nationals were not parties to the proceedings. Awards may only be challenged as described in Articles 50-52 of the Convention, which provide for a kind of administrative appeal. It is important to note that no judicial scrutiny is allowed for. Otherwise the Convention contains no rules of substantive law and primarily allows the parties freedom to agree on such matters.

In terms of the Convention's use, while only 18 cases had been

61 See A Broches, "Dispute Resolution in the Region", *Asian Pacific Regional Trade Law Seminar*, 22-27 November 1984, Canberra, at p 482.

62 A Broches, footnote 61. Also *Multilateral Treaties, Index and Current Status*, Butterworths, Bowman and Harris, 1984.

63 The others being Costa Rica, Ethiopia and Haiti. Australia signed the Convention on 24 March 1975.

64 Senator Evans' address to Asian Pacific Trade Law Seminar (November 1984).

submitted to ICSID by 30 June 1984, an increasing number of ICSID members have enacted domestic investment laws or have entered into bilateral investment treaties which refer to ICSID as the forum for the settlement of investment disputes.

## COMMENTS AND CONCLUSIONS

Clearly, there has been considerable development over the last decade or so in the area of dispute resolution, in terms of legislative changes, the adoption of arbitration rules and provision of facilities, as well as an overall "growing awareness" of dispute resolution as an issue of legal and commercial significance. While most mechanisms of dispute settlement, such as arbitration or conciliation, have been in existence for a long time, others have only recently been discovered and developed to suit the modern commercial climate.

Hopefully, the discussion in this paper has emphasised, in particular, the attributes of and facilities for arbitration as a means of settling international commercial disputes. This is not to deny that there are other effective means. The usefulness of a particular means will depend on the circumstances. Indeed, as I have stated earlier, the best overall system for dispute resolution is one that offers a number of viable alternatives. While arbitration may be the most effective in some circumstances, friendly discussions or conciliation are obviously preferable whenever possible, both in terms of cost advantage and the minimization of damage to the parties' commercial relationship.

In addition, and most importantly for businessmen in the Region, it is highly desirable that, having opted for arbitration, regional locations are available and regarded as internationally suitable for the holding of such arbitrations. I have mentioned a few countries and their arbitration centres and believe that important inroads in this area have been made. From an Australian businessman's point of view, the recently established Australian Centre for International Commercial Arbitration provides an element of bargaining power in the dispute settlement area and hopefully over the next few years will develop into an important international centre.

Of course, there are other more complex situations in which litigation may provide the answer. While it was stated earlier that litigation had drawbacks from the point of view of disputants from different countries, legislators in some countries at least, have acted to remove some of these perceived difficulties. However, arbitration retains a significant advantage in that it can be arranged on a neutral, supra-national basis which renders it largely free of links with a particular country's law — and in the context of international arbitration this is likely to be of importance.