



[Articles]

Report on the International Commercial Arbitration Seminar on Recent Court Decisions & Developments in UNCITRAL Model Law Jurisdictions - Trends and Issues-

Shinji Kusakabe*

1. Overview

The International Commercial Arbitration Seminar on Recent Court Decisions & Developments in UNCITRAL Model Law Jurisdictions took place at 14:00 on Friday, July 20, 2012 in Otemachi Sankei Plaza, Tokyo, Japan, sponsored by the Japan Association of Arbitrators, the Japan Chamber of Commerce and Industry and the Tokyo Chamber of Commerce and Industry and organized and hosted by the Japan Commercial Arbitration Association (the "JCAA"). The seminar featured presentations by guest speakers Dr. Luke Nottage, Professor at the University of Sydney, Dr. Romesh J. Weeramantry, Associate Professor at the City University of Hong Kong and Prof. Tatsuya Nakamura, Professor at Kokushikan University and General Manager of the Arbitration Department of the JCAA and was moderated by Mr. Shinji Kusakabe, a Partner at Anderson Mori & Tomotsune. A total number of approximately one hundred participants, comprised mostly of practicing lawyers, barristers and other professional legal practitioners, took part in this seminar.

2. Guest Speakers

The seminar focused on recent amendments to local legislation based partly on the UNCITRAL Model Law revised in 2006 (the "Model Law") and their projected implications. The guest speakers from Australia, Hong Kong and Japan each made presentations on recent court decisions on arbitration law in their respective jurisdictions arising from such amendments and thereafter the moderator opened the floor to questions to promote discussion and further exploration and comparison of the legal issues raised. The

following are brief summaries of the topics presented by each speaker.

(1) Dr. Luke Nottage, Professor, University of Sydney

Dr. Nottage's presentation revolved around selected cases and trends of international arbitration in Australia. He began by providing a backdrop of Australia's 2010 reforms and transitioned into the concept and process of Australia's law reform. Briefly going over the aims of Australia's amended International Arbitration Act (the "IAA"), he then discussed certain features of the IAA, such as the "writing" requirement, enforcement of awards, interim measures and the non-exclusion of the Model Law. Dr. Nottage then highlighted the temporal application of the new IAA, an interesting aspect of the implementation of the new law which resulted in certain anomalies such as a so-called "legislative black hole", as well as various "non-amendments" in the IAA and practical issues concerning the new Commercial Arbitration Act (used for domestic arbitrations in Australia) as influenced by the IAA as regards arbitrator's mediation. Dr. Nottage then went over selected recent cases, discussing them in some details before finally finishing his presentation by presenting his conclusions on Australia's legislative framework and courts and counsel.

(2) Dr. Romesh J. Weeramantry, Associate Professor, City University of Hong Kong**

Dr. Weeramantry's presentation was on recent Hong Kong court decisions concerning arbitration with specific focus on new limitations on court and arbitrator discretion pursuant to Article 34 of the Model Law.

* Partner, Anderson Mori & Tomotsune

** Editor's note: Dr. Weeramantry's current affiliation is King & Wood Mallesons.

Dr. Weeramantry began by providing an overview of arbitration in Hong Kong by covering local arbitration legislation. He then moved on to specific recent cases of legal significance, namely *Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd (2012)*, *Gao Haiyan v. Keeneye Holdings Ltd (2012)* and *Democratic Republic of Congo v. FG Hemisphere Associates LLC (2011)*. Through analysis of these cases, Dr. Weeramantry uncovered significant issues in relation to the interpretation and application of Article 34 of the Model Law, eloquently leading participants to draw their own conclusions regarding Hong Kong's Arbitration Ordinance (Cap.609) and the role of local courts in keeping in step with legislative advances and global best practices.

(3) Prof. Tatsuya Nakamura, Professor, Kokushikan University and General Manager, Arbitration Department of the JCAA

Prof. Nakamura's presentation was on recent Japanese court decisions on arbitration. His presentation first introduced the Arbitration Law of Japan which came into force on March 1, 2004. Thereafter, by making reference to recent court decisions applying the Arbitration Law, he highlighted certain developments and significant rulings regarding Japanese arbitration, in particular, in relation to the writing requirements of arbitration agreements, laws applicable to arbitration agreements, grounds for setting aside an arbitral award and enforcement of multi-tiered dispute resolution clauses. Prof. Nakamura's careful analysis of the legislation and its application in Japanese courts was meticulous and well thought out and ultimately allowed the participants useful insight into the developing field of Japanese arbitration.

3. Discussion: Questions and Answers

After the three guest speakers made their respective presentations, the moderator commenced the discus-

sion session by opening the floor to questions. Questions raised in the discussion session included whether in a broad sense, the strict rule of "Arb-Med" in a country constitutes a public policy ground for refusal to enforce foreign arbitral awards in that country; whether the Hong Kong Court of Appeal's high regard for the mediation practice prevailing in Mainland China as exhibited in *Gao Haiyan v. Keeneye Holdings Ltd (2012)* is a prevalent attitude widely supported by practitioners/scholars in Hong Kong given that the manner of mediation in such case was markedly different from that in Hong Kong (and possibly most other parts of the world); whether any precedents in Australian or Hong Kong law existed whereby the law of the place of arbitration would be determined to be the law applicable to an arbitration agreement, in light of Article 34(2)(a)(iv) and Article 36(1)(a)(iv) of the Model Law or their equivalents in local arbitration law or whereby a domestic arbitral award could be set aside or the enforcement of a foreign arbitral award refused due to a violation of "procedural" public policy as might be envisioned by Article 34(2)(b)(ii) and Article 36(1)(b)(ii) of the Model Law or their equivalents in local arbitration law; and how Australian or Hong Kong courts would rule when faced with a case of "Multi-tiered Dispute Resolution Clauses" as mentioned in Prof. Nakamura's presentation. With a pool of participants unprecedentedly comprised predominantly of actual legal practitioners, the discussion session was informative and thought provoking.

4. Close

Discussions drew to a close at 16:30 and the resounding success of the seminar was celebrated by all participants. The extremely impressive number of legal practitioners in attendance was an indication of great interest in recent trends and issues in international arbitration in Japan and the presentations and discussions of the seminar were both of practical value and also highly academic.

* Associate Dean and Professor of Comparative and Transnational Business Law, Sydney Law School; Co-Director, Australian Network for Japanese Law (ANJEL: sydney.edu.au/law/anjel/); Director, Japanese Law Links Pty Ltd (www.japaneselawlinks.com). This article draws on research for Nottage's project entitled 'Fostering a Common Culture in Cross-Border Dispute Resolution: Australia, Japan and the Asia-Pacific', supported by the Commonwealth through the Australia-Japan Foundation which is part of Australia's Department of Foreign Affairs and Trade. It is based on material presented at public seminars with project affiliate Professor Tatsuya Nakamura in Tokyo on 20 July, in Brisbane on 12 September, and in Sydney on 13 September 2012. A longer version of this article is available at http://sydney.edu.au/law/scil/publications/working_papers.shtml.

International Commercial Arbitration Developments in Model Law Jurisdictions: Japan Seen from Australia

Luke Nottage*

Like Japan since enactment of its *Arbitration Act* in 2003,¹ the core of Australia's arbitration law is the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration ('ML').² For international arbitration matters, Australia acceded in 1974 to the 1958 *New York Convention on the Recognition of Foreign Arbitral Awards* ('NYC'), now incorporated as Part II of the *International Arbitration Act 1974* (Cth) ('IAA'), which since 1989 gives force of law to the ML in Australia under Part III of the IAA. The IAA underwent further major amendments in 2010, partly to incorporate the 2006 revisions to the ML, including more liberal provisions on writing requirements for arbitration agreements,³ and additional support for tribunal-issued interim measures.⁴

For domestic arbitration matters, from the mid-1980s each state and territory within the Australian federation enacted uniform *Commercial Arbitration Act* ('CAA') provisions. These were based instead on older English law, and could also extend to international arbitrations with the seat in Australia — especially if parties agreed explicitly or implicitly to exclude the ML (as permitted by the original s 21 of the IAA). Since 2010 most states and territories have substituted new uniform CAA provisions, based instead on the ML but with some differences — given that the new statutes apply now only to domestic arbitrations.⁵ For example, parties can still agree to allow courts to review awards for serious errors of law (a provision that applied instead on an opt-out

basis under the old CAA legislation). IAA s 21 has also been amended to provide that the ML 'covers the field' for international arbitrations.⁶

Like Japan, improved 'global standard' arbitration legislation has not yet resulted in many international arbitrations taking place with the seat in Australia.⁷ But there has been more activity in recent years thanks also to other initiatives, including updated Arbitration Rules for the Australian Centre for International Commercial Arbitration ('ACICA')⁸ and the new 'Australian International Disputes Center' in Sydney.⁹ Australian lawyers and arbitrators are also very active in proceedings overseas, with many Australian companies now prepared to arbitrate in Asia's major venues (especially Hong Kong and Singapore, where several large Australian law firms now have branches). This renewed engagement with international arbitration, underpinned by a new ML-based regime for domestic arbitration within Australia, will hopefully result in a broader 'cultural reform'.¹⁰ Partly because of the more interventionist English law tradition, epitomized by the old CAA legislation, domestic arbitration had become increasingly 'formalised' and not widely used.

One difference from Japan is that Australia has generated a significant volume of international arbitration case law since 1989, especially over the last decade.¹¹ Few decisions involve IAA Part III, reflecting the paucity of international arbitrations with the seat in Australia. But there are many judgments

1 Tatsuya Nakamura and Luke Nottage, 'Arbitration in Japan' in Tom Ginsburg and Shahla Ali (eds) *Arbitration in Asia* (Juris, New York, 3rd ed 2012) forthcoming. For further works in Western languages analyzing Japanese arbitration law, see Harald Baum, Luke Nottage, Markus Thier and Joel Rheuben, *Japanese Business Law in Western Languages: An Annotated Selective Bibliography* (Hein, New York, 2nd ed 2013) Part III.VI.4.

2 Luke Nottage and Richard Garnett, 'Introduction' in *ibid* (eds), *International Arbitration in Australia* (Federation Press, Sydney, 2010) 1, pp 1-18.

3 Cf the expansive interpretation of such requirements, under Japan's existing law, in *NIPPONKOA Insurance Co Ltd v Camellia Line Co Ltd*, Tokyo District Court, 26 March 2008; noted in Tatsuya Nakamura, 'The Recent Japanese Court Decisions on Arbitration' (September 2012) 28 *JCAA Newsletter* 4, <http://www.jcaa.or.jp/e/arbitration/newsletter.html>, pp 4-5.

4 Richard Garnett and Luke Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (2011) 7(1) *Asian International Arbitration Journal* 29, <http://ssrn.com/abstract=1676604>.

5 See the CAA 2010 (NSW), the *Commercial Arbitration (National Uniform Law) Act 2010* (NT), the CAA 2011 (Vic), (SA) and (Tas), and the CAA 2012 (WA). New CAA legislation is still being considered by the legislature in Queensland but not yet in the Australian Capital Territory. Most Australian legislation (and case law) is freely available via <http://www.austlii.edu.au/>.

6 Available at http://www.austlii.edu.au/au/legis/cth/consol_act/IAA1974276/.

7 Luke Nottage, http://blogs.usyd.edu.au/japaneselaw/2009/04/australias_less_lethargic_law.html (19 April 2009); Nottage and Garnett, above n 2, pp 32-3.

8 See <http://acica.org.au/acica-services/acica-arbitration-rules> (last updated in 2011, including 'emergency arbitrator' provisions). I have served on ACICA's Arbitration Rules drafting committee since 2005.

9 See <http://www.disputescentre.com.au/>.

10 Nottage and Garnett, above n 2, p 16 (citing the former federal Attorney-General, who actively promoted Australia's recent amendments to domestic and international arbitration law). For more a more pessimistic assessment recently, see Luke Nottage, 'Addressing International Arbitration's Ambivalence: Hard Lessons from Australia' in Vijay Bhatia, Christopher Candlin & Maurizio Gotti (eds), *Discourse and Practice in International Commercial Arbitration* (Ashgate, 2012) 11.

11 Albert Monichino, Luke Nottage and Diana Hu, 'International Arbitration in Australia: Selected Case Notes and Trends' (August 2012) 12/53 *Sydney Law School Research Paper* <http://ssrn.com/author=48852>, Figure at p 6. That paper also contains an Appendix listing names and citations for cases decided through to end-June 2012.

involving IAA s 7 (equivalent to NYC Art II: enforcing agreements for arbitration abroad) and IAA s 8 (NYC Art V: enforcement of foreign awards in Australia), especially over 2011-12.

In part, the large volume of case law compared to Japan is due simply to more reporting of judgments in Australia.¹² But the willingness to pursue arbitration-related cases to final judgment may also reflect the significant number of Australian lawyers now with significant exposure to international arbitration (and cross-border dispute resolution more generally) from having worked overseas for extended periods. Most IAA judgments are decided by the Federal Courts and the Supreme Court of New South Wales (Australia's most populous state), followed by the state Courts in Victoria.¹³

Overall, decisions by Australian courts are now demonstrating a more consistent and 'internationalist' approach, supportive of arbitration.¹⁴ Yet there do remain some exceptions, even in recent years. Elsewhere, I have co-authored detailed casenotes on 11 judgments rendered since 2010.¹⁵ The rest of the present article picks up some of that material (especially Parts 2.1.1 and 2.1.2) as well as other developments in Australian arbitration law and practice that seem particularly interesting to compare with some of the recent Japanese decisions which were discussed and set in broader context by Professor Nakamura during our recent joint seminars in Japan and Australia.¹⁶

1 Dispute Resolution Clauses and Practices Generally

1.1 Why (Not) Enforce Multi-tiered Dispute Resolution Clauses?

The Tokyo High Court judgment of 22 June 2011, reversing the first-instance decision and refusing to enforce a clause that provided for good faith negotiations, or otherwise appointment of a mediator by the Japan Commercial Arbitration Association (JCAA) if the parties could not agree on one themselves,¹⁷ is

unhelpful in promoting alternative dispute resolution (ADR) more generally in Japan. It is hard enough for private providers of ADR services to 'compete' with a taxpayer-subsidised judicial system where court-annexed conciliation committees and indeed many judges themselves actively encourage settlement of civil disputes. The High Court's judgment also contrasts with the willingness of courts abroad (including Australia) to enforce multi-tiered dispute resolution agreements.¹⁸ These are widely used nowadays in cross-border contracts, especially when combined with arbitration as the 'fall-back' dispute resolution process.¹⁹

The contemporary attitude of Australian courts needs to be understood, however, in the context of the growth of commercially-supplied mediation services for domestic dispute resolution. This expansion has occurred only over the last two decades or so, due to two factors not (yet) found in Japan. First, the cost of civil litigation remains high in Australia, although court procedures have often become quicker and somewhat more flexible. Secondly, and relatedly, there is strong government support for ADR generally – both for dispute resolution between firms, and for cases involving the government.²⁰ This support is premised not just on the capacity for ADR to generate more efficient and party-focused outcomes. It also derives from the concept, linked to a particular conception of democracy and the rule of law, that the government should act as a 'model litigant' – not necessarily always using its (typically greater) resources to pursue litigation to the bitter end, but instead admitting or settling claims by (individual or corporate) citizens in appropriate circumstances. There is no real analogue in Japan, where government lawyers instead emphasise and seek uniformity and predictability in dispute-related activity.²¹ Until this view changes, or the Japanese government commits more generally to promoting ADR in new ways (eg by including ADR clauses in many government contracts), current practices and judgments like that of the Tokyo High Court may well persist.

¹² Almost all are uploaded and freely available at <http://www.austlii.edu.au/>, whereas only a minority of court decisions are reported even by commercial publishers in Japan.

¹³ Monichino, Nottage and Hu, above n 11, p 7. That Figure counts unrelated cases decided under the IAA from 1989 until end-June 2012.

¹⁴ P A Keane, 'Judicial Support for Arbitration in Australia' (2010) 34 Australian Bar Review 1

¹⁵ Above n 11 (with versions also reproduced on the 'Case Law on UNCITRAL Texts' (CLOUT) database service, for which Albert Monichino SC and I serve as 'National Correspondents' for Australia: http://www.uncitral.org/uncitral/en/case_law.html). (Regrettably, no casenotes on Japanese judgments applying the NYC or ML provisions are uploaded on that database.)

¹⁶ Nakamura, above n 3.

¹⁷ X Co v Y et al, 2116 Hanrei Jiho 64; noted in *ibid*, pp 9-10.

¹⁸ See eg *United Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177.

¹⁹ See eg School of International Arbitration Research, '2006 International Arbitration Study: Corporate Attitudes and Practices' available via <http://www.arbitrationonline.org/research/>.

²⁰ See eg <http://www.ag.gov.au/Legalsystemandjustice/Pages/AlternativeDisputeResolution.aspx>.

²¹ See generally Luke Nottage and Stephen Green, 'Who Defends Japan? Government Lawyers and Judicial System Reform in Japan and Australia' (2011) 13(1) *Asian-Pacific Law and Policy Journal* 129.

Nonetheless, perhaps that judgment will not have much effect as a precedent, especially as Japanese law does not have a doctrine of *stare decisis*. After all, the clause was contained in a domestic contract, yet the wording seems to have been adopted or adapted from an international contract.²² The High Court may therefore have considered that the party resisting enforcement of the clause did not adequately realize what was involved in agreeing to this multi-tiered dispute resolution procedure. Perhaps other Japanese courts will be more willing to uphold such clauses in purely international contracts, more carefully negotiated and with both parties better advised by their lawyers regarding the risks and benefits of ADR.

Secondly, the Tokyo High Court's reference to the constitutional guarantee to 'access to courts' seems to be a throwaway line. Australian judges have generally come around to the idea that ADR is far from inconsistent with a similar right under Australian law. Admittedly, however, there is a (hopefully futile) challenge presently before the High Court of Australia regarding the constitutionality of the IAA's regime for enforcing arbitral awards.²³

Thirdly, the constitutional point and the whole tenor of the Tokyo High Court's judgment sit awkwardly with the Act Promoting the Use of ADR ('ADR Act'), enacted in 2004 and not yet showing much impact.²⁴ That Act formed part of Japan's broader judicial system reforms underway since 2001, aimed at moving its people away from relying on ex ante regulation by public authorities and towards more indirect socio-economic ordering, premised on autonomous decision-making backed up by a more functional system for ex post dispute resolution.²⁵ Given that background, one would have expected the Court to take the next step and uphold the multi-tiered ADR process chosen by the parties. In other fields where the legislature has intervened since the 1990s, Japan-

ese judges have instead tended to take this as a signal to press the boundaries of the new statutes, rather than adopting the (older) view that the courts should interpret them narrowly.²⁶

Unlike the ACICA website,²⁷ the JCAA website does not display a sample multi-tiered dispute resolution clause where the last tier provides for arbitration.²⁸ But the JCAA does now have International Commercial Mediation Rules,²⁹ so parties could easily agree on such mediation followed by JCAA arbitration. If only because the JCAA is certified under the ADR Act, Japanese courts should uphold such a multi-tiered dispute resolution clause. JCAA's new Mediation Rules also allow the parties to agree on the mediator becoming arbitrator (Rule 8) if the dispute escalates. This agreement could be reached before the dispute arises, in a multi-tiered clause, or after the mediation fails but the parties want to proceed to arbitration with the same third-party neutral.

1.2 Engaging in 'Arb-Med'

Even where parties agree simply to JCAA arbitration, without first attempting mediation, Professor Nakamura's recent empirical study shows that many cases over the last decade have settled after the arbitrator has facilitated settlement ('Arb-Med'). This is especially true when the arbitrators came from a civil law background (including Japan).³⁰ This tendency may have decreased in recent years, as common lawyers (especially those from the Anglo-Australian law tradition) have been more skeptical about this hybrid procedure, due to possible (perceptions of) bias on the part of the third-party neutral or contravention of other mandatory provisions of arbitration law. These concerns become particularly acute when Arb-Med involves 'caucusing' (*ex parte* meetings by the arbitrator with each party) to encourage settlement.³¹

However, the UK-based Centre for Effective Dispute

²² It specifies, for example, that the mediator 'shall be a native speaker of Japanese'.

²³ See *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia & Anor* [2012] HCATrans 172 (23 July 2012), <http://www.austlii.edu.au/au/other/HCATrans/2012/172.html> (outlined in PA Keane, 'AMTAC 2012 Annual Address: The Prospects for International Arbitration in Australia', <http://www.amtac.org.au/amtac-papers>, pp 13-14; and criticized in John Wakefield and Georgina Philpott, 'Constitutional Heat' (21 September 2012) <http://www.holmanwebb.com.au/publications/constitutional-heat-air-conditioner-distribution-agreement-sparks-challenge-to-constitutional-validity>).

²⁴ Hideaki Irie, 'An Overview on the Current Status of Japanese Private Dispute Resolution: Small Impact of the ADR Act and It's Still at the Early Stage' (2012) 25 JCAA Newsletter 1.

²⁵ Daniel Foote, 'Introduction and Overview: Japanese Law at a Turning Point' in *ibid* (ed) *Law in Japan: A Turning Point* (University of Washington Press, Seattle, 2007) xix.

²⁶ Luke Nottage, 'Consumer Rights in Japan' in Parissa Haghairian (ed) *Japanese Consumer Dynamics* (Palgrave, New York 2010) 31.

²⁷ <http://acica.org.au/acica-services/mediation-clauses>

²⁸ See <http://www.jcaa.or.jp/e/arbitration/clause.html>. The Japanese-language side of the JCAA website (at <http://www.jcaa.or.jp/arbitration/clause.html>) displays various other clauses, including a 'finger-pointing' agreement often favoured by Japanese parties (whereby arbitration takes place at the seat of the respondent): see eg *X Co v Y Co*, Tokyo District Court, 10 March 2011, 1358 Hanrei Taimuzu 236; noted by Nakamura, above n 3, p 6.

²⁹ See <http://www.jcaa.or.jp/e/mediation/docs/rules.pdf>.

³⁰ Tatsuya Nakamura, 'Brief Empirical Study on Arb-Med in the JCAA Arbitration' (June 2009) 25 JCAA Newsletter 10.

³¹ Luke Nottage, 'Arb-Med and New International Commercial Mediation Rules in Japan' (21 July 2009) http://blogs.usyd.edu.au/japaneselaw/2009/07/arbmed_and_new_international_c_1.html.

Resolution ('CEDR') recently issued provisions and guidelines to encourage Arb-Med, albeit in principle without caucusing. Australia's new CAA legislation (like the old) also allows for Arb-Med even with caucusing, but (unlike the old) adds the safeguard that if mediation attempts fail, the parties must re-authorise the neutral to proceed with the arbitration. Unfortunately, the 2010 amendments to the IAA declined to add any provisions on Arb-Med. This leaves some doubt as to whether an Australian court might refuse enforcement of an award rendered by a JCAA tribunal that had failed to mediate the dispute even after caucusing, even though such Arb-Med may have been agreed pursuant to JCAA Rules and Japan's Arbitration Act. This possibility arises despite Australian courts recently favouring a narrower interpretation of the 'public policy' exception to enforcing foreign awards (as explained in Part 2.2 below).

World-wide, it is difficult to find judgments where awards following failed Arb-Med have been refused enforcement or otherwise challenged in the courts.³² The Hong Kong Court of Appeal even enforced recently an award from mainland China following a particularly dubious caucusing attempt.³³ But the trial Court had refused enforcement, and there is an unusually close relationship between both those jurisdictions. The High Court in New Zealand has also expressed misgivings over Arb-Med.³⁴

One way to improve chances of enforcing a JCAA award given after a failed mediation that did involve caucusing, as remains common in Japan where parties authorize Arb-Med, is for them to agree beforehand with the tribunal that it will not use any information from the mediation if it resumes the arbitration.³⁵ This should lessen concerns about bias or equal treatment of the parties, and Australian courts now tend to give narrow scope to the 'public policy' exception under the NYC (as explained further below). However, there might still be problems if this proposal were adopted by parties seeking to engage in Arb-Med in an international arbitration with the seat in Australia. After all, ML Art 24(3) is arguably mandatory — requiring that all 'information supplied to the arbitral tribunal by one party shall be commu-

nicated to the other party'.³⁶ Australia should therefore clarify, by legislative amendment, the contours of appropriate Arb-Med in international arbitration. Meanwhile, it might be wise for those involved in JCAA arbitrations with parties from Australia (or where assets might be located there) to agree to Arb-Med without caucusing, as recommended by CEDR and effectively practiced by many well-known continental European arbitrators.

2 Judgments on Setting-Aside Applications

2.1 'The Case of the Missing Arbitrator'

There are two striking aspects of the Tokyo District Court's decision of 28 July 2009 regarding the somewhat bizarre facts of this case, summarized by Professor Nakamura³⁷ -- quite apart from the fact that the third arbitrator who went 'missing in action' seems to have been an Australian!

2.1.1 Time Limits for Arbitration-related Court Applications

A first aspect of the judgment allows us to compare two recent decisions in Australia, where the judges similarly emphasized the importance of a party contesting an arbitrator's decision to make applications within time limits specified in the relevant arbitration law.

In *teleMates (previously Better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd*, the parties had selected Australia as the seat so the IAA applied.³⁸ The applicant (an Australian company) and the respondent (an Indian company) had entered into a written agreement which included a dispute resolution clause providing that all disputes be referred to arbitration 'in accordance with the provisions of 'The Institute of Arbitrators & Mediators Australia' ('IAMA') ... [and that the] venue of arbitration shall be mutually decided within New South Wales Australia'. IAMA is a non-profit company that provides arbitration and mediation services in Australia, including administering international and (mostly) domestic arbitrations if parties adopt the IAMA Arbitration Rules.³⁹

³² Luke Nottage and Richard Garnett, 'The Top 20 Things to Change in or around Australia's International Arbitration Act' in *ibid* (eds), *International Arbitration in Australia* (Federation Press, 2010) 149, pp 179-84.

³³ Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor [2011] HKCA 459. See further Weeramantry, in this Issue.

³⁴ *Acorn Farms Ltd v Schnuriger* [2003] 3 NZLR 121.

³⁵ Mark Goodrich, 'Arb-Med: Ideal Solution or Dangerous Heresy?' [2012-1] *International Arbitration Law Review* 12, p 18.

³⁶ Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2010) p 93, referring to Aaron Broches, 'UNCITRAL - Commentary on the Model Law' in Jan Paulsson (ed), *International Handbook on Commercial Arbitration* (Supplement 1) (Kluwer, 1990) 92; Micah Burch, Luke Nottage and Brett Williams, 'Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century' (2012) 35(3) *UNSW Law Journal* 1013, Part III.B, <http://ssrn.com/abstract=2065636>.

³⁷ *X Co v American International Underwriters Ltd*, 1304 Hanrei Taimuzu 292; noted in Nakamura, above n 3, p 7.

³⁸ [2011] NSWSC 1365 (11 November 2011), www.austlii.edu.au/au/cases/nsw/NWSC/2011/1365.html.

³⁹ The latest version of IAMA's Arbitration Rules date from 2007: see <http://www.iama.org.au/resources/adr-rules-guidelines>.

A dispute arose and the respondent requested IAMA to nominate an arbitrator. One was nominated by IAMA (a Mr McCrane), but this was disputed on the basis that the applicant had not consented to the referral or appointment. McCrane published an 'interim award' holding that, as a preliminary question, he had jurisdiction to hear the dispute, and later found against the applicant on the merits.

The applicant sought three separate declarations from the Supreme Court of New South Wales: (i) McCrane had not been appointed as arbitrator; (ii) the parties failed to agree on the procedures of appointment (or in the alternative, the respondent failed to follow the required procedures); and (iii) an arbitrator should be nominated instead by ACICA. The applicant that McCrane should not have been appointed as the parties failed to agree on a procedure for appointing an arbitrator under ML Art 11(3). The applicant alternatively argued that the respondent failed to comply with the procedure for appointing an arbitrator under ML Art 11(4), on the basis that no reasonable steps were taken to seek the applicant's agreement over who would be appointed as arbitrator.

Both the applicant's primary and alternative submissions were held to be relevant to the issue of jurisdiction. Hammerschlag J rejected each argument because (a) ML Art 16(1) stated that an arbitral tribunal may rule on its own jurisdiction, and (b) the applicant failed to apply for a court determination within 30 days of receiving notice of the tribunal's interim 'award' maintaining that the arbitrator had jurisdiction, as required under ML Art 16(3). The Court held that it could not intervene on the question of a tribunal's jurisdiction after expiry of this 30-day period. Hammerschlag J emphasised ML Arts 5 and 16, understood as reflecting underlying principle of the need for a speedy resolution of disputes and minimal court intervention.

The Court commented (at [44]) that it was 'undoubtedly arguable' that the IAMA Rules would apply where the parties fail to reach agreement on appointment of the arbitrator. This could have disposed of the case straightforwardly. However, Hammerschlag expressly did not consider this point, holding that the applicant could not overcome the initial issue of the time bar for judicial intervention regarding the tribunal's ruling on jurisdiction. The Court also did not discuss whether any final award from the tribunal may be later set aside under ML Art 34, including on the basis that the tribunal was not composed in

accordance with the agreement of the parties. However, considerable commentary suggests that this avenue is not available where the tribunal has made a preliminary ruling on its jurisdiction which has not been challenged within 30 days.⁴⁰

In a second recent decision, but given by the Federal Court of Australia in an application to enforce a maritime arbitration award rendered in London, Foster J similarly emphasised the need to be careful about making applications within time limits set down by the arbitration law at the chosen seat. In *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*,⁴¹ the applicant shipowner ('DKN') chartered a vessel through an Australian broker to 'Beach Building and Construction Group (of which Bowen Basis Coal Group forms a part), Australia'. Disputes arising out of this charterparty were, under cl 32, to be governed by English law and settled by arbitration with the seat in London. DKN claimed demurrage resulting from the charterer's delayed transportation of coal from Australia to China. It agreed with the respondent, Beach Building and Civil Group Pty Ltd (Beach Civil), on a sole arbitrator. DKN then sought and obtained from the arbitrator a first 'Declaratory Arbitration Award' that held that the charterer's name was incorrectly recorded in the charterparty documentation, and ordered rectification to confirm the parties' common intention that the charterer was Beach Civil. The arbitrator later issued a Final Arbitration Award against Beach Civil, comprising damages, interests and costs. DKN sought enforcement of both awards against Beach Civil in Australia under s 8 of the *IAA*, which gives effect to NYC Art V.

Foster J seems to have adopted a different approach to the Victorian Court of Appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*,⁴² where enforcement of an award was refused because the award creditor had not sufficiently established that the party against whom enforcement was sought in Australia was party to the arbitration agreement.

Nevertheless, Foster J refused enforcement because the charterparty was 'a sea carriage document' and s 11 of the *Carriage of Goods by Sea Act 1991* (Cth) ('*COGSA*') operated to render an arbitration clause (which required disputes to be arbitrated in London) to be of no effect. Section 2C of the *IAA* provides that nothing in the *IAA* affects the operation of the *COGSA*. The latter states that an 'agreement (whether made in Australia or elsewhere) has no effect so far as it purports to' restrict the jurisdiction of Australian

⁴⁰ See eg Greenberg, Kee and Weeramantry, above n 36, pp 235-6.

⁴¹ [2012] FCA 696 (29 June 2012) <http://www.austlii.edu.au/au/cases/cth/FCA/2012/696.html>

⁴² VSCA 248 (22 August 2011), www.austlii.edu.au/au/cases/vic/VSCA/2011/248.html; (2011) 282 ALR 717.

courts to resolve certain disputes (s 11(2)), unless the parties agree on ‘arbitration ... conducted in Australia’ (s 11(3)). Thus, s 11 of the *COGSA* makes certain disputes non-arbitrable unless the seat of the arbitration is within Australia (or possibly, as the *COGSA* wording is unclear, foreign-seated arbitrations if hearings are conducted in Australia). Under *COGSA* s 11(1), such disputes encompass those arising from ‘(a) a sea carriage document relating the carriage of goods from any place in Australia to any place outside Australia; or (b) a non-negotiable instrument of a kind mentioned in subparagraph 10(1)(b)(iii), relating to such a carriage of goods’. His Honour held (at [142]) that the charterparty fell within category (a), based on the wording and legislative history of the *COGSA* (including 1997 amendments), although not a ‘non-negotiable instrument’ pursuant to category (b) (see [144]).⁴³

Curiously, Foster J did not specify what aspect of s 8 of the *IAA* was relied on to reach the following conclusion: ‘The onus of establishing one or more of the grounds on which enforcement may be refused under s 8(5) and s 8(7) rests upon the party resisting enforcement’. Section 8(7) of the *IAA* is the counterpart to NYC Art V.2, whereby a foreign award can be refused enforcement if (a) the dispute’s subject matter is not capable of enforcement (i.e., not arbitrable) under the laws of the state where enforcement is sought (here: Australia), or (b) enforcement would be contrary to its public policy.

Arguably, the clearest ground for refusing enforcing the award in this case is the former, namely lack of objective arbitrability of the dispute under NYC Art V.2(a) or s 8(7)(a) of the *IAA*. Another possible ground was public policy under Art V(2)(b) or s 8(7)(b). Even though the intention behind the NYC, and the tendency of courts and commentators in applying this exception is to construe it as ‘international public policy’,⁴⁴ this is to be judged from the perspective of the enforcing state. In this situation, the Australian legislature has specified that certain disputes with international elements are to be decided only by courts or arbitral tribunals in Australia.

Foster J in fact noted this point earlier in the judgment

in a different context, namely the respondent’s alternative objection that Beach Civil was never a party to the original arbitration agreement. His Honour noted (at [99]), following s 8(5)(b), that this question was to be decided according to English law.⁴⁵ However, since no evidence was adduced ‘as to the relevant principles of construction of contracts under English law’, Foster J was entitled to assume it is the same as Australian law (at [100]), which enabled errors of misdescription of parties to be rectified as in this sort of case (see [96]-[97]).

Foster J also justified the rectification of the arbitration agreement by another line of reasoning — and here we can finally make a connection back to the importance of timely objections, evident also from Tokyo District Court’s judgment in the ‘case of the missing arbitrator’.⁴⁶ In *DKN*, Foster J pointed out that s 30 of the *English Arbitration Act 1996*, the *lex arbitri*, empowers the arbitrator to rule on his own substantive jurisdiction — including the validity of the arbitration agreement — while s 48(5)(c) gives arbitrators the same powers as the English Commercial Court to order rectification of documents. Under s 67, a party who has unsuccessfully challenged jurisdiction before the arbitrator may appeal to the Court but within 28 days of the arbitrator’s decision. Because that had not occurred, Foster J concluded (at [102]) that ‘the first Award cannot now be challenged under English law and is therefore determinative of the point at issue’.

This alternative reasoning is debatable, however, as it may give excessive deference to the *lex arbitri* — contrary to the general intention behind the NYC system. Imagine for example if the latter provided for strict time limits for any appeals to courts at the seat regarding other matters, such as seeking replacement of arbitrators for bias or setting aside awards for serious irregularities. A court in another state arguably should not be precluded from resisting enforcement based on grounds set out in the NYC. In the specific case of an arbitral tribunal’s jurisdictional ruling, moreover, English courts have recently affirmed that *de novo* review is available when resisting enforcement, even if no appeal or challenge had been lodged with courts at the seat of the arbitration.⁴⁷

⁴³ Foster J disagreed (at [147]) with a contrary recent short ‘Ruling on Preliminary Question’ by Anderson J in the Supreme Court of South Australia, who had decided that s 11 of the *COGSA* covered persons holding bills of lading or similar instruments, not charterparties: *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50.

⁴⁴ *Greenberg, Kee and Weeramantry*, above n 36, pp 461-7.

⁴⁵ Unfortunately, however, the *IAA* amendments did not add that for stay proceedings regarding foreign arbitration agreements (under s 7) the law applicable to the arbitration agreement is that chosen by the parties, otherwise the law of the seat: *Nottage and Garnett*, above n 32, pp 156-7. Such a rule, filling a gap in NYC Art II (cf Art V), is a sensible one that seems to be accepted also by Japanese courts and influential commentators: *Nakamura*, above n 3, pp 5-6.

⁴⁶ Above n 37.

⁴⁷ In *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, the seat for the arbitration was France. Enforcement was declined in the UK because the Supreme Court disagreed with the arbitral tribunal’s decision that (under French law) Pakistan was party to the arbitration agreement.

2.1.2 No Serious Violation of Due Process or Public Policy

The second interesting aspect of the Tokyo District Court's decision in the 'missing arbitrator' case was its rejection of the argument that the award (reached fortunately by the remaining two arbitrators) should be set aside under the ML's public policy exception – even if the factual findings and legal reasoning might be found to be unreasonable.⁴⁸ Australian courts have also recently preferred a narrow reading of 'public policy', even at the stage of enforcing a foreign award under the similar exception provided under s 8 (NYC Art V).

For example, in *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)*⁴⁹ a Luxembourg company (Traxys) had contracted with an Indian company (Balaji) regarding coke supplied by an Egyptian company. The contract was governed by English law and provided for arbitration in London under the London Court of International Arbitration (LCIA) Rules. Balaji refused to pay Traxys for the coke, so the latter duly commenced an arbitration against Balaji and the arbitrators rendered an award in favour of Traxys. It sought enforcement in the Federal Court of Australia as Balaji appeared to own shares in Booyan Coal Pty Ltd (another Australian company). Traxys also sought a freezing order for the shares, which it sought to attach by way of enforcement. Meanwhile, the Indian High Court had made an order purportedly setting aside the award and restrained Traxys from taking any step to enforce the award. This order was made upon an *ex parte* injunction, and Traxys was only notified a month after the order was made.

Balaji raised various arguments in an attempt to resist enforcement of the award.⁵⁰ For example, it argued that seeking to enforce an award where the award debtor may not have assets in the jurisdiction would be contrary to 'public policy', pursuant to IAA s 8(7). Foster J succinctly rejected this submission (at [108]). His Honour also rejected (at [111]) the contention of a public policy violation 'simply because Balaji has pursued an appeal in India from an unfavourable decision in India [which had refused its application for a stay of the award from the arbitration in London] and has somehow persuaded the Indian High

Court to grant an *ex parte* interim injunction against Traxys', restraining the latter from 'putting the award into execution' (at [21]). Indeed, the Court in India went further and purportedly set aside the award. Foster J held (at [110]) that the Indian Court order purporting to set aside the award made in an arbitration seated outside of India was ineffectual. The well-established view is that an award can only be set aside by a court at the seat of the arbitration (London, in this case).⁵¹

More generally, repeating (at [132]-[133]) his view in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*,⁵² and following case law from the United States⁵³ and Hong Kong,⁵⁴ Foster J reasoned (at [105]):

the scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defence of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state.

This approach arguably interprets the NYC as referring to 'international public policy', namely public policy viewed from the perspective of the enforcing state's court while allowing leeway (compared to 'domestic public policy') for the fact that various international elements are involved in enforcing foreign awards. Less clear is what the Australian position is regarding 'transnational public policy', namely 'public policy which is common to many States' - according to the 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', from the International Law Association ('ILA').⁵⁵ As in that authoritative Report, however, Foster J's decision (at [90]) confirms the narrow contemporary scope generally given in Australia to the public policy exception, and the 'pro-enforcement bias of the Convention, as reflected in the IAA'.

Nonetheless, Australian courts require arbitral tri-

⁴⁸ Above n 38.

⁴⁹ [2012] FCA 276 (23 March 2012), www.austlii.edu.au/au/cases/cth/FCA/2012/276.html.

⁵⁰ For two other arguments, see *Monichino, Nottage and Hu*, above n 11, p 25.

⁵¹ *Greenberg, Kee and Weeramantry*, above n 36, pp 77-78, 418-9.

⁵² [2011] FCA 131 (22 February 2011), www.austlii.edu.au/au/cases/cth/FCA/2011/131.html; (2011) 277 ALR 415 at 439.

⁵³ Eg *MGM Productions Group Inc v Aeroflot Russian Airlines 2004 WL 234871*.

⁵⁴ *Hebei Import and Export Corporation v Polytek Engineering Co Ltd [1999] HKCFA 16 at [28]-[29]*, per Bokhary PJ.

⁵⁵ *New Delhi, 2002*, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>, [11].

bunals to afford basic procedural due process to the parties. In *Sugar Australia Pty Limited v Mackay Sugar Ltd*,⁵⁶ the Queensland Supreme Court set aside an award involving a dispute over joint venture and sales agreements. McMurdo J held that the losing party was denied natural justice as the arbitrator failed to provide it with the opportunity to address a point not raised or anticipated by the parties, which ultimately formed a critical element of the arbitrator's reasoning in the award. Although this was a domestic arbitration decided under the (old) CAA, the IAA has long added a similar gloss to the public policy exception under the ML by expressly including within it 'a breach of the rules of natural justice occurred in connection with the making of the award'. Accordingly, a similar decision seems likely under the IAA regime.⁵⁷

The latter anyway incorporates ML Art 34(2)(a)(ii), allowing an award to be set aside if the party is unable to present its case. Australian courts would likely agree with the Tokyo District Court's view on the comparable provision in Japan's Arbitration Act, in the 'disappearing arbitrator case', that this exception would apply for example if 'the arbitral award was made relying on materials of which the party was unaware'.⁵⁸

2.2 Licence Fees for Expired Patents?

The more recent judgment of the Tokyo District Court, rendered on 13 June 2011,⁵⁹ offers an interesting comparison. The Court did allow the applicant to add 'out of time' a new argument for setting aside the award regarding a licensing contract dispute because it was based on the ML's 'public policy' exception, which courts are expected to consider *ex officio*. It then found a 'procedural public policy' violation due to the tribunal having incorrectly recorded as an 'undisputed fact' that a technical service fee (held payable by the licensee) amounted to a division of profits the joint venture between the parties. The licensee, ordered by the tribunal to pay that fee, had argued that it amounted to a licensee fee for expired patents — violating Japan's Anti-Monopoly Act.

Professor Nakamura's critique of this judgment helpfully invokes the ILA's Report, which emphasizes the need for finality of arbitral awards save in exceptional circumstances.⁶⁰ If that principle is appropriate when it comes to enforcing a foreign award in a particular jurisdiction under the NYC, it should generally be all the more so when considering a setting aside application under the (NYC-inspired) ML. (After all, once set aside at the seat, an award is unusually no longer enforceable in any jurisdiction.) Given the helpful guidance provided by the ILA's Report as to the scope and types of 'public policy', it is regrettable that it is not invoked in court practice in Japan or even in Australia. (More generally, however, IAA s 39(2) (added in 2010) does usefully direct courts to exercise powers having regard to specified principles, including that 'awards are intended to provide certainty and finality'.)

Professor Nakamura goes on to suggest that a procedural public policy violation should only be found if the tribunal could be (somehow) shown to have deliberately treated a key fact as undisputed, when it was disputed by the parties. In my view, if a party were not given any opportunity to argue or adduce evidence regarding such a key matter, this would also amount to a violation of public policy or indeed the requirement on arbitrators to allow each party to present its case.⁶¹

A more puzzling feature of judgment, however, is that the Tokyo District Court did not directly address whether there had been a 'substantive public policy' violation, arising from the underlying contract contravening Japan's competition law. This type of violation is even more difficult to delineate, as even the ILA Report shows, in normal commercial dealings — as opposed to situations where an underlying agreement (for people-smuggling, for example) is clearly and universally considered to be illegal and wrong. It would be helpful for the legislature in Japan, but also in Australia,⁶² to add more guidance on the limits to arbitrators' powers created by such 'substantive public policy' concerns as well.

56 [2012] QSC 38 (8 March 2012), <http://www.austlii.edu.au/au/cases/qld/QSC/2012/38.html>.

57 Sarah Lancaster and Erika Hansen, 'Court Decision Imparts Guidance on Public Policy' (5 September 2012) <http://www.lexology.com/library/detail.aspx?g=59a65fb7-04c5-4e56-9d7d-72fdb729352d>.

58 Above n 37.

59 *X Co v Y Inc*, 2128 Hanrei Jiho 58; noted by Nakamura, above n 3, pp 7-9. For recent case law decided quite similarly in both Japan and Australia regarding the scope of arbitrability in patent licensing disputes, see also Christopher Heath and Luke Nottage, 'Case No. 71: Arbitration Law — Separability and Arbitrability? Terminated Contract' in Moritz Baelz, Marc Derauer et al (eds), *Business Law in Japan: Cases and Comments* (Kluwer, Alphen aan den Rijn, 2012) 773-84.

60 Nakamura, above n 3, p 8.

61 Akiko Yamakawa and Nicholas Lingard, 'Japan: Public Policy and Procedure Collide to Sink an Arbitral Award' (17 February 2012) *Global Arbitration Review* via www.globalarbitrationreview.com.

62 Nottage and Garnett, above n 32, pp 164-7.

3. Avoiding Arbitration Agreements

Other recent Japanese decisions, such as the ‘American employee’ case decided by the Tokyo District Court on 15 February 2011,⁶³ are also interesting from an Australian perspective — as elaborated in the longer version of this article.⁶⁴ Recent case law and commentary have highlighted the potential to challenge arbitration agreements as ‘unfair’ under the *Australian Consumer Law* regime (Schedule 2 of the *Australian Competition and Consumer Act 2010* (Cth), the new name for the *Trade Practices Act*) or when one party becomes insolvent.⁶⁵ Australian legislators should examine these issues, as well as the policy rationale for only allowing court proceedings or arbitration ‘conducted in Australia’ for charterparty disputes involving outbound carriage of goods by sea.⁶⁶

They also need urgently to address serious uncertainty about the temporal application of recent *IAA* amendments, another issue identified by the ‘American employee’ case in Japan. Specifically, a ‘legisla-

tive black hole’ arguably arises for international arbitration agreements concluded before 6 July 2010, where the parties had agreed expressly or implied to exclude the ML (as permitted by the original of the *IAA*), and had specified the seat to be a State or Territory in Australia which has now repealed the old *CAA* with new *CAA* legislation — which only applies to domestic arbitrations!⁶⁷

4. Conclusion

The experience of persistently more popular venues for international commercial arbitration in the Asia-Pacific region, such as Hong Kong and Singapore, suggests that frequent legislative amendments can provide an opportunity to demonstrate sustained commitment to a complex and rapidly-evolving field of law. Perhaps policy-makers in Australia and Japan, as well as experts in arbitration associated with arbitral institutions like ACICA and JCAA, should join forces to press for parallel reforms in the most promising areas.

Recent Developments in Hong Kong Arbitration Law

J. Romesh Weeramantry*

Hong Kong Arbitration Ordinance (Cap. 609)

Hong Kong experienced a major change in its arbitration regime on 1 June 2011, the date its new arbitration law, the Arbitration Ordinance (Cap. 609), commenced. It had been many years in the making and replaced the Arbitration Ordinance (Cap. 341). The old Ordinance was a cumbersome instrument having been subject to numerous major amendments over several decades and was difficult to navigate.¹ The new Ordinance started afresh and provided a welcome overhaul. Of particular significance was its break from the English Arbitration Acts on which much of the Hong Kong arbitration law was traditionally based.² The key change was the introduction of a unified system (with exceptions) for both domestic

and international arbitration. That single system has at its core the UNCITRAL Model Law.

Many of the provisions of the new Ordinance simply quote the relevant Model Law text. For example, section 20(1) of the new Ordinance provides as follows:

- (1) Article 8 of the UNCITRAL Model Law, the text of which is set out below, has effect
“Article 8. Arbitration agreement and substantive claim before court
- (1) A court before which an action is brought in a matter which is the

⁶³ *X v Y Asian Inc et al*, 1350 Hanrei Taimuzu 189; noted by Nakamura, above n 3, pp 6-7.

⁶⁴ Available at http://sydney.edu.au/law/scil/publications/working_papers.shtml.

⁶⁵ *Re ACN 103 753 484 Pty Ltd (in liq)* [2011] QSC 64 (4 April 2011) www.austlii.edu.au/au/cases/qld/QSC/2011/64.html.

⁶⁶ *Cf DKN*, above n 41.

⁶⁷ Richard Garnett and Luke Nottage, ‘What Law (If Any) Applies to International Arbitration’ (2012) 35(3) *UNSW Law Journal* 955, <http://ssrn.com/abstract=2063271>.

* King & Wood Mallesons

¹ As an illustration, section 2 of Arbitration Ordinance (Cap 341) was followed by section 2AA through to section 2AD, which in turn was followed by section 2A to section 2G, at which point sections 2GA to 2GN commenced. Due to various repeals, the next provisions were sections 2L and 2M and immediately thereafter was found section 3. The rest of the Ordinance continued in this disjointed fashion.

² See John Choong and J. Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Analysis* (Sweet & Maxwell 2011), Chapter 1.

subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

- (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”.

The typical style of the Ordinance is to indicate after the Model Law quotation any exceptions or modifications to it.

The emphasis on the Model Law was deliberate. Hong Kong wanted to adopt a truly international standard. Its legislators desired a system that would be familiar to anyone coming to Hong Kong to do business or to resolve their disputes by arbitration.

In an exception granted mainly due to insistence from the construction industry, provisions of the old Ordinance may still have effect. The old Ordinance provisions are set out in Schedule 2 to the new Ordinance. These permit submission of disputes to a sole arbitrator; consolidation of arbitrations; court decisions on a preliminary question of law; the challenge of an award for serious irregularity and appeals against an arbitral award on a question of law. These provisions allow greater court interference than is allowed under the Model Law. They are triggered in the event parties opt-in to Schedule 2 or apply automatically pursuant to section 100 in the case of arbitration agreements entered into before or within six years from the commencement of the current Ordinance “provided that arbitration under the agreement is a domestic arbitration”.

The new Ordinance also gives effect to many of the 2006 Model Law revisions, including those on interim measures. The Option II writing requirement of the 2006 Model Law has been chosen for arbitration agreements.

In addition, a number of provisions supplement the

Model Law. For instance, section 46(3)(c) of the Ordinance entrusts arbitrators “to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate”. Sections 74-77 have no counterpart in the Model Law. They deal with costs, including taxation of costs and disputes over the tribunal’s fees and expenses. Section 18 deals with confidentiality.³

Pacific China Holdings

Pacific China Holdings Ltd (In Liq) v Grand Pacific Holdings Ltd [2012] HKEC 645 (Court of Appeal), 9 May 2012 (“*Pacific China*”) is only the second setting aside case under Article 34 of the UNCITRAL Model Law to be decided by the Hong Kong courts. It concerned an international arbitral award challenged under the Model Law-based regime set out in Part IIA of the Arbitration Ordinance (Cap 341) (the “old Ordinance”). Its significance has, however, increased since the commencement of the Arbitration Ordinance (Cap 609) (the “new Ordinance”) because, as indicated above, this new law unifies Hong Kong arbitration law by extending the reach of the Model Law to domestic awards as well. Domestic awards were not previously subject to Article 34, absent party agreement.

The impugned award in *Pacific China* was initially set aside by the Hong Kong Court of First Instance on the grounds that (i) the applicant was unable to present its case, and (ii) the procedure adopted by the arbitral tribunal was not in accordance with the parties’ agreement. But this decision was overturned by the Hong Kong Court of Appeal.

Pacific China concerned an ICC award rendered in Hong Kong on 24 August 2009. The underlying dispute concerned a Loan Agreement (“the Agreement”) concluded by the parties in 2001. The Agreement was governed by New York law and contained an arbitration clause providing for ICC arbitration in Hong Kong. The Tribunal comprised three highly regarded arbitrators: David Williams QC, Sally Harpole, and James Carter.

Pursuant to the Agreement, Pacific China Holdings (“PCH”) was said to be indebted to Grand Pacific Holdings (“GPH”) in the amount of US\$40 million. In 2004, GPH began demanding payment of the sums apparently due under the Agreement. PCH refused to pay. The dispute was not resolved. In 2006, GPH

³ For further elaboration on the principal features of Arbitration Ordinance (Cap 609) see J. Romesh Weeramantry, “The New Arbitration Ordinance”, in Ma and Brock (eds), *Arbitration in Hong Kong: A Practical Guide 3* (Sweet & Maxwell 2011).

commenced arbitration against PCH to enforce the Agreement.

The Taiwanese law issue: In the arbitration PCH argued, among other things, that the Agreement was illegal under the law of the place of its performance (Taiwan). The relevant background to this issue was a procedural timetable that was agreed to by the parties in May 2007. This provided for the simultaneous exchange of pre-hearing submissions. In October 2007 PCH introduced the Taiwanese law issue for the first time. The agreed procedure was called into question when in November 2007 the tribunal required PCH to submit its full Taiwanese law argument first and GPH was given 10 days thereafter to submit its response. Saunders J at first instance held that the tribunal's order of November was not in accordance with the agreement of the parties and prevented PCH from properly presenting its case. He found that Model Law Article 34(2)(a)(ii) and (vi) had been satisfied.

The Court of Appeal (through the judgment of Tang V-P) disagreed. It took the view that the Taiwanese law argument constituted a late amendment of PCH's case and as such the tribunal need not have been constrained by the May 2007 procedural agreement. Tang V-P observed that "[t]he Tribunal when faced with a late amendment was entitled "to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute ...""⁴

Tribunal's refusal to consider three authorities: During the proceedings legal authorities relied on by PCH's expert had not been produced or translated at the time of the first hearing. The examination of experts was therefore adjourned to the second hearing and a joint expert report was required to be prepared for that hearing. In relation to this joint report, the tribunal indicated that no additional authorities were to be included, unless they were "sensational". In the words of David Williams, the presiding arbitrator: "These experts have had their statements presented, with reference to certain authorities, and we are opposed to the ambit of the documents they are relying upon being expanded". Nevertheless, PCH's expert included three new legal authorities in the joint expert report. The tribunal refused to receive and consider these.

Saunders J found that the tribunal's refusal prevented PCH from presenting its case and led to a setting aside ground under Model Law Article 34(2)(a)(ii). In contrast, the Court of Appeal held that the refusal was a valid exercise of the tribunal's powers. Tang V-P stated: "I do not believe [Saunders J] was entitled to interfere with a case management decision, which was fully within the discretion of the Tribunal to make."⁵

The Hong Kong law issue: After the second hearing, the post-hearing submissions of PCH raised for the first time an issue as to Hong Kong law. Because of this, the tribunal permitted PCH to make a submission on that issue by 20 October 2008, GPH to reply by 24 October 2008 and PCH to make additional comments by 28 October 2008. PCH sought leave to make further submissions on 20 November 2008. The tribunal refused to grant leave.

Saunders J held that the failure of the tribunal to give PCH an opportunity to respond to GPH's submissions rendered PCH unable to present its case within the scope of Model Law Article 34(2)(a)(ii). Again, the Court of Appeal took a different view. Tang V-P noted that "[g]iven the circumstances under which the Hong Kong law issue was raised the Tribunal could not be faulted for not allowing PCH another opportunity to deal with the issue."⁶

The New York law issue: Another argument by PCH was that the tribunal's award referred to certain New York legal authorities without notice to the parties and without the parties having made submissions on them. On this point, the Court of Appeal agreed with Saunders J's finding that this did not fall within Article 34(2). It observed that arbitrators are chosen for their special knowledge and experience and may use this knowledge without reference to the parties and that the arbitrators in the case in question were sufficiently qualified to deal with the NY authorities without submissions of the parties.

Court discretion under Article 34 Model Law: On the standard required to trigger Article 34(2)(a)(ii), Tang V-P took the view that only conduct that is serious or egregious can lead to a finding of an inability to present one's case. As to court discretion to refuse a setting aside application even if the circumstances fell within Article 34 (as a result of the word "may"), Tang V-P stated "if the violation had no effect on the

⁴ [2012] HKEC 645, at para. 53, quoting from Sec 2GA, Arbitration Ordinance (Cap 341).

⁵ [2012] HKEC 645, at para. 68, quoting from Sec 2GA, Arbitration Ordinance (Cap 341).

⁶ [2012] HKEC 645, at para. 77.

outcome of the arbitration that is a good basis for exercising one's discretion against setting aside".⁷ However, he added that "[s]ome breaches may be so egregious that an award would be set aside although the result could not be different".⁸

The decision of the Court of Appeal in *Pacific China* was well received. It recognizes the important powers and discretions granted to arbitrators to control and manage proceedings, with a view to conducting them efficiently and expeditiously.

Gao Haiyan v Keeneye

The case of *Gao Haiyan v Keeneye Holdings Ltd* [2012] HKCA 162 (Court of Appeal), 29 March 2012 throws into sharp focus the practice of arb-med in commercial arbitration.

Keeneye Holdings Ltd ("Keeneye") commenced arbitration at the Xian Arbitration Commission ("XAC") to confirm the validity of certain share transfer agreements. Gao Haiyan ("GH") counterclaimed that the agreements should be revoked. Less than three months before award was issued, one of the arbitrators (not the chair) and XAC's Secretary General met Mr Zeng for dinner at the Xian Shangri-La Hotel. Mr Zeng was not a party representative but was said to be "a person related to" Keeneye. He was told at this meeting that the tribunal suggested settlement by payment by Keeneye to GH of RMB250 million. Additionally, Mr Zeng asked to "work on" Keeneye.

No settlement was reached and the arbitration tribunal proceeded to render an award. The award upheld GH's counterclaim and "recommended" that GH pay RMB50 million to Keeneye.

Keeneye challenged the award before Xian Intermediate People's Court but its setting aside application was not granted. The court held that the allegation that the XAC Sec-General manipulated the case was not proved and XAC's Rules permitted "relevant persons" on approval of the parties to help or chair the mediation.

GH sought to enforce the award in Hong Kong. Keeneye objected and asked the Hong Kong courts to refuse enforcement on the ground that it contravened public policy. The matter did not concern the enforcement of a "foreign" award as is covered by the New York Convention. Rather it related to the

enforcement of a Mainland China award. The Hong Kong law in relation to such an enforcement follows the New York Convention. The Court of First Instance refused enforcement but this decision was reversed by the Court of Appeal.

Waiver issue: GH argued in the Hong Kong courts that Keeneye was prevented from objecting to enforcement as it had waived this rights to do so by conduct, namely, it had not raised an objection during the arbitration proceedings. In the Hong Kong Court of First Instance, Reyes J held that although Keeneye did not complain to the tribunal about what happened at the Shangri-La Hotel, Keeneye's continuation of the arbitration cannot be seen as a waiver to raise a bias claim in the enforcement proceedings. In his opinion, had Keeneye complained to the tribunal, it would have risked antagonising the tribunal and turning it against Keeneye.

The Court of Appeal took a very different view, with Tang V-P again writing the judgment of the Court. In the Court's opinion, it was not open for Keeneye to wait and see how the claims turned out before pursuing the bias claim. Had the claim been raised during the arbitration, the Court observed that the arbitral tribunal may have been able to take action to remedy the situation. The Court also noted that GH was handicapped by the XAC Secretary General's refusal to testify in Hong Kong and, importantly, the tribunal and the Xian Court were in a much better position to ascertain facts and decide if actual or apparent bias was present. Tang V-P concluded that no estoppel arises from the Xian Court's decision but the "fact that the Xian Court has refused to set aside the Award for bias is relevant to the enforcement court's decision on enforcement".⁹

Issue of bias: In opposing the award enforcement, Keeneye asserted that the arbitral process was biased. As to this issue, Reyes J took a robust view. He determined that apparent bias had been made out on a number of grounds. He reasoned that the XAC Secretary General and arbitrator should have approached Keeneye themselves rather than approaching a "related party" to "work on" Keeneye. To Reyes J. these two individuals were actively pushing their proposal, rather than merely communicating a plan in neutral fashion and were acting on their own on an initiative that favoured GH. He concluded that justice requires that decision-makers are not only impartial, but seen to be such.

⁷ [2012] HKEC 645, at para. 102.

⁸ [2012] HKEC 645, at para. 105.

⁹ [2012] HKCA 162, at para. 66.

The prism within which the facts were seen by the Court of Appeal was very different. On behalf of the Court, Tang V-P held that there was no apparent bias. He noted that Keeneye did not complain before the Xian court that the mediation took place between a person “related to” Keeneye and not one of its own lawyers and that the Mainland court is in a better position to understand the reason why. An important finding of the Court of Appeal in the context of the case before it was that the Mainland court was better able to determine if a mediation at a dinner in a hotel is acceptable. It observed that mediation is conducted differently in HK, but whether this creates an apprehension of bias may depend on understanding

of how mediation is conducted at the place it was conducted. Accordingly, it concluded that due weight must be given to the Mainland court for refusing to set aside the award. This approach, in the opinion of the Court of Appeal, cast light on whether there was an appearance of bias.

The Court of Appeal decision has had a mixed reception. Some say that it is an example of Hong Kong courts bowing to Mainland China. Others see it as yet another example of Hong Kong courts deferring to the arbitrators and not interfering in the arbitral process.

[JCAA Activities]

AFIA Symposium

In Tokyo, on December 3, 2012, the Australasian Forum for International Arbitration* (AFIA) held its 32nd International Arbitration Symposium, which was hosted by Freshfields Bruckhaus Deringer. The Japan Commercial Arbitration Association (JCAA) supported the symposium and Prof. Tatsuya Nakamura, General Manager of the JCAA’s Arbitration Department, participated in the symposium as one of the panelists.



(From the left, Mr. Nicholas Lingard, Ms. Yoshimi Ohara, Prof. Luke Nottage, Mr. Akira Kawamura, Prof. Tatsuya Nakamura)

The AFIA International Arbitration Symposium commenced with a presentation by Mr. Akira Kawamura, President of the International Bar Association. He shared his views on appropriate dispute resolution processes and legal services in the turbulent world economy and placed his expectations in young professionals in the field of the international arbitration.

Mr. Nicholas Lingard (Freshfields Bruckhaus Deringer) moderated the panel discussion and Prof. Luke Nottage (University of Sydney) and Ms. Yoshimi Ohara (Nagashima Ohno & Tsunematsu) joined as panelists. After Prof. Nakamura’s overview of case law and other developments in Japan since its UNCITRAL Model Law based Arbitration Act was enacted in 2003, the panelists and moderator discussed actively among themselves and with the audience a wide range of issues, selected from those submitted in advance by AFIA members. Topics included foreign subsidiary bodies of arbitral institutions, emergency arbitrators and an impending IBA code of conduct for counsel in international arbitration.

*Since its inauguration in 2004, AFIA has held regular and interactive symposia mainly for younger practitioners to discuss issues and developments in international arbitration, with a particular focus on the Asia-Pacific region: see <http://afia.asia/>. Prof. Nakamura is the newly-elected JCAA Liaison, and Prof. Nottage currently serves as Japan Representative, on the AFIA Council.

Standard Arbitration Clause

All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.

Notes to Contributors for Article Submissions

The Editor welcomes submissions of articles and essays on international arbitrations. Articles should not normally exceed 2500 words in length including notes. Manuscripts must be submitted in the format of MS Word together with CV. Material accepted for publication becomes the property of JCAA. However, author may use the article without permission from JCAA. Submission must be sent via E-mail: arbitration@jcaa.or.jp

The Japan Commercial Arbitration Association

URL: <http://www.jcaa.or.jp>

Tokyo Office

3F Hirose Bldg., 3-17, Kanda Nishiki-cho, Chiyoda-ku, Tokyo 101-0054 Japan

Tel: +81-3-5280-5161 Fax: +81-3-5280-5160 Email: arbitration@jcaa.or.jp

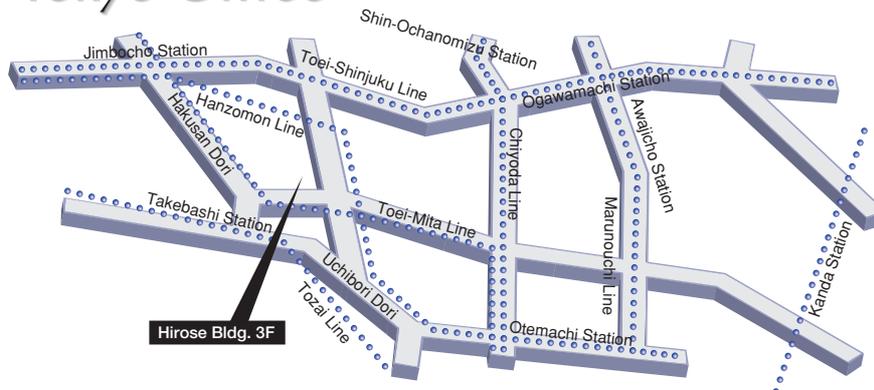
Osaka Office

5F The Osaka Chamber of Commerce & Industry Bldg., 2-8, Hommachibashi, Chuo-ku,

Osaka 540-0029 Japan

Tel: +81-6-6944-6163 Fax: +81-6-6946-8865 Email: osaka@jcaa.or.jp

Tokyo Office



Osaka Office

